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Allocating the Judicial Power in a 'Unified Judiciary' (Restructuring Federal Courts)

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I. Introduction

Over the past half-century, federal courts scholarship concerning congressional control over the authority of Article III courts has focused predominantly on the question of jurisdiction: Which, if any, federal courts may or must be available to adjudicate which cases or controversies?[1] This preoccupation is unsurprising since most threatened or actualized congressional regulation over this period of time has concerned when and

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1. Scholars have provided a wide range of answers: (1) Congress enjoys plenary control over all Supreme appellate and inferior original and appellate jurisdiction. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Martin H. Redish, *Article III and the Judiciary Act of 1789: Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990). (2) Congress must authorize jurisdiction sufficient to preserve the "essential functions" of the Supreme Court. *See* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960). (3) Congress must authorize jurisdiction sufficient to preserve the supremacy-securing "essential functions" of the federal judiciary writ large. *See* Lawrence G. Sager, *The Supreme Court, 1980 Term—Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). (4) Congress must provide jurisdiction to entertain all "cases" but not all "controversies" listed in Article III somewhere in the federal judiciary. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985). (5) Congress must provide jurisdiction to entertain all "cases and controversies" listed in Article III somewhere in the federal judiciary. *See* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984). All of these scholars agree that Congress enjoys at least some authority to allocate jurisdiction among the various federal courts; even the "mandatory jurisdiction" theorists, who read Article III as demanding that some federal court be available to hear certain cases and controversies, believe that Congress may select the particular court(s) in which such jurisdiction should lie.

which federal courts would play a role in implementing the law of the land.[2]

Recent congressional reforms, however, have invited a shift in focus away from the questions of "when and where" to the question of "how": When Article III courts have jurisdiction to adjudicate a case, whether by congressional invitation or constitutional compulsion, how may or must those courts do so? Various provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[3] the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[4] and the Prison Litigation Reform Act of 1995 (PLRA)[5] regulate not only the time and place of federal court adjudication of various federal claims, but also the *manner* in which those courts adjudicate such claims. For example, in certain circumstances the AEDPA requires federal courts to defer to the interpretive judgments of state courts, modifies the conventional rules of precedential authority and stare decisis, and imposes time limitations on judicial decisionmaking.[6]

These reforms have prompted more careful consideration of the precise content of the adjudicatory powers granted to federal courts by the Constitution. Article III's Vesting Clause clearly bestows "[t]he judicial Power of the United States" in the federal judiciary, but provides no further delineation of what exactly the judicial power is.[7] In an impressive recent article, Professor James Liebman and William Ryan canvass both the drafting history of Article III and two centuries of Supreme Court case law, concluding that "[t]he judicial Power" encompasses five essential qualitative attributes. When given jurisdiction, "[a]n Article III court must decide (1) the whole federal question (2) independently and (3) finally, based on (4) the whole supreme law, and (5) impose a remedy that, in the process of binding the parties to the court's judgment, effectuates supreme

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2. *See, e.g.*, RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 350-51 & nn.12-17 (4th ed. 1996) (listing exemplar proposals to withdraw federal court jurisdiction over various constitutional claims).

3. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253-2255 and adding §§ 2261-2266).

4. Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-607 (1996).

5. Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (amending 18 U.S.C. § 3626 (1994)).

6. *See* 28 U.S.C. § 2254(d) (Supp. IV 1998) (forbidding a federal court from granting a writ of habeas corpus unless the state court judgment was based on an unreasonable application of clearly established federal law as determined by the Supreme Court or an unreasonable determination of the facts); *id.* § 2244(b)(3)(D) (requiring that a court of appeals grant or deny the authorization to file a second writ of haheas corpus application within 30 days of filing the motion for authorization); *id.* § 2263 (requiring the filing of a habeas corpus application within 180 days of the affirmance of the state court conviction).

7. *See, e.g.*, EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 16 (1914) ("[A]s to *what* that [judicial] power is, what are its intrinsic nature and scope, [the Constitution] says not a word.") (emphasis in original).

law and neutralizes contrary law."[8] Other scholars commenting on various aspects of the 1996 congressional reforms have also articulated or explored at least partial definitions of the judicial power.[9] A dialogue exploring the irreducible attributes of the judicial power is thus emerging.

Scholars and courts identifying the judicial power's attributes have almost invariably assumed that the judicial power—whatever it includes—is vested *identically* and *discretely* in each and every Article III court created by the Constitution or Congress.[10] According to this "discrete-vesting postulate," the judicial power has a one-size-fits-all quality to it; by virtue of the Vesting Clause, the power of any one federal court is identical to the power of any other. It follows that any effort by Congress to burden or restrain a specific federal court's exercise of its judicial power may be evaluated in isolation, without considering whether other federal courts are similarly burdened.

Upon reflection, however, this discrete-vesting postulate, when coupled with conventional descriptions of judicial power attributes, proves both descriptively and prescriptively problematic. Descriptively, it is oversimplistic because it does not fit well with certain accepted features of Article III adjudication. Even if each federal court is equally and identically entitled to resist congressional, presidential, or state efforts to compromise various attributes of its judicial power in favor of such *nonjudicial actors*, different Article III courts enjoy somewhat different packages of judicial power *vis-a-vis each other*, depending on their specific role and placement within the integrated and hierarchical Article III system. For example, the attribute of "finality" is commonly viewed as an essential aspect of the judicial power, but only some and not other courts' rulings possess this attribute. This differential allocation of certain judicial power

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8. James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 696 (1998).

9. *See, e.g.*, Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2461-64 (1998) (discussing Congress's constitutional authority to limit remedies available to a federal court); *id.* at 2465-68 (considering whether federal courts have interpretive independence or are mere mouthpieces of Congress); *id.* at 2469-70 (examining the claim that "it is an essential element of Article III adjudication that the final judgments of Article III courts matter as precedent"). *See also* John Harrison, *Jurisdiction, Congressional Power and Constitutional Remedies*, 86 GEO. L.J. 2513 (1998) (evaluating Congress's authority to limit judicial remedies); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549-65 (1998) (assessing the sufficiency of constitutional remedies available to the courts); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 799-810 (1997) (discussing the constraints on judicial deliberation of congressionally imposed time limits); Lawrence Gene Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998) (arguing that Congress cannot insist that a federal court support Congress's interpretation of a law when such an interpretation runs contrary to the court's best judgment).

10. *See infra* notes 30-32 and accompanying text.

attributes rests in substantial tension with the conventional one-size-fits-all characterization.

Prescriptively, the discrete-vesting postulate provides a misleading analytical framework for evaluating arguable infringements of the judicial power. Various challenges to Congress's recent restrictions on the manner of federal court adjudication take the following form:

(a) X is an essential attribute of the judicial power;
(b) the provision in question deprives a specific federal court of X;
(c) therefore, the provision violates Article III.

Conclusion (c) follows from the discrete-vesting postulate because any deprivation of any court's attribute X deprives that court of its independently vested authority; whether other federal courts are similarly burdened need not be considered. But this analytical framework is misleading; certainly Congress may move *some* attributes of judicial power, such as finality, from one federal court to another. A richer analytical framework that contemplates and even explains Congress's ability to make such moves would offer better guidance to courts having to decide whether an attribute really must be vested in the particular court being constrained.

My principal goals in this Essay are threefold: to emphasize the importance of considering the *allocative* aspects of various judicial power attributes; to develop a taxonomy that helpfully describes and distinguishes these allocative aspects; and to explore various ways of resolving the apparent tension between these aspects and the presumed one-size-fits-all vesting of the judicial power. In my view, the various attributes comprising the judicial power fall into three allocative categories: *intrinsic*, *hierarchical*, and *systemic*. Some judicial power attributes are, by their very nature, intrinsic to each individual Article III court and cannot be compromised or infringed by *any* governmental actor—including other federal courts. Other attributes are hierarchical in nature, meaning that they attach uniquely to courts in certain levels of the judicial hierarchy, perhaps the Supreme Court, all appellate tribunals, or all original tribunals. Lastly, some attributes are conferred upon the federal judiciary as a whole rather than upon any particular court or level of court. Congress thus has some control over where these systemic attributes are vested, though Congress must ensure they are vested in *some* federal court such that they are brought to bear in every case or controversy. In other words, Congress enjoys some authority to allocate systemic attributes of the judicial power so long as it allocates that power among—rather than away from—Article III courts. This taxonomy of allocative features calls into question the conventional view that Article III's Vesting Clause bestows a uniform package of decisionmaking attributes upon each federal court in a one-size-

fits-all fashion. Instead, I propose, it is more useful heuristically to view this clause as bestowing a set of decisionmaking attributes *in the federal judiciary as a unified system.* Rather than regarding federal courts as discretely exercising a predetermined and uniform set of powers, we should conceptualize them as exercising the judicial power in concert as interconnected members of a unified judiciary. Doing so will illuminate the proper resolution of current Article III controversies involving congressional regulation of the manner of judicial decisionmaking.[11]

Part II of this Essay delineates the essential attributes of Article III's judicial power. Part III develops the discrete-vesting postulate, considers its apparent tension with the well-established differential allocation of certain judicial power attributes among various federal courts, and develops a tripartite taxonomy of specific judicial power attributes: intrinsic, hierarchical, and systemic. Part IV explores three approaches to reconciling the tension between this taxonomy of allocative features and the conventional view that the judicial power is vested in each Article III court in a one-size-fits-all fashion. The third approach here is novel, positing that the judicial power is vested globally in the aggregate of all Article III courts rather than discretely in each such court. Finally, Part V demonstrates that the unified judiciary perspective provides a more nuanced analytical framework by illustrating its application to a contemporary challenge to section 2254(d)(1) of the AEDPA's recent modification of conventional rules of precedent in habeas litigation.

II. The Essential Attributes of Article III's Judicial Power

The Vesting Clause of Article III provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[12] This clause does two things. First, it designates the recipients of the "judicial Power" delegated by the Constitution; such power is vested fully and exclusively in Article III courts. Second, it directly confers a power

11. I do not engage here in the debate over whether constraints imposed on various judicial power attributes by non-Article III actors should be considered per se invalid or should be evaluated according to some balancing rubric (perhaps considering both the degree of the constraint and the governmental interests served thereby). The Court has employed different approaches to this problem in different contexts. *Compare, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995) ("In its major features (of which the conclusiveness of judicial judgments is assuredly one) [the doctrine of separation of powers] is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."), *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) ("weigh[ing] a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."). My focus is on the question of whether a congressional regulation of the manner of adjudication infringes at all upon the judicial power vested in federal courts.

12. U.S. CONST. art. III, § 1.

to engage in coercive governmental activity of a particular sort—the sort encompassed by the admittedly ambiguous "judicial Power." Congress has some control over the number of federal courts authorized to decide cases and controversies, and over the jurisdiction of each specific court,[13] but the federal courts created and imbued with jurisdiction derive their *power* to act directly from the opening sentence of Article III.[14] Thus while Congress has some control over "when and where" the judicial power is exercised, the Vesting Clause itself establishes the "who and what"—who has the power and of what that power consists.[15]

Of course, to say that the Vesting Clause devolves upon Article III courts a "nebulous grant[] of power"[16] is somewhat of an understatement; one must certainly go beyond that sparse phrase to discover the power's specific attributes. Various interpretive routes might prove profitable. The content of the judicial power might be gleaned by examining the specifications following the Vesting Clause in Article III's further provisions.[17] History might provide additional insights, since in some ways the Article III judicial power was modelled by the Framers on the "business of the Colonial courts and the courts of Westminster when the Constitution was framed."[18] A more thorough-going functionalist analysis

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13. *See supra* note 1; Evan H. Caminker, *Why Must Inferior Courts Obey Supreme Court Precedents?*, 46 STAN. L. REV. 817, 823-24 (1994) (discussing Congress's role in determining the number and specific jurisdiction of lower federal courts); James E. Pfander, *Jurisdiction Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEXAS L. REV. 1433, 1452-54 (2000) (discussing Congress's power regarding the federal courts); Ryan, *supra* note 9 (discussing Congress's authority to regulate the jurisdiction, procedure, and practice of lower federal courts).

14. *See* Michaelson v. United States, 266 U.S. 42, 65-66 (1924) ("The Courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the [judicial] power . . . ; the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative.").

15. Some scholars have suggested that the similarly-worded Vesting Clauses of Articles II and III concern only the "who" rather than the "what" aspect of power-conferral, merely designating the recipient of a particular form of power without conferring any substantive power at all. *See, e.g.*, A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994). Professor Froomkin argues that the substantive powers conferred upon the president and federal courts are conferred not by the Vesting Clauses but rather by subsequent clauses in Articles II and III. In particular, Froomkin contends that the authority to exereise the judicial power is granted by the sentence in Article III, Section 2 specifying that the "judicial Power shall extend to" a nienu of cases and controversies. The better view, however, is that the Vesting Clauses both confer power and designate the recipients of that power, identifying (however sketchily) the "what" as well as the "who" of the executive and judicial powers. For a persuasive defense of this interpretive position, see Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1378-1400 (1994).

16. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1195 (1992) (comparing the grants of power in Articles II and III with that in Article I).

17. *See, e.g.*, Calabresi, *supra* note 15, at 1389-1400 (claiming that while the meaning of Article III's Vesting Clause can be determined in part by examining its interplay with the Vesting Clauses of Articles I and II, its content is more clearly discerned from subsequent language in Article III itself).

18. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring). *See also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (Scalia, J.,

might provide further illumination since the judicial power was designed (in tandem with the Supremacy Clause) in part to secure the supremacy of federal law.[19]

The judicial power includes some "inherent" or "implied" powers of a case-management or supervisory nature "to manage [a court's] own affairs so as to achieve the orderly and expeditious disposition of cases."[20] The judicial power also includes some authority to supervise the behavior of subordinate officials, both in the judiciary and in other branches of government.[21] However, the core of the judicial power, and my primary focus here, is the authority to adjudicate and resolve Article III cases and controversies. I will call this the adjudicatory aspect of the judicial power so as to distinguish it from ancillary managerial or supervisory powers over the courtroom, litigants, and subordinate officials.[22]

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concurring) ("'The judicial Power of the United States' . . . must be deemed to be the judicial power as understood by our common-law tradition.").

19. *See* Liebman & Ryan, *supra* note 8, at 704 ("As did the Framers, . . . the Court has understood those qualities [of judicial decisionmaking] and that 'Power' as principally designed to maintain—and to ensure that 'the Judges in every State' maintain—[the supremacy of national law]. Only by reference to the Supremacy Clause, that is, can the nature of '[t]he judicial Power' be understood.").

20. Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962). *See also* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'") (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)). For example, the Supreme Court has held that Article III courts possess inherent power to, "within limits, formulate procedural rules not specifically required by the Constitution or the Congress," United States v. Hasting, 461 U.S. 499, 505 (1983); to appoint private attorneys to prosecute contempt sanctions for in-court conduct, *see* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793 (1987); and to stay their own proceedings for equitable reasons, *see* Landis v. North American Co., 299 U.S. 248, 254 (1936). For a more exhaustive list of different aspects of the inherent power in various procedural contexts, see *NASCO*, 501 U.S. at 43-46.

As is the case with various case-deciding components of the judicial power, the Court has yet to establish clear guidelines as to whether and when federal courts' inherent managerial powers are entirely defeasible by Congress or subject to some congressional regulation so long as the powers remain adequate for their essential purposes. *See, e.g.*, *NASCO*, 501 U.S. at 47-48 n.12 (declining the invitation to decide whether some inherent powers are "irreducible powers derived from Article III" which are not defeasible by Congress, or "essential powers . . . which can be legislatively regulated but not abrogated"); *id.* at 58 (Scalia, J., dissenting) ("Some elements of that inherent authority are so essential to 'the judicial Power' . . . that they are indefeasible. . . ."); *id.* at 59-60 ("Just as Congress may . . . specify the manner in which the inherent or constitutionally assigned powers of the President will be exercised, so long as the effectiveness of those powers is not impaired, so also Congress may prescribe the means by which the courts may protect the integrity of their proceedings.") (citation omitted); *id.* at 64 (Kennedy, J., dissenting) ("[O]ur cases recognize that Rules and statutes limit the exercise of inherent authority.").

21. *See generally* Pfander, *supra* note 13 (examining the development and current status of the Supreme Court's power to supervise such other governmental actors through supervisory writs).

22. Some scholars maintain that the judicial power does not just encompass some capacity and obligation to decide cases over which a federal court is independently granted jurisdiction (by Constitution or statute), but also itself "comprehends the subject matter jurisdiction to decide all cases in certain categories." Amar, *supra* note 1, at 231 n.88. I and others disagree with this merger of the

To date, the most comprehensive and intensive effort to specify the precise contours of this adjudicatory aspect of the judicial power is the recent and impressive scholarship by Professor Jim Liebman and William Ryan.[23] After canvassing in great detail the drafting history of Article III and considering the interplay of numerous canonical and more esoteric Supreme Court decisions concerning judicial authority, Liebman and Ryan conclude that the judicial power encompasses a series of distinct, though related, qualitative attributes. Specifically, their summary of the essential attributes of the judicial power is this:

> Read, as designed, in conjunction with the Supremacy Clause, "[t]he judicial Power" means the Article III judge's authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case and nothing but the case on the basis, and so as to maintain the supremacy, of the whole federal law. By "independently, finally, and effectually decide," we mean dispositively to arrange the rights and responsibilities of the parties on the basis of independently developed legal reasons, subject to review only by a superior Article III court. By "case," we mean a court action that can be resolved on the basis of enforceable law, and by "whole case," we mean not only the "construction" of applicable provisions of law but also their actual application to the facts to reach a decision. By deciding "nothing but the case," we mean a court's insulation from formally giving advice to another agency of government, particularly advice of a political nature, either inside or outside the context of particular disputes. By "maintaining the supremacy of the whole federal law," we mean (1) giving the entire body of hierarchically ordered federal law the effect on the decision that the law, on its own terms, demands, and (2) treating as void any law or judicial decision—most explicitly, any *state* law or judicial decision—that is contrary to hierarchically ordered federal law and to which the case necessarily calls the federal court's attention.[24]

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concepts of "judicial power" and "jurisdiction" to exercise it, *see, e.g.*, Liebman & Ryan, *supra* note 8, at 752 (describing the Framers' debates over Article III as cognizant of and concerning the distinction between jurisdiction and judicial power); Harrison, *supra* note 1, at 214 ("Article III's shift in Section 2 from the judicial power . . . is a natural way of expressing separate answers to the separate questions of the maximum scope of the lawsuits federal courts may be able to decide and the actual rules that determine the lawsuits they will be able to decide at any time."). I do not explore here the implications of this distinction for theories about the mandatory allocation of jurisdiction over certain categories of cases.

23. Liebman & Ryan, *supra* note 8.

24. *Id.* at 771 (emphasis in original and other emphases omitted) (footnotes omitted). The authors elsewhere flesh out the demands of these specific attributes, *see id.* at 768-73, and discuss numerous precedents exploring them, *see id.* at 773-850.

Other scholars have recently focused more discretely on specific aspects of the adjudicatory function. Professor Larry Sager, for example, has deployed a fresh interpretation of *United States v. Klein*[25] to argue that the attribute of interpretive independence inhering in the grant of judicial power precludes Congress from ordering courts to articulate existing law as Congress, rather than the courts, sees fit, thus "conscript[ing] the judiciary in a constitutional charade."[26] Professor Vicki Jackson has suggested that it might be "an essential element of Article III adjudication that the final judgments of Article III courts matter as precedent."[27] Lastly, William Ryan has proposed that the attribute of independent adjudication might be compromised by congressionally imposed time limits on judicial deliberation and decisionmaking.[28]

Of course, one can take issue with any proposed list of judicial power attributes or with the precise contours of any listed attribute.[29] I intend to do neither here. I assume *arguendo* that Liebman and Ryan, as supplemented by others, have accurately captured the essential attributes of judicial decisionmaking mandated by Article III's Vesting Clause. My primary interest, rather, is in exploring the *allocative* aspects of those attributes in a unified judiciary.

III. Allocative Features of the Judicial Power's Essential Attributes

A. The Misleading Nature of the One-Size-Fits-All Approach to the Vesting of Judicial Power

The United States Constitution establishes a single Congress and single President but a "plural" judiciary, plural in the sense that it bestows the

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25. 80 U.S. (13 Wall.) 128 (1871).

26. Sager, *supra* note 9, at 2528. I agree in principle with Professor Sager's claim of interpretive independence in this regard, though I also agree with Professor Dan Meltzer's response that Sager applies his thesis too broadly, *see* Meltzer, *supra* note 9, at 2545-49.

27. Jackson, *supra* note 9, at 2469.

28. William Ryan argues that:

> A practice is objectionable as unduly interfering with the judiciary's core inherent power to decide contested cases when it interferes with the judiciary's decisionmaking function and poses a risk of decreasing judges' impartiality, blurring lines of public accountability or increasing the potential for arbitrary decisions. A congressionally imposed time limit on judicial decisions can have both effects.

See Ryan, *supra* note 9, at 798.

29. For example, recent scholarship highlights a disagreement about what it means to issue an "effectual" remedy for constitutional violations. *Compare, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) (arguing that governments acting unconstitutionally "must in some way undo the violation by ensuring that victims are made whole"), *with* Harrison, *supra* note 9, at 2522 (rejecting the argument that governments have such a broad affirmative remedial duty and concluding that "[i]t seems entirely possible that the self-executing force of Section 1 [of the Fourteenth Amendment] is limited to nullification" of the state's illegal action). *See generally* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (describing various approaches to evaluating the propriety of the right-remedy gap).

judicial power on a department that, at Congress's discretion, may include multiple courts.[30] Moreover, the judges sitting on congressionally created Article III courts enjoy a significant degree of structural parity. As Professor Akhil Amar has emphasized, "[t]he structural mechanisms to assure independence and competence in the federal judiciary—appointment, confirmation, tenure and salary guarantees, and impeachment—are the same for all Article III judges, supreme and inferior."[31] Thus, conventional wisdom holds that the judicial power, whatever attributes it includes, is vested discretely in each Article III court established by the Constitution or by Congress pursuant thereto so that:

> [w]henever called upon to decide those matters [within the specified categories of cases and controversies], federal judges would be required to deploy the qualities—the decisionmaking powers and responsibilities—inherent in "[t]he Judicial Power" and thus *inherent in every court constituted by or under the judiciary article*.[32]

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30. *See generally* Calabresi & Rhodes, *supra* note 16 (comparing the internal structures of the three branches of the federal government). The legislative power is vested nondelegably in a bicameral Congress. The executive power, Calabresi and Rhodes maintain, is likewise "unitary" in the sense that power is vested exclusively in the president, and all executive power exercised by other executive officials is exercised on the president's behalf through his actual or constructive delegation of power to his subordinates. *Id.* at 1181-82, 1203. The judicial branch is non-unitary, or "plural," in the sense that the judicial power is *not* vested exclusively in the Supreme Court and then delegated by it to inferior tribunals. *See, e.g.*, Lindh v. Murphy, 96 F.3d 856, 870 (7th Cir. 1996) (noting that inferior courts do not rely on the Supreme Court for their authority); Calabresi & Rhodes, *supra* note 16, at 1184 n.158 (contrasting Congress's power to create inferior courts with full statutory and constitutional power with the requirement that the president enable statutorily created executive agencies).

31. Amar, *supra* note 1, at 230. Of course, structural parity among *judges* does not necessarily entail institutional parity among *courts*; the textual designations "supreme" and "inferior" *courts* reflect some important distinctions between these two levels of court in our hierarchical system. *See infra* notes 109-124 and accompanying text (discussing implications for congressional allocation of precedential authority). *See generally* Caminker, *supra* note 13 (examining the doctrine of hierarchical precedent).

32. Liebman & Ryan, *supra* note 8, at 752 (emphasis added); *see id.* at 708 (contending that the phrase "'shall be vested in one supreme Court *and* in such inferior courts . . .' meant that and not 'shall be vested in one supreme Court *or* in such inferior courts'") (emphasis in original); *id.* at 741 ("[T]he Wilson-Rutledge draft [of Article III] defined a characteristic that *all*, and only, federal judges had: the duty and responsibility to exercise the 'Judicial Power of the United States.'" (emphasis added)); *id.* at 751 ("Section 1 of the judiciary provision that emerged from the Committee of Detail had vested '[t]he Judicial Power' in its entirety *"in" each and every inferior court* that the national legislature chose to constitute as well as 'in' the constitutionally created supreme court." (emphasis in original and emphasis added)); *id.* at 882 ("[T]he plain text of Article III . . . vests the whole 'judicial Power' in *any* inferior court Congress creates.") (emphasis added); *see also* Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc) ("[T]he judicial power is given by the Constitution to *each* of the inferior Article III courts.") (emphasis added), *rev'd on other grounds*, 521 U.S. 320 (1997); Calabresi, *supra* note 15, at 1382 ("The [Vesting] Clause . . . specif[ies] that national judicial powers 'must' be given to *both* the one Supreme Court *and* to the inferior courts. Thus, a national power is created, and it is given equally both to the Supreme and inferior federal courts between which a certain parity might be said to exist." (emphasis added)); Harrison, *supra* note 1, at 210 ("Whatever federal courts there are have the power to decide cases and controversies for the national government because they have the judicial power."); *cf.* Ryan, *supra* note 9, at 812 ("The grant of independent decisionmaking

Based on this discrete-vesting interpretation of the Vesting Clause, one would expect that the attributes of the judicial power—again, whatever they specifically may be—are identical for each and every federal court, supreme or inferior. In other words, the judicial power is bestowed upon every federal court in a one-size-fits-all manner. Since each court receives the same judicial power, no court should have any greater or lesser authority than the next.

As the ensuing discussion reveals, however, this seemingly straightforward deduction from the discrete-vesting postulate is demonstrably inconsistent with longstanding and uncontroversial practice. Efforts to define the judicial power with respect to its adjudicatory attributes typically focus on the relationship between courts and actors external to Article III,[33] but the relationship between federal courts is conceptually significant as well. If one-size-fits-all is an apt description of the way in which the judicial power is vested, then one court's essential attributes can no more be curtailed in favor of another actor within the Article III judiciary than in favor of an external actor. Yet there are numerous well-established circumstances in which a supposedly essential attribute of one federal court's power is curtailed in deference to another, usually a superior, federal court's authority. A few examples will suffice to demonstrate the point.

Consider "finality." Both scholars and the Court have declared that finality is one of the essential attributes of the judicial power vested in federal courts and therefore judicial decisions cannot be subject to revision or supplantation by legislatures, executive officials, or even state courts.[34] It is clear, however, that a federal court lacks finality in the sense that its rulings can be revised by superior federal courts with appellate jurisdiction over it. One must therefore qualify the judicial power attribute of finality vested in a particular federal court by characterizing its decisions as final vis-a-vis external actors but potentially nonfinal vis-a-vis other Article III courts. Thus the Court is careful to state that the judicial power gives federal courts authority to decide cases dispositively, subject to review by a superior federal court.[35]

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authority runs to each Article III judge, not just to the judiciary in general or to courts as a whole."). *But see* Amar, *supra* note 1, at 231 (arguing that the Vesting Clause of Article III establishes "that the judicial power of the United States *must* be vested in the federal judiciary as a whole") (emphasis in original).

33. This external category includes Congress; the federal executive branch; and state legislative, executive, and judicial bodies.

34. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217-39 (1994) (invalidating a congressional statute that commanded federal courts to reopen final judgments by extending the statute of limitations applicable thereto); Liebman & Ryan, *supra* note 8, at 783-810.

35. *See, e.g.*, *Plaut*, 514 U.S. at 218-19 (holding that Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, *subject to review only by superior courts in the Article III hierarchy*—with an understanding, in short, that a 'judgment conclusively resolves the case'

Consider next "interpretive independence." The judicial power encompasses the authority and duty to "say what the law is"[36] in the federal court's own best independent judgment. Congress, for example, may not command a federal court to defer to Congress's understanding of the law[37] or to a state court's legal interpretation,[38] nor may Congress order a federal court to articulate as law a principle with which the court disagrees.[39] But a federal court's interpretive independence is often compromised by the views of fellow courts within the Article III hierarchy. The doctrine of stare decisis requires a deciding court to defer substantially to its own prior rulings[40] and sometimes a deciding court must defer completely to another court's rulings. Most starkly, whenever a higher court reverses a lower court decision and remands the case for further proceedings consistent with the higher court's opinion, the lower court is effectively commanded to exercise its judicial power in a manner it independently believes to be erroneous. Congress may not be able to tell an inferior tribunal to say that the Free Exercise Clause really means X,[41] for example, but a superior tribunal surely may do so. More subtly, the general requirement that inferior courts obey legal precedents established by superior courts with revisory jurisdiction over them means that lower courts' interpretive authority is meaningfully constrained rather than truly independent.[42] Even more narrowly, the "law of the case" doctrine holds

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because 'a "judicial Power" is one to render dispositive judgments.'") (emphasis in original and emphasis added) (citation omitted); *Lindh*, 96 F.3d at 870 ("[W]hen these [Article III] courts act within their jurisdictions, they exercise the judicial power directly, *though subject to the limits of revisionary jurisdiction of a court superior* within the Article III hierarchy.") (emphasis added and emphasis omitted); Liebman & Ryan, *supra* note 8, at 771 ("By 'independently, finally, and effectually decide,' we mean dispositively to arrange the rights and responsibilities of the parties on the basis of independently developed legal reasons, *subject to review only by a superior Article III court.*") (emphasis added and original emphasis omitted).

36. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

37. *See, e.g.*, Liebman & Ryan, *supra* note 8, at 811-15 (identifying *Marbury* as the canonical case establishing the judiciary's "interpretive independence" from Congress); *id.* at 815-23 (citing *Klein* for the proposition that Congress may confer jurisdiction but may not direct the exercise of jurisdiction conferred).

38. This principle was recently affirmed by the Seventh Circuit:

> Congress lacks power to revise the meaning of the Constitution or to require federal judges to 'defer' to the interpretations reached by state courts. Once the judicial power is brought to bear by the presentation of a justiciable case or controversy within a statutory grant of jurisdiction, the federal courts' independent interpretive authority cannot constitutionally be impaired.

Lindh v. Murphy, 96 F.3d 856, 872 (7th Cir. 1996). *See also* Liebman & Ryan, *supra* note 8, at 831-54 (reviewing cases which held that state court decisions cannot constrain the federal judiciary).

39. *See supra* notes 25-26 and accompanying text.

40. *See* Caminker, *supra* note 13, at 818.

41. *See* Sager, *supra* note 9, at 2532-33 (applying his *Klein*-driven principle of independence to the Religious Freedom Restoration Act).

42. In *Lindh*, the Seventh Circuit explained this constraint:

> Judges of the inferior courts must implement the views of their superiors, from which it follows that many decisions of the lower courts will be inconsistent with the conclusions

that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case," a rule which "applies as much to the decisions of a coordinate court in the same case as to a court's own decisions."[43]

Consider lastly the duty to apply the "whole law" pertinent to a case, which I will call "comprehensivity." Liebman and Ryan maintain that the judicial power encompasses the authority and duty to "apply the whole supreme national law to any case before the Court."[44] As they show, the Supreme Court has consistently resisted express or implied efforts by Congress to deny federal courts' resort to particular aspects of federal law when adjudicating a case. For example, recall Chief Justice Marshall's famous rhetorical question in *Marbury v. Madison*: "In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what parts of it are they forbidden to read, or to obey?"[45] The clear answer is that Article III precludes Congress from ordering federal courts to "close their eyes on the Constitution, and see only the [statutory] law."[46] More generally, Congress may not require a federal court to decide a case based on consideration of only some but not all applicable federal law.[47]

That is, Congress may not do so *unless* the issue withheld from the federal court is adjudicable in *some other federal court*. In *Yakus v. United States*,[48] for example, the Court upheld a statute that barred federal courts entertaining criminal enforcement actions from considering the constitutionality of the price-fixing regulations being enforced.[49] Even though

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> their judges would have reached, if unfettered by precedent. Applying, even predicting, the work of other judges, rather than reaching independent conclusions, makes up the bulk of the work of a federal judge . . . .

Lindh, 96 F.3d at 873. *See generally* Caminker, *supra* note 13 (exploring and evaluating rationales underlying the well-established doctrine of hierarchical precedent within the federal judiciary).

43. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)).

44. Liebman & Ryan, *supra* note 8, at 814 (citing Chief Justice Marshall); *see generally id.* at 810-37 (expanding and illustrating this claim).

45. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803).

46. *Id.* at 178; *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 11 (1983) ("There is no half-way position in constitutional cases; so long as it is directed to decide the case, an article III court cannot be 'jurisdictionally' shut off from full consideration of the substantive constitutional issues. . . .").

47. *See* Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("[W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it."). The Court has subsequently treated this dissenting statement as authoritative. *See* Liebman & Ryan, *supra* note 8, at 829 (discussing cases).

48. 321 U.S. 414 (1944).

49. *Id.* Yakus was convicted in federal district court of having sold meat above administratively established price limits authorized by emergency legislation during World War II. *Id.* at 418. At trial, Yakus tried to challenge the price limits as unconstitutionally confiscatory. *Id.* at 419. The district court refused to consider this claim, however, on the ground that the statute prohibited federal courts

the statute required these enforcement courts to close their eyes to the legal challenge against the regulations' validity, the Court rejected Yakus's claim that the statute thus unconstitutionally compromised the enforcement courts' judicial power.[50] The Court observed that the statute provided wholesalers such as Yakus a fair *pre-enforcement* opportunity to challenge the price-fixing regulations through administrative action, coupled with review by the Article III Emergency Court of Appeals and access to Supreme Court review.[51] Thus, while the statute technically deprived *enforcement* courts from considering the "whole law" applicable to the case, it did so only by horizontally reallocating the power to consider the constitutional challenge to another Article III tribunal.[52] As the Court noted, the challenge did not need to be heard "in one [Article III] tribunal rather than in another, so long as there [was] an opportunity" for a fair challenge in at least one of them.[53] In other words, the judicial power of the enforcement courts could be compromised if that attribute withheld was reserved for some other Article III court.

These examples make apparent that at least certain attributes of the judicial power mean one thing when threatened by actors external to the federal judiciary and quite another when threatened by actors inside the Article III hierarchy. The practical judicial power of two federal courts can differ because of the particular role Congress has asked each to play in the judiciary writ large. One court might enjoy plenary authority to determine fully and finally every legal issue arising in a specific case while a second court is permitted to determine only a subset of legal issues raised (deferring in part to another court) and to do so contingently, subject to revision by a superior court. This differential allocation of power is dictated by Congress, which determines each court's authority by establishing both the specific scope of its jurisdiction (whole versus partial case review) and the reviewability of its decisions by another federal court. Thus, there emerges what might be called a "practice-postulate gap"—a disjunction between the allocation of judicial power in actual practice and the allocation theorized by the discrete-vesting postulate.

B. A Taxonomy of the Allocative Features of Judicial Power Attributes

The preceding illustrations of this practice-postulate gap suggest that various judicial power attributes can be distinguished according to their allocative features. In my view, these features can usefully be categorized

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entertaining enforcement actions from inquiring into the underlying validity of the price-fixing regulations. *Id.*

50. *See id.* at 428-29.

51. *See id.* at 435-36.

52. *Id.* at 444-46.

53. *Id.* at 444.

as follows: *intrinsic*, *hierarchical*, and *systemic*. In this Section I define and illuminate each category with examples, though it is decidedly *not* my goal here to provide a detailed justification for how each and every proposed judicial power attribute should be classified. Rather, I offer some tentative classifying judgments merely to illustrate my proposed taxonomy.

1. Intrinsic Attributes.—"Intrinsic" attributes of the judicial power are those which must be exercised by each and every discrete court adjudicating a case. Inherent managerial powers related to case and courtroom supervision, considered so "necessary to the exercise of all others"[54] that they are indefeasible by Congress, certainly fall into this category.[55] With respect to adjudicatory aspects of the judicial power, certainly the authority to decide a case inheres in each federal court vested with jurisdiction over said case. Moreover, other adjudicatory attributes might properly be considered intrinsic to each court.

Consider, for example, Professor Larry Sager's argument that Congress may not "conscript the judiciary in a constitutional charade" by ordering a court to articulate constitutional principles consonant with Congress's preferred views rather than with its own best judgment.[56] Professor Sager might persuasively argue that Congress cannot make *any* federal court its "puppet" in this manner, even just an intermediate court whose ruling will be reviewed by another court not similarly constrained. In two senses, the anti-conscription doctrine has expressive elements. In form, congressional conscription improperly makes the court appear subordinate to the legislature; in content, conscription improperly requires that the court articulate an erroneous (from its perspective) rule of law that might confuse and mislead the public. These expressive concerns arise from the conscription of any single federal court, whether or not that court has the final say in the case.[57] Thus the anti-conscription attribute defined by Sager arguably falls within the intrinsic category.

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54. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

55. *See id.* (noting that such "implied powers must necessarily result to our courts of justice from the nature of their institution"); Chambers v. NASCO, Inc., 501 U.S. 32, 43, 44 (1991) (stating that the power to discipline attorneys and punish them for contempt is "incidental to all Courts" and "inherent in all courts") (citations omitted); Bank of Nova Scotia v. United States, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) ("[E]very United States court has an inherent supervisory authority over the proceedings conducted before it . . . .").

56. Sager, *supra* note 9, at 2528.

57. If a superior court (perhaps the Supreme Court) retains interpretive independence from Congress and thus can revise the conscripted court's ruling before it becomes final, then at least the law as ultimately articulated and applied to the specific case will be untainted by congressional decree. However, the *expressive* concerns driving Sager's interpretation of *Klein*'s anti-conscription principle are at best somewhat muted, but certainly not fully abated.

2. Hierarchical Attributes.—"Hierarchical" attributes of the judicial power are those whose functional justifications are served so long as they are brought to bear by a court at a specific level in the judicial hierarchy. Such attributes are fully vested in the judiciary so long as they are exercised by the designated recipient level of court.[58] The exalted status of the "one supreme Court"[59] might refer to certain features of that Court unrelated to its exercise of judicial power, but it appears to qualify its reposition of judicial power in various ways as well.[60] With respect to non-adjudicatory functions, the Court has occasionally suggested that it enjoys some unique supervisory authority over the procedures and case-management practices of all inferior federal courts,[61] and arguably the Court enjoys certain forms of supervisory authority over various aspects of subordinate official decisionmaking as well.[62] With respect to adjudicatory functions, Professor Akhil Amar has argued that Supreme Court decisions uniquely *must* have the attribute of finality because it is the

58. It is conceptually possible to attach certain attributes of judicial power uniquely to trial courts (*e.g.*, fact finding) or to all inferior courts (*e.g.*, remedial discretion) but arguments that Article III vests certain attributes of judicial power uniquely in the Supreme Court seem more persuasive.

59. U.S. CONST. art. III, § 1.

60. Professor Akhil Amar has suggested that the Court's "supreme" status might refer to four structural features: it is the only court created by the Constitution rather than by Congress, it is the only court whose jurisdiction is constitutionally bestowed and defined, it is the only court with an irreducible original jurisdiction, and it is the only court from which no appeal could constitutionally lie. *See* Amar, *supra* note 1, at 221 n.60. For an argument that these structural features cannot persuasively be understood to exhaust the meaning of "supreme," see Caminker, *supra* note 13, at 828-30.

Some might view the adjective "supreme" as itself bestowing a unique set of powers on the court so designated. *See, e.g.*, Calabresi & Rhodes, *supra* note 16, at 1176 n.115 (positing that the use of the adjective "supreme" may constitute an additional and "*implicit* grant of power to the Supreme Court to reverse the judgment of the inferior courts and to bind them with precedents"); Pfander, *supra* note 13, at 1451-52 (deriving the Supreme Court's supervisory authority from its status as the "supreme" court compared to "inferior" courts). However, as explained earlier, *see supra* note 15 and accompanying text, the Vesting Clause of Article III appears to be the *only* clause that actually grants any judicial power to any federal court; *cf.* U.S. CONST. art. II, § 2, cl. 2 (authorizing "Courts of Law" to receive and exercise a quasi-executive appointments power). I believe the better view is that Article III's use of the adjectives "supreme" and "inferior," augmented by Article I, section 8, clause 9's authorization of Congress to constitute tribunals "inferior *to*" the Supreme Court, guides the proper understanding and allocation of the judicial power attributes bestowed upon these courts by the Vesting Clause itself.

61. *See, e.g.*, McNabb v. United States, 318 U.S. 332, 341 (1943) (stating that the Supreme Court has "supervisory authority over the administration of criminal justice in the federal courts," including the authority to formulate rules governing court proceedings) (citations omitted). *But see* Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225, 250 (1992) (questioning whether the Court enjoys a unique power to supervise inferior courts "beyond th[e] traditional sense of reviewing the soundness of a lower court's exercise of the power to manage its own proceedings").

62. *See* Pfander, *supra* note 13. Pfander argues that the Court's "supreme" status entails that it possess some minimal authority to supervise subordinate courts through various extraordinary writs. Inferior courts may but need not be granted similar authority by Congress. *Id.* at 1509-11.

"only court from which no appeal could constitutionally lie,"[63] and I have previously argued that Supreme Court rulings necessarily bind subsequent inferior court decisions as authoritative precedent.[64]

3. Systemic Attributes.—"Systemic" attributes of the judicial power are those that must be brought to bear on a particular case by the *combination* of federal courts adjudicating that case, not necessarily by each participating court. If Congress grants jurisdiction to only a single Article III court, then of course that court must exercise all of the attributes comprising the judicial power. However, if Congress grants jurisdiction over a single case to multiple federal courts, then each court need not redundantly exercise these attributes so long as they all are brought to bear before the adjudication terminates.

Many, perhaps most, judicial power attributes identified by Liebman and Ryan and others fall into this category. Perhaps the most obvious example is finality, defined as invulnerability to revision or override. Each federal court adjudicating a case need not—indeed, by definition cannot—have the final word. What matters is that once appellate jurisdiction, if any, is exhausted, the case produces a non-revisable "final word of the department as a whole."[65] As explained previously,[66] the attributes of decisional independence and comprehensivity are systemic as well. Rules of stare decisis, precedential authority, and law of the case all dictate that one court defer substantially or completely to the conclusions of another. Congress may permit one court to determine only a subset of legal issues or consider only a subset of federal laws so long as the judicial department *en toto* resolves the whole case based upon all applicable federal law.[67] I tentatively think this is true of the attribute of effectualness as well; not every court need be empowered to effectuate its own judgment so long as the department *en toto* renders every case resolution effective in the end.[68] According to this view it is the judiciary, not each court, that must decide the case independently, finally, and effectually based on all pertinent federal law.

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63. Amar, *supra* note 1, at 221 n.60.

64. *See* Caminker, *supra* note 13, at 828-34.

65. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1994).

66. *See supra* text accompanying notes 36-53.

67. For example, Congress could establish an appellate Court for Statutory Review that would review and revise only issues decided by district courts involving the proper construction of federal statutes, leaving unreviewed and intact the district courts' rulings on all other matters. Or, Congress could establish an appellate Constitutional Court which would review and revise only the constitutional rulings of district courts.

68. For example, Congress might refer all remedial questions, or a subset thereof (say, those involving institutional reform), to specialized Article III tribunals; conventional federal courts would determine questions of liability but leave the effectuation of their judgments entirely to the Remedial Court.

For the most part, the preceding classification of various judicial power attributes tracks their historical treatment by the Supreme Court. My tentative classification of additional attributes, such as Sager's anti-conscription doctrine and the effectualness requirement, reflects my provisional assessment of the functions those attributes are thought to serve and the allocation required to serve those functions. A more comprehensive evaluation of the allocative features of each and every claimed judicial power attribute would, of course, demand careful scrutiny of an array of both formalist and functionalist justifications for the definition and allocation of judicial power. My more modest goal here is simply to highlight the need for, and facilitate through taxonomy and reconceptualization, such a comprehensive inquiry.

IV. Reconciling the Allocative Taxonomy of Judicial Power Attributes with the Discrete Vesting Postulate

The foregoing taxonomy makes clear that, at least with respect to certain attributes, courts are not all created equal. By either constitutional design or congressional decree, certain courts enjoy some attributes (such as finality) that others do not. How can this differential allocation of judicial power among various federal courts be squared with the conventional view that "the Supreme Court and the inferior federal courts have the same judicial power—they are vested with the judicial power of the United States—even though they have different jurisdictions"?[69] Certainly judges and scholars have occasionally acknowledged that different courts seem to have different capacities and responsibilities, but few have offered any explanation of how their observations square with the discrete-vesting hypothesis. In this Part, I briefly explore three alternative efforts to resolve this tension, in ascending order of promise. While none is free of difficulty, each highlights the need for greater focus on the allocative aspects of particular judicial power attributes.

A. Further Nuancing the Definition of Judicial Power

One way to redress the practice-postulate gap, while maintaining the view that each Article III court enjoys exactly the same judicial power, would be to define the content of that power in such a nuanced way as to incorporate the permissible inter-court constraints on decisional authority. For example, instead of defining the judicial power to include the attribute of "finality," one could characterize the attribute as "finality with respect to all non-Article III actors and all inferior or coordinate Article III actors." Instead of the attribute of "interpretive independence," Article III

69. Harrison, *supra* note 1, at 214-15.

could encompass "interpretive independence from the views of non-Article III actors and all inferior or coordinate Article III actors." Instead of a duty to "invoke the whole supreme law applicable to a case," Article III could impose a duty to "invoke all of the supreme law applicable to a case *except* that which has been congressionally withheld for application to the same case by another Article III tribunal." This definitional revision would not only preserve *Yakus* and like cases,[70] but it would also account for res judicata rules requiring one federal court to credit the previous adjudication of specific claims and issues by another federal court.[71] By thus nuancing the definitions of specific attributes of judicial power, one can account for their susceptibility to inter-court allocation by Congress while adhering to the discrete-vesting postulate.

However, relaxing the practice-postulate tension in this manner comes at some cost to conceptual elegance. One of the appeals of a global description of the judicial power's essential attributes, such as that Liebman and Ryan provide,[72] is its simplicity. Concepts such as interpretive independence and comprehensivity are useful parts of our lexicon partly because they are basic and straightforward. In comparison, the preceding definitions are quite awkward and unwieldy. The more one builds such complicating nuances into the definition of each attribute just to satisfy the one-size-fits-all constraint, the more one risks undermining the attribute's usefulness for basic descriptive purposes.

More significantly, definitional complexity may jeopardize the durability of these judicial power attributes in the face of congressional incursions. In the long run, it may be easier for a court to defend its own judicial power when it can articulate that power's attributes in bold and straightforward terms such as "finality"—even if the attribute's application is guided by a distinct allocative feature such as "systemic"—than if the very definition of finality comes riddled with hedges and qualifications. If descriptive choices have such normative consequences, then this nuanced approach satisfies the one-size-fits-all requirement only by risking a reduction of that size in the long run.

Finally, this approach to redressing the practice-postulate gap is normatively agnostic. To be sure, once one determines the properly nuanced definition of each and every judicial power attribute (including necessary cross-references to other courts' powers, awkward as this may be), one can vest that definition identically in each federal court. But how does one determine the properly nuanced definitions in the first place?

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70. *See supra* notes 48-53 and accompanying text.

71. *See* Liebman & Ryan, *supra* note 8, at 830-31 (linking *Yakus*'s holding with res judicata principles).

72. *See supra* text accompanying note 24.

This approach provides no vocabulary or analytic tools to advance this key normative inquiry.

B. *A Function-Fulfillment Approach to Implementing the Judicial Power's Attributes*

A second way to close the practice-postulate gap would be to maintain the simplistic definition of each judicial power attribute but also defend the proposition that individual courts may sometimes decide or be congressionally directed not to exercise their full complement of discretely-vested powers. Liebman and Ryan offer such a defense. They develop a functional approach to interpreting "[t]he judicial Power" that resolves the practice-postulate tension by softening the discrete-vesting notion's formalist cast. In light of Article III's textual, conceptual, and drafting connections to the Supremacy Clause, these scholars conclude that the judicial power is meant primarily to ensure the supremacy of federal over state law and secondarily to ensure the priority of constitutional over other forms of federal law.[73] Thus a federal court given unique jurisdiction over a case must exercise the full attributes of judicial power because that is the constitutional mechanism for maintaining supremacy.

When more than one federal court adjudicates a single case, Liebman and Ryan propose, each court need not act redundantly in serving the purposes of Article III. If one Article III court brings each of the essential judicial power attributes to bear in a given case, then a second such court entertaining the same case need not do so because the first court has fulfilled Article III's functions. As Liebman and Ryan put it, the function of Article III courts is:

> to engage in "independent judicial review . . . to the end that the Constitution as the supreme law of the land may be maintained." Accordingly, although the "whole supreme law" and other qualitative ingredients of "[t]he judicial Power" are the constitutionally mandated means to Article III's overriding supremacy-maintaining end, once that end is achieved, the means' constitutional protection lapses.[74]

Thus, "once an *Article III court* has finally resolved a litigant's claim, the federal 'judicial Power' has been exercised fully, and no *other* federal court—whether coordinate (as in *Yakus*) or, especially, the same or an inferior federal court (as in the law of the case context)—has any Article III or supremacy-based obligation to exercise that 'Power' anew."[75] To

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73. Liebman & Ryan, *supra* note 8, at 702-03.

74. *Id.* at 862.

75. *Id.* at 881 n.884 (emphasis in original). Considering exceptions to the "whole case" and "whole law" attributes, the authors observe:

put it another way, a federal court may decide or be congressionally instructed not to assert its discretely-vested judicial power—in essence, to act as if impotent—whenever the supremacy-maintaining purposes of the power have been fulfilled by other courts.

This function-fulfillment approach might be invoked to explain away the tension between the theoretical one-size-fits-all judicial power and its observed differential allocations. The approach can account for both theory and practice if it turns out that essential attributes are allocated away from a given court only when they are vested elsewhere in the judiciary such that the overall allocation fully secures Article III's supremacy-maintaining purposes. Liebman and Ryan take great care to show this is true.

This function-fulfillment approach constitutes an improvement over the nuanced definition approach in several respects. First, it uses the familiar definitions of the various judicial power attributes such as finality and interpretive independence, securing the descriptive and normative benefits of a simple lexicon. Second, it more clearly reflects the notion of a unified judiciary, that federal courts work in tandem toward systemic goals rather than as discrete actors working in isolation. Finally, it self-consciously imports an overarching normative framework for determining how the various judicial power attributes must be brought to bear by the federal judiciary in a given case.[76]

On the other hand, this approach has a conceptual difficulty of its own: grafting a function-fulfillment shoot onto a discrete-vesting branch proves a somewhat strained and inelegant means of resolving the practice-postulate tension.[77] Let me illustrate by example. Consider a conventional case moving up through the judicial hierarchy. The district court hearing the case in the first instance must bring to bear all of the essential elements of the judicial power to secure the supremacy of national law,

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> The decisionmaking qualities that define "[t]he judicial Power" are not inherent attributes of judges as *judges*. Instead, they are the Framers' chosen qualitative means to the supremacy-maintaining objective to which the Constitution most fundamentally commits *federal* judges. Although the capacity and duty to achieve that supremacy-maintaining objective through those qualitative means in a case over which jurisdiction has been conferred *does* absolutely inhere in the constitutional status of Article III judges, once that structural objective has been achieved in the case, the previously sacrosanct qualitative means lose their absolute protection.

Id. at 836 (emphasis added).

76. Of course, one can logically embrace Liebman and Ryan's function-fulfillment approach even if one replaces their characterization of Article III's function as supremacy-maintenance with a different proposed function.

77. I wish to make clear that this was not the task that Liebman and Ryan self-consciously undertook, even though they do embrace the discrete-vesting postulate. Liebman and Ryan deploy their judicial power definitions to justify and explain case law, not to respond to any challenge to the discrete-vesting postulate per se. I merely suggest that their solution to one problem cannot easily be employed to solve the different problem I pose here.

except for those, if any, that have already been fulfilled by a previous court in a separate filing.[78] If an appeal is taken, the reviewing court may leave in place any and all aspects of the district court's decision that implement the judicial power. The district court's decision by hypothesis exhausts the judicial power; the appellate court need do no more. But this creates a conceptual oddity. According to Liebman and Ryan's argument, the district court's adjudication fully exhausts the function of Article III, and thus the attributes of judicial power thereafter lose their constitutional status with respect to this particular case. This means that the reviewing court of appeals would have no constitutional duty to exercise the power purportedly vested in it despite the fact that certain attributes—such as the duty to "decide the case"—are viewed as mandatory.[79]

Consider a second oddity. Suppose Congress directs the court of appeals (but not the district court) to grant a heavy presumption of validity to the state statute under review, say by instructing the court of appeals to invalidate the state statute only if it is "unconstitutional beyond a reasonable doubt." Strictly speaking, under Liebman and Ryan's view, the court of appeals is no longer bound by the constraints of the judicial power; the power's purposes were already fulfilled by the independent district court judgment being reviewed, such that the appellate court lacks any "Article III or supremacy-based obligation to exercise that 'Power' anew."[80] According to their view, the appellate court's decision to accede to Congress's instruction would not appear to violate *its* vestment of judicial power; that power by definition has been rendered void.

I have no doubt Liebman and Ryan would nevertheless conclude that Congress's instruction to the court of appeals is unconstitutional. Perhaps they would respond that the appellate decision would be tainted in a manner that undoes the district court's prior fulfillment of the judicial power's functions. In other words, the district court's original exercise of decisional independence would retroactively be overridden and should no longer be considered to fulfill the judicial power's purposes. But this response does not sit well with the discrete-vesting postulate because it makes the district court's satisfaction of Article III contingent on another court's subsequent behavior. One could not definitively determine whether

78. A court in a previous case might have supplied an independent interpretation of the governing law that should now guide the instant case's resolution through the doctrines of stare decisis or hierarchical precedent. Or, a court in a previous case might have decided or potentially decided some legal issues that form part of the instant case and should now be incorporated by reference through the doctrine of res judicata or the holding of *Yakus v. United States*, 321 U.S. 414 (1944). *See supra* notes 48-53 and accompanying text.

79. *See* Liebman & Ryan, *supra* note 8, at 752 ("[F]ederal judges would be *required* to deploy the qualities—the decisionmaking powers and responsibilities—inherent in '[t]he Judicial Power' and thus inherent in every court constituted by or under the judiciary article.") (emphasis added).

80. *Id.* at 881 n.884.

the district court's exercise of judicial power in fact fulfilled its discrete supremacy-based obligations until one knew if and how its decision was reviewed on appeal.

Professor Liebman has suggested to me a possible response to these conceptual oddities, one that "appeal[s] to the supremacy-maintaining integrity and logic of a system designed to have inferior and superior courts. Insofar as appellate jurisdiction is conferred, then the appellate court's duty is to exercise the judicial power to constrain the lower court."[81] In other words, once Congress exercises its discretionary power over the "when and where" of jurisdiction by authorizing an appeal from the district court's decision, the appellate court assumes the duty to ensure that the lower court's decision fulfills the supremacy-maintaining function of the judicial power by holding it to the supreme national law.

This response is quite appealing. However, it clearly backpedals from the discrete-vesting postulate. The function-fulfillment approach is consistent with this postulate only because each court is considered to bear identically the responsibility of fully exercising the judicial power, *except* to the extent that some or all attributes of this power have previously been exercised in a supremacy-maintaining way by another Article III court. In my preceding hypothetical, once the district court has fully exhausted the judicial power's attributes by bringing them to bear satisfactorily on the instant case, the appellate court simply has no obligation "to exercise that 'Power' anew."[82] In contrast, Liebman's response proposes that the appellate court still has some judicial power duties despite their previous exhaustion by the district court. It thus backtracks from the strict function-fulfillment approach superimposed on a discrete-vesting premise.

Rather, the suggestion that the appellate court must ignore Congress's directions and exercise interpretive independence embraces a more global perspective on the judiciary's supremacy-maintaining function than the discrete-vesting hypothesis entails. The core intuition is that an independent judicial interpretation should be brought permanently to bear on the instant case by whatever *combination of courts* Congress authorizes to decide that case; it is not enough for one court to exercise the judicial power if a reviewing court will subsequently undo that exercise with a supremacy-undermining final resolution.

I believe the intuition that my hypothetical congressional instruction to the appellate court is unconstitutional is best captured by a *systemic* view of the judicial power, *viz.*, that the final decision of the *judicial department writ large* must reflect an independence of judgment free from a

81. Professor Liebman offered this suggestion when helpfully commenting on an earlier draft of this essay.

82. Liebman & Ryan, *supra* note 8, at 881 n.884.

congressionally-imposed obligation of deference to non-Article III actors' determinations. Indeed, both the "nuanced-definition" and "function-fulfillment" approaches to defining the judicial power reflect a global vision that Article III requires certain judicial power attributes to be applied to individual cases, even if those attributes may be divided among various federal courts rather than imbued in each one.

However, as illustrated above, efforts to square this systemic vision with the discrete-vesting postulate prove somewhat awkward and inelegant. It therefore seems desirable to consider an alternative understanding of the Vesting Clause's mechanics, one that fits more naturally with the systemic view of the judicial power.

C. *Replacing the Discrete-Vesting Postulate with an Aggregate-Vesting Postulate*

One can build on Liebman and Ryan's insight that the judicial power should be understood in functional terms, but jettison the awkward baggage of the discrete-vesting postulate by embracing what I call the "aggregate-vesting postulate." This postulate holds that the Vesting Clause bestows the judicial power on the federal judiciary as a whole, not on each member court thereof. As a generalization, it is the judiciary, not necessarily each court, that must decide the case independently, finally, and effectually based on all pertinent federal law. Whether a specific judicial power attribute need be exercised by a specific court within the unified judiciary turns on a further specification of that attribute's allocational nature, meaning whether that attribute should be considered intrinsic, hierarchical, or systemic.[83] In other words, one can determine whether a given federal court must exercise a particular attribute by considering its allocational nature and then, if appropriate, considering whether other courts hearing some or all components of the instant case have or will separately bring that attribute to bear in a final sense. With the aggregate-vesting postulate, there is no need to resort to awkward, complicating definitions or conceptualizations to square such allocations with a one-size-fits-all vesting premise.

The Supreme Court, although not purporting to choose between the discrete-vesting and aggregate-vesting approaches, has frequently employed language revealing a systemic understanding of the judicial power. It is worth noting, for example, that Chief Justice Marshall's canonical statement that the judicial power includes the duty or power to "say what the law is" imposes that duty on "the judicial department," not each individual Article III court.[84] More recently, in the context of defining

83. *See supra* notes 54-68 and accompanying text.

84. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) ("Article III establishes a 'judicial department' with the 'province and

the attribute of finality, the Court observed that "Article III creates . . . not a batch of unconnected courts, but a judicial *department* composed of "'inferior courts' and 'one supreme Court,'" and an inferior court decision is not necessarily "the final word of the department as a whole."[85]

The greatest obstacle to embracing the aggregate-vesting postulate is not conceptual, but textual. I concede that the aggregate-vesting postulate does not reflect the most natural reading of the Constitution, which vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[86] When read in isolation from other interpretive clues, the phrase ", and in" seems to support one of two propositions. Either the judicial power is vested in each discrete federal court, or the power is vested both fully in the Supreme Court and fully in the *aggregation* of inferior courts Congress chooses to create. I also concede that the phrase ", and in" seems unnecessary to capture the aggregate-vesting postulate. If the framers subscribed to the aggregate-vesting postulate, it would have been more straightforward to vest the judicial power "in one supreme Court and such inferior courts as the Congress may from time to time ordain and establish."

On the other hand, this latter formulation might have generated some confusion as to whether the creation of the Supreme Court was left to congressional discretion; it could have been read as permitting Congress to establish zero or one supreme court and any number of inferior courts. Therefore, the ", and in" may have been intended merely to make clear that Congress controls the inferior but not the supreme tribunal's existence, and hence not intended to embrace a discrete-vesting over an aggregate-vesting approach. Liebman and Ryan take issue with this suggestion.[87] They maintain that "[t]he biggest difficulty" with this explanation of the ", and in" phrase "is that the 'permissive "may"' is nowhere to be found in the Wilson-Rutledge draft where the second 'in' first appears."[88] The opening sentence of the relevant section of the Wilson-Rutledge draft

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duty . . . to say what the law is' in particular cases and controversies.") (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

85. *Plaut*, 514 U.S. at 227 (emphasis in original).

86. U.S. CONST. art. III, § 1.

87. They do so in responding to Akhil Amar's similar suggestion. *See* Amar, *supra* note 1, at 232 n.88 (claiming that the word "in" was "simply reinserted for the sake of grammatical clarity; without it, Article III might have been read to imply that the permissive 'may' language concerning the creation of inferior courts also applied to the Supreme Court, whose establishment was intended to be mandatory."). Liebman and Ryan's response is really directed at Amar's misleading equation of the terms "judicial power" and "jurisdiction" that drives his desire to minimize the significance of the ", and in" language. *See* Liebman & Ryan, *supra* note 8, at 740-41 n.216. But they also offer the response I now discuss in the text.

88. Liebman & Ryan, *supra* note 8, at 741 n.216.

provided as follows: "The Judicial Power of the United States shall be vested in one Supreme (National) Court, and in such (other) <inferior> Courts as shall, from Time to Time, be constituted by the Legislature of the United States."[89] It is true that in this draft Congress's authority over inferior tribunals is introduced by "shall" rather than "may" as the final text provides. But the clause still gives Congress discretion over inferior court formation; there is no other way to read the phrase "from Time to Time." Thus, a careful drafter might have worried that, in the absence of the ", and in" clause-divider, readers *might* erroneously understand that the congressional discretion to constitute inferior courts "from Time to Time" relates to the Supreme Court as well. Liebman and Ryan deny that the Vesting Clause would have been ambiguous in this respect even without the ", and in" clause-divider,[90] but surely it is at least *plausible* that the drafters would have lacked Liebman and Ryan's confidence and included the clause-divider in an abundance of caution.

Of course, there remains the question whether, even if the ", and in" clause-divider was inserted into the Wilson-Rutledge draft to clarify that Congress lacked discretion over the Supreme Court's existence, the clause *also* had the foreseeable effect of endorsing one of the two more "natural" approaches to the vesting of judicial power.[91] As Professor Liebman has observed, a careful drafter could have clarified the Supreme Court's mandatory status without having to use language that seemingly supported a discrete-vesting rather than an aggregate-vesting approach.[92] For example, Article III could have mimicked Article I and opened: "The judicial Power of the United States shall be vested in a national judiciary, which shall consist of one supreme Court, and of such inferior Courts as the Congress may from time to time ordain and establish." That the drafters did not employ such a formulation, but intentionally chose language less consistent with the aggregate-vesting postulate (even if designed to accomplish a different purpose), might be viewed as fortifying the textual obstacle to embracing this alternative perspective.

Still, I hesitate to conclude that the text definitively rules out the aggregate-vesting interpretation. It is conceivable, for example, that the drafters used the ", and in" phrase and structure rather than other available textual formulations to underscore a point made earlier about the judicial power's allocation: certain attributes of that power apply uniquely or

89. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172 (Max Farrand, ed., 1911).

90. *See* Liebman & Ryan, *supra* note 8, at 741 n.216.

91. *See supra* text accompanying note 86 (arguing that under a "plain meaning" approach, the ", and in" phrase suggests that the judicial power is either vested discretely in each congressionally established inferior court, or vested in the aggregation of all such inferior courts).

92. *See supra* note 81.

differently to the Supreme Court than to the inferior courts in the Article III hierarchy.[93]

Moreover, before one rejects the aggregate-vesting postulate because of its textual deficiencies, at the very least one must consider its comparative interpretive advantages over the discrete-vesting postulate. The conventional approach may be better grounded in Article III's text, but it can be squared with the differential allocation of judicial power attributes only by embracing either the nuanced-definition or functional-fulfillment approaches, each of which poses conceptual difficulties of its own.

D. The Unified Judiciary Approach Revisited

The three proposed means of reconciling the differential allocation of judicial power attributes with a one-size-fits-all approach to the vesting of that power have distinct strengths and weaknesses. They do, however, share a common and critical theme. Each, in its own way, highlights the importance of focusing on the allocative aspects of the judicial power's various attributes.

Various challenges to Congress's recent restrictions on the manner of federal court adjudication take the following form:

(a) X is an essential attribute of the judicial power;
(b) the provision in question deprives a specific federal court of X;
(c) therefore, the provision violates Article III.

Conclusion (c) assumes that any deprivation of any court's attribute X deprives that court of its discretely vested authority and thus violates Article III, whether or not other federal courts are similarly burdened.

This assumption is simply false. Whether depriving a specific court of attribute X violates Article III turns on whether X is an intrinsic, hierarchical, or systemic attribute, and perhaps (if X falls into one of the latter two categories) where X has been allocated by Congress within the unified judiciary. The following Part illustrates how the conventional one-size-fits-all approach can mislead, by considering a current challenge to the constitutionality of one provision of the Antiterrorism and Effective Death Penalty Act of 1996.[94]

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93. *See supra* notes 59-64 and accompanying text.

94. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253-2255 and adding §§ 2261-2266).

V. Illustrating the Unified Judiciary Approach: the Constitutionality of Amended Section 2254(d)(1) of the Recent Habeas Reforms

As amended by the AEDPA, section 2254(d) of the Judicial Code now provides, in relevant part:

> "An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> —(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[95]

Habeas petitioners have argued that this provision violates Article III in two respects: it requires all federal courts to give undue deference to state court decisions and requires lower federal courts to give undue deference to the United States Supreme Court's rulings.

The Supreme Court recently interpreted section 2254(d)(1) to require federal habeas courts to grant some degree of deference under certain circumstances to the legal rulings of state courts.[96] Several scholars have previously suggested that such an interpretation would be constitutionally problematic, compromising the attribute of "interpretive independence."[97] I will not pursue this inquiry here, because the unified judiciary approach I propose adds little to this particular dispute. The Court's interpretation of section 2254(d)(1) as requiring deference to the state courts' objectively reasonable application of federal law applies to *all* federal courts, inferior and Supreme. Assuming *arguendo* that section 2254(d)(1) unduly infringes upon the judicial attribute of independent judgment, it violates the Vesting Clause whether this attribute is classified as intrinsic, hierarchical, or systemic. Congress cannot withdraw even hierarchical or systemic attributes entirely from the federal judiciary writ large.[98]

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95. 28 U.S.C. § 2254(d) (Supp. IV 1998).

96. In *Williams v. Taylor*, 120 S. Ct. 1495 (2000), Justice O'Connor authored an opinion of the Court addressing the proper interpretation of § 2254(d)(1). The Court held that

> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1522; *see also id.* at 1521 (framing the question as whether "the state court's application of clearly established federal law was *objectively* unreasonable") (emphasis added).

97. *See* Liebman & Ryan, *supra* note 8, at 864-84; *see also* Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 131-36 (1998) (both considering constitutional difficulties posed by various interpretations of § 2254(d)(1)).

98. I tentatively believe that freedom from mandated deference to a non-Article III actor is best considered an intrinsic attribute, for reasons analogous to those explaining why Sager's anti-conscription rule should be so considered. *See supra* notes 56-57 and accompanying text. If such interpretive

The unified judiciary approach has much more to say about the second constitutional challenge to section 2254(d)(1) which concerns Congress's authority to modify conventional rules of precedent. Habeas petitioners have argued that section 2254(d)(1) unduly infringes upon the judicial power of inferior federal courts by allowing them to assess the correctness of state court decisions only by reference to "clearly established Federal law, as determined by the Supreme Court of the United States."[99]

This argument can be understood only against the backdrop of *Teague v. Lane*,[100] which prohibits federal habeas courts from providing relief based on "new rules" of law. More specifically, the case holds that a petitioner can secure relief only if the favorable rule she asks the habeas court to apply to her case was "clearly established" at the time her state conviction became final.[101] Under *Teague*, the rule could be "clearly established" by circuit or Supreme Court precedent.[102] In contrast, section 2254(d)(1) makes clear that petitioners may rely on only those rules clearly established by Supreme Court precedent. It is this "retrenchment from [the] former practice [of] allow[ing] the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court"[103] that raises interesting questions concerning Congress's

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freedom were merely a systemic attribute (and surely it is at least that), then Congress could mandate or a court could decide voluntarily that a court issuing a non-final decision should defer to an external actor's view, knowing that this view could prevail only until reviewed by a nondeferential court. It seems quite odd to countenance a temporary expression of a legal ruling that will necessarily change before the case becomes final.

99. 28 U.S.C. § 2254(d)(1) (Supp. IV 1998).

100. 489 U.S. 288 (1989).

101. *Id.* at 310 ("[N]ew constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). *Teague* and its progeny use various terms to describe the standard used to determine whether a favorable rule qualifies as settled or new. *See, e.g.*, Caspari v. Bohlen, 510 U.S. 383, 395 (1994) (describing a rule as new if "reasonable jurists [could] disagree" based on precedent) (quoting Sawyer v. Smith, 497 U.S. 227, 234 (1990)). "Clearly established" is a sufficient characterization for my purposes. *Teague* recognized exceptions for new rules that either immunize behavior from criminal sanction or create "watershed" criminal procedure rules protecting the innocent. *Teague*, 489 U.S. at 307, 311 ("First, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' Second, a new rule should be applied retroactively if it requires the observance of 'those procedures . . . that are implicit in the concept of ordered liberty.'") (quoting Mackey v. United States, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))). Section 2254(d)(1) incorporates no such exceptions.

102. *See, e.g., Caspari*, 510 U.S. at 393-95 (reviewing the decisions of federal courts of appeals and state courts of last resort as part of the *Teague* analysis); Ciak v. United States, 59 F.3d 296, 301-03 (2d. Cir. 1995) (applying the *Teague* standard and treating circuit precedent as governing the determination of a rule's "newness").

103. Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996); *see also, e.g.*, Williams v. Taylor, 120 S. Ct. 1495, 1523 (2000) ("§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence"); Sweeney v. Parke, 113 F.3d 716, 718 (7th Cir. 1997) ("[Circuit courts are] no longer permitted to apply [their] own jurisprudence, but must look exclusively to Supreme Court caselaw. . . .").

authority to modify or eliminate the conventional rules of stare decisis and precedent governing the binding authority of circuit court rulings.[104]

Suppose a habeas petitioner claims that her state court conviction was secured in violation of constitutional rule X, that the relevant circuit court of appeals had adopted rule X at t=1, a time before the state conviction became final, and that the Supreme Court has never issued a ruling on point or anywhere near it. Under *Teague*, the circuit ruling issued at t=1 (call it CA_1) could qualify as clearly established law[105] and the petitioner could rely on rule X when challenging her conviction at t=2. Under section 2254(d)(1), however, federal courts must adjudicate her habeas claim at t=2 (call it DC_2 for district courts or CA_2 for courts of appeal) as if precedent CA_1 simply did not exist.

Petitioners' argument that section 2254(d)(1)'s mandated ignorance of CA_1 violates Article III has been articulated in various ways. I think the argument is most clearly put and evaluated by separating it into two different components, each embracing a different temporal perspective. First, section 2254(d)(1) is assertedly unconstitutional from the perspective of the court issuing CA_1 because it "attempts to remove the stare decisis effect from constitutional rulings by Article III courts."[106] Second, section 2254(d)(1) is assertedly unconstitutional from the perspective of the court issuing DC_2 or CA_2 because it violates the comprehensivity attribute by preventing these subsequent courts "from applying the entire body of supreme federal law to cases before them."[107] I consider these perspectives in turn.

According to the petitioners' first challenge, one judicial power attribute is "precedential status," meaning that judicial rulings have binding force through the doctrines of hierarchical precedent and stare decisis; the former absolutely binding courts considered subordinate to the deciding

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104. Of course, oue might question whether *Teague* itself is inconsisteut with Article III because *Teague* requires federal courts to violate (depending on how the case is characterized) either the interpretive independeuce, comprehensivity, or remedial effectualness requirements. *See* Liebman & Ryan, *supra* note 8, at 852. However, Liebman and Ryan defend *Teague* as consistent with these attributes because it preserves their supremacy-maintaining function. *See id.* at 855-63. I assume here, as must those raising the current constitutional challenge to § 2254(d)(1), that *Teague* is a valid doctrine against which "retrenchment" must be evaluated.

105. I assume here that there is no circuit split on point which would complicate the hypothetical.

106. Motion of Marvin E. Frankel, *et al.* for Leave to Appear as Amici Curiae and Brief in Support of Petitioner, Williams v. Taylor, 120 S. Ct. 1495 (2000) (No. 98-8384), *available in* LEXIS, 1998 U.S. Briefs 8384, at *29 [hereinafter *Frankel Brief*]; *see also id.* at *17 ("A Congressional attempt to undermine the stare decisis effect of rulings on constitutional issues by lower Article III judges would be a[n]. . . offensive breach of the separation of powers.").

107. *Id.* at *27; *see also Lindh*, 96 F.3d at 887 (Ripple, J., dissenting) ("To require the federal judiciary to hold that there is no constitutional violation simply because there is no case of the Supreme Court of the United States directly on point, is to deny it the right to refer to the corpus of jurisprudence to which it turns when it must 'say what the law is.'") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

court and the latter presumptively binding subsequent rulings by the same court. It follows, petitioners claim, that this attribute is unduly compromised by Congress's decree in section 2254(d)(1) that CA_1 lacks either precedential or stare decisis force for future habeas cases.[108]

Some petitioners and scholars have suggested that this position finds support in *City of Boerne v. Flores*,[109] in which the Supreme Court arguably held that Congress may not "withdraw the stare decisis [and presumably precedential] effect of the [Supreme] Court's constitutional interpretations."[110] If one strictly embraces the discrete-vesting postulate's one-size-fits-all characterization of the judicial power, one must conclude that if precedential status is an essential attribute of the Supreme Court's constitutional rulings then it is likewise an essential attribute of circuit and district court rulings. Under this conventional approach it is methodologically sufficient to demonstrate that Congress cannot strip Supreme Court decisions of their precedential status; the extension of this argument to all federal courts follows as a matter of course.

The unified judiciary approach shows this extension to be over-simplistic. To begin with, while for completely different reasons I agree with the basic premise that Article III requires Supreme Court rulings to bind subsequent inferior court decisionmaking,[111] I am dubious about this reading of *Boerne*.[112] In any event, the important methodological point

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108. This caveat, "for future habeas cases," is significant. Some have suggested that federal court rulings must have some precedential implications because "the court that is deciding an issue must do so with awareness that it is not only deciding the dispute between the parties before it, but that it is also deciding on a basis that may help set a rule followed by other courts. In this sense, stare decisis may be conducive to more responsible decisionmaking by courts faced with novel or difficult issues." Jackson, *supra* note 9, at 2470 (citations omitted). Notwithstanding § 2254(d)(1), ruling CA_1 could still have precedential and stare decisis implications for other types of cases (*e.g.*, either direct or habeas review of federal criminal prosecutions). Perhaps this provides sufficient incentive for responsible decisionmaking to satisfy this asserted attribute of judicial power.

109. 521 U.S. 507 (1997).

110. Liebman & Ryan, *supra* note 8, at 838; *see also* Jackson, *supra* note 9, at 2469 ("*Boerne* could be read to suggest that decisions of Article III courts [have] the ordinary weight stare decisis would give them.").

111. *See* Caminker, *supra* note 13, at 818 ("[A] court is *always* bound to follow a precedent established by a court 'superior' to it.") (emphasis in original).

112. This interpretation is based on the following pronouncement of the *Boerne* Court:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but . . . it is this Court's precedent, not RFRA, which must control.

Boerne, 521 U.S. at 536. The context of this discussion, however, concerned specific federalism and separation of powers doctrines rather than the doctrines of precedent and stare decisis. I think the Court's declaration that "this Court's precedent . . . must control" is not itself a reason for decision based on an analysis of judicial power attributes, but merely a conclusion reached because RFRA was held unconstitutional on other grounds. *See* Jackson, *supra* note 9, at 2469 (noting that *Boerne*

is as follows: even if Article III precludes Congress from withdrawing precedential or stare decisis effect from *Supreme Court* rulings, that does not mean Article III similarly precludes Congress from withdrawing precedential or stare decisis effect from *circuit court* rulings. The latter conclusion assumes that the attribute of precedential status is either an *intrinsic* attribute or a *hierarchical* one inhering in all appellate courts. If instead it is a *systemic* or a *hierarchical* attribute inhering only in the Supreme Court, then Congress can remove the precedential status of lower court rulings so long as it does not similarly regulate Supreme Court rulings. The argument that precedential status is either an intrinsic attribute or a hierarchical attribute inhering in all appellate courts faces a much higher burden.

I believe this higher burden is difficult to surmount.[113] To begin with, because district court decisions are not considered to enjoy precedential status,[114] the claim that such status is intrinsic to *all* Article III adjudication seems weak. The most one can claim is that all Article III courts having revisory jurisdiction over subordinate courts must issue decisions with precedential status; this would make such status a hierarchical attribute that attaches to appellate adjudication. But even this argument proves difficult to defend.

In my view, the constitutional requirement that inferior federal courts respect Supreme Court precedents flows from the inferior-supreme relationship specified in the text and confirmed by the structural design of Article III. This argument "says nothing about the relationship among the tiers of inferior federal courts."[115] The conventional doctrine of hierarchical precedent that binds district courts to follow their reviewing court of appeals' rulings is grounded, not in constitutional principle, but rather in an amalgam of pragmatic arguments (*e.g.*, judicial economy, expertise, and uniformity).[116] Because precedential rules governing courts of appeals' decisions essentially reflect common law rather than constitutional doctrine, the rules seem properly subject to congressional regulation.

Moreover, one can ask Liebman and Ryan's question: whether the supremacy-maintaining function of Article III requires federal district and circuit court precedents established at t=1 to bind later federal courts

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"appears to rest substantially on federalism-based grounds" and that therefore it is "unclear how much significance to attach to the Court's separation of powers comments" quoted above).

113. My claim here is somewhat preliminary and tentative. My primary goal in this Essay is not to resolve definitively the constitutional challenge to § 2254(d)(1), but merely to illustrate the methodological difference between the conventional discrete-vesting postulate and my proposed unified judiciary approach.

114. *See* Caminker, *supra* note 13, at 825 & n.31.

115. *Id.* at 837.

116. *See id.* at 839-56 (exploring justifications for the doctrine of hierarchical precedent).

reviewing state court convictions at t=2. Another way to put this question is whether DC_2's or CA_2's decision (following the new habeas statute) to bind a state court to the rules established by Supreme Court precedents but not precedents DC_1 and CA_1 frustrates the supremacy of national law. In my view, while Congress might *choose* to bind state courts to follow inferior federal court precedents (either for supremacy or other purposes[117]), the supremacy of federal law does not seem to depend on this relationship in the same way that it depends on state court fidelity to Supreme Court precedents.

Some have suggested that a requirement of precedential authority might be read into the Court's decision in *Plaut v. Spendthrift Farm, Inc.*,[118] in which the Supreme Court invalidated a federal statute requiring courts to reopen judgments that became final after exhaustion of the available avenues of appeal.[119] I do not read *Plaut* so broadly. *Plaut* held that Congress cannot reopen or revise a final judgment so as to terminate or modify the binding nature of the court's decree on the parties before the court. Nothing in *Plaut* says that the Court meant to protect from congressional revision both the final judicial decision's status as a case disposition directly binding the parties and the decision's status as a precedent indirectly governing non-parties.

Thus, neither functionalist justifications nor Supreme Court case law provide strong support for the claim that precedent-setting is an intrinsic or even hierarchical attribute, as opposed to a systemic one. If precedent-setting is indeed a systemic attribute, this formulation of the challenge to section 2254(d)(1) should fail.[120]

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117. *See supra* text accompanying note 116.

118. 514 U.S. 211 (1995).

119. *See Frankel Brief*, *supra* note 106, at *16-17 (citing *Plaut* in support of the proposition that Congress "[c]annot [p]revent the [l]ower [f]ederal [c]ourts from [a]dhering to [s]tare [d]ecisis"); Jackson, *supra* note 9, at 2469 (asserting that *Plaut* and *Boerne* taken together "might be read to suggest that it is an essential element of Article III adjudication that the final judgments of Article III courts matter as precedent"); *id.* at 2469-70 ("*Plaut* and *Boerne* suggest a vision of Article III courts that requires Congress not only to leave their final judgments intact, but also to treat (and allow other courts to treat) their decisions as having ordinary stare decisis effect.").

120. One might persuasively argue that congressional efforts to manipulate substantive outcomes by *selectively* withdrawing the precedential status of courts of appeals' decisions would contravene separation of powers principles. For example, a congressional mandate that district courts treat as precedent only courts of appeals' rulings that are favorable to the government's litigation position might well cross the line between a "necessary and proper" allocation of precedential authority and a blatant attempt to gerrymander the substantive law in a desired direction. This congressional influence might violate the spirit if not the letter of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). Section 2254(d)(1), however, withdraws precedential status from all circuit court decisions across the board and can be justified by neutral principles governing the allocation of law-declaration and law-application functions. *See infra* text accompanying notes 122-24. This provision, therefore, does not raise the same threat of substance gerrymandering that my hypothetical does.

More generally, a congressional power to dictate the precedential impact of Supreme Court rather than circuit court decisions would raise unique separation of powers concerns. If Congress could suspend in an across-the-board fashion either the binding effect of all Supreme Court decisions on

The subtly distinct second constitutional challenge embraces the temporal perspective of the courts issuing DC_2 or CA_2 at t=2. The claim is that section 2254(d)(1) violates the comprehensivity attribute by preventing these subsequent courts from considering CA_1 to be part of the "applicable body of federal law" from which they may engage in reasoned elaboration. In deciding whether a habeas petitioner may invoke rule X as "clearly established" for purposes of *Teague*, the courts deciding DC_2 and CA_2 may not even *voluntarily* rely on CA_1 in support of that position, and they certainly are not bound to do so.

The discrete-vesting postulate holds that the judicial power attribute of comprehensivity attaches to each and every Article III court. Thus, assuming that prior judicial rulings count as part of the "body of law" from which courts may reason in deciding subsequent cases,[121] it follows that section 2254(d)(1) violates Article III because it precludes courts issuing DC_2 and CA_2 from drawing upon the "whole supreme law."

In contrast, under the unified judiciary approach, this challenge to section 2254(d)(1) fails if comprehensivity is considered a systemic rather than an intrinsic attribute. If it is systemic, then Congress need only ensure that *some* court or combination of courts within the judicial hierarchy may consider the entirety of pertinent federal law. Section 2254(d)(1) arguably satisfies this weaker requirement. Habeas review under *Teague* might be understood as implementing and extending the

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inferior courts (by overriding the doctrine of hierarchical precedent) or the influential effect of all Supreme Court rulings on the Court's own subsequent decisionmaking (by overriding the doctrine of stare decisis), then Congress could still manipulate substantive outcomes through careful *temporal* selectivity. Congress could prohibit courts from considering themselves bound by rules of precedent and stare decisis during a period of time when Congress generally disagreed with important Supreme Court rulings, and then Congress could later lift the prohibition after the Supreme and perhaps inferior courts had exercised their new-found discretion to revise these important rulings in a congressionally preferred direction. The prospect of such temporal manipulation might violate the spirit of *Klein*, albeit through a subtle mechanism. This temporal concern, however, is not seriously implicated by § 2254(d)(1)'s withdrawal of the precedential status of *circuit court* decisions. These decisions influence the fate of habeas petitions only until the Supreme Court has stepped in to settle the law. Thus, even if Congress were to engage in a systematic practice of allowing habeas petitioners to invoke clearly established circuit court precedents when such precedents were generally pro-government but prohibiting petitioners from invoking circuit court precedents when they turned generally pro-petitioner, Congress would have only a limited and arbitrary influence over habeas outcomes because at any time the Supreme Court could issue a decision that would bind all lower courts whether it was pro-government or pro-petitioner. The separation of powers concern raised by the prospect of temporal selectivity is thus greatly muted when applied to circuit rather than Supreme Court precedents. *See also* Caminker, *supra* note 13, at 828-34 (arguing that the constitutionally specified supreme-inferior relationship between the Supreme Court and other federal courts uniquely ascribes precedential status to Supreme Court decisions).

121. This premise itself remains underdeveloped. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEXAS L. REV. 1, 24-27 (1994) (arguing that binding precedents are best understood as judicial events that provide strong pragmatic reasons for later courts to interpret positive law in the same way, rather than as sources of positive law themselves).

Supreme Court's power of direct appellate review over state criminal convictions, by authorizing federal courts to act as proxies for the Supreme Court which lacks sufficient time and other resources to entertain all federal claims on direct review.[122] This habeas model thus divides the responsibility for ensuring state court fidelity to federal constitutional principles between the Supreme Court, which is given exclusive authority to "say what the law is" that governs state court decisionmaking, and the inferior federal courts, which are given concurrent authority to apply the *law so defined* to discrete cases. Put differently, section 2254(d)(1)—like *Teague*—divides the function of judicial decisionmaking into two components, law-declaring and law-applying, and vests the former in the Supreme Court alone while vesting the latter in all federal courts. If as suggested earlier[123] comprehensivity is a systemic attribute, then it is properly subject to congressional allocation among various federal courts in this manner.[124] Thus the differing methodologies of the discrete-vesting postulate and the unified judiciary approach lead to divergent substantive conclusions.

VI. Conclusion

Congress's recent spate of statutes dictating the manner, in addition to time and place, of Article III adjudication has prompted a resurgence of judicial and scholarly attention to the content of "[t]he judicial Power." However, focus on content alone, without simultaneous focus on the allocative nature of that content, can provide misleading answers to the questions now posed by the recent reforms. The conventional discrete-vesting postulate has induced many to assume that the judicial power necessarily comes in a one-size-fits-all package, an assumption that confounds rather than clarifies analysis of current instances of arguable infringement of judicial authority.

My taxonomy of allocative features and reconceptualization of the Vesting Clause's mechanics are intended to provide a more descriptively

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122. *See* Liebman & Ryan, *supra* note 8, at 882-83 (noting that § 2254(d)(1) suggests a view of habeas "as a surrogate for Supreme Court direct review" by "requiring habeas courts to apply a rough approximation of the law the Supreme Court assumedly would have applied in the case on direct appeal certiorari, namely, 'clearly established Federal law, as determined by the Supreme Court' as of the end of direct appeal"). For further support of habeas review as essentially "appellate," see Jordan Steiker, *Habeas Exceptionalism*, 78 TEXAS L. REV. 1725, 1748 (2000); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 407-11 (1996) (exploring and ultimately rejecting the possibility that AEDPA creates a form of appellate jurisdiction in federal district courts).

123. *See supra* notes 44-53, 67 and accompanying text.

124. Just as in *Yakus v. United States*, 321 U.S. 414 (1944), the Court held that an enforcement court need not have authority to consider the validity of the regulations being enforced so long as another court theoretically available to the claimant enjoyed such authority, *see supra* notes 52-53 and accompanying text, so too here the habeas enforcement court need not have authority to develop the underlying constitutional rules to be applied so long as the Supreme Court retains such authority.

accurate and prescriptively helpful framework for evaluating purported infringements upon judicial authority. The move to a unified judiciary perspective highlights the possibility that different component attributes comprising the judicial power can have different allocative characteristics, raising the question of whether a given attribute must be vested in all Article III courts, a given level of the Article III judiciary, or merely in any one Article III court. This framework reveals that each attribute does not mechanically flow into each Article III court, but rather its proper allocation turns on its precise function within the unified judiciary.

The nuanced-definition, function-fulfillment, and novel aggregate-vesting approaches provide alternative ways in which this allocative taxonomy can be squared with Article III's Vesting Clause. I find the latter approach the most conceptually attractive. I recognize, however, that some may resist embracing the aggregate-vesting postulate outright, preferring the discrete-vesting approach for its historical pedigree and somewhat more natural fit with Article III's syntax. One can instead reach the same endpoint by massaging the conventional view, following either of the other two approaches, although doing so raises some nontrivial conceptual difficulties. At the very least, the aggregate-vesting postulate provides a useful heuristic, highlighting the allocation question as a central concern rather than making it secondary or peripheral to content-definition. And, as the illustrative application of the unified judiciary approach to one aspect of recent habeas reform reveals, the question of how the judicial power's attributes are vested is as important as what those attributes are.