JUDICIAL MODESTY AND THE JURY

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INTRODUCTION

"That even purportedly fair adjudicators 'are disqualified by their interest in the controversy to be decided is, of course, the general rule.'"[1]

In the exercise of judicial review, the judiciary plays the unique role of policing its own power in relationship to the competing powers of other actors under the Constitution. These actors include the legislative and executive branches of the federal government, the states,[2] the criminal jury, and the civil jury. While the Court has examined the manner in which the judiciary should interpret the power of other actors—for example, how the Court should analyze the constitutionality of legislative acts[3]—the Court has not separately considered the general question of how the judiciary should interpret the power of constitutional actors that have power that competes with the judiciary's own power. That is, the

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1. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2651 (2004) (plurality) (quoting Tumey v. Ohio, 273 U.S. 510, 522 (1927)).

2. One could argue that the Constitution does not grant power to the states because the Constitution simply "reserve[s]" to the states those powers not given to the United States and those powers not prohibited to the states. U.S. CONST. amend. X. For the purposes of this Article, this reference to "reserved" in the Tenth Amendment is treated as a grant of power.

3. Both the Court and scholars have examined the manner in which the judiciary should interpret legislative acts. *See, e.g.*, Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 79–87 (2003) (describing the Court's and commentators' discussion of the proper interpretation of the constitutionality of legislative acts). This Article concerns both a more specific and a more general issue. This Article concerns those circumstances in which the Court must interpret the Constitution where the power of the judiciary actually competes with power of the legislature or another constitutional actor.

Court has not generally decided whether in the review of the judiciary's own power under the Constitution versus the competing power of another actor under the Constitution, the judiciary should exercise some degree of restraint in the interpretation of its own power. Scholars have with rare exception also ignored this issue of how the judiciary should interpret its own power versus the competing power of another actor under the Constitution.[4]

This Article begins to fill this gap by exploring the issue of the judiciary's self-policing of its own power in the context of one competing constitutional actor—the jury. The relationship between the power of the judiciary and the power of the criminal jury has been particularly rele-

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4. To be clear, this Article does not concern the much explored question of the power of the judiciary to perform judicial review. *See infra* note 19.

Professor Tushnet has discussed the maximization of the Court's power through the exercise of judicial supremacy. *See* Mark Tushnet, *Two Versions of Judicial Supremacy*, 39 WM. & MARY L. REV. 945, 949–55 (1998). He compared the self-interest of the Court to maximize its power to the self-interest of Congress to decide questions regarding its power. *See id.* at 948–60. He argued that Congress was better able than the Court to define both it and the Court's power. *See id.* at 949–52. Judge Noonan has argued that the Court should arguably be able to "protect [its] own turf" as opposed to "judge all acts of Congress." John T. Noonan, Jr., *Foreward: A Silk Purse?*, 101 MICH. L. REV. 2557, 2559 (2003).

Other issues like the propriety of judicial supremacy have dominated the scholarship. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (arguing for propriety of judicial supremacy). *But see, e.g.*, ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 85–111 (2001) (discussing concept of judicial supremacy, including analyzing Alexander and Schauer article); Larry D. Kramer, *The Supreme Court 2000 Term Foreward: We the Court*, 115 HARV. L. REV. 4, 130–169 (2001) (arguing that judicial supremacy is becoming judicial sovereignty such that the interpretation of the Constitution by the other branches of the government does not matter); Gary Lawson, *Interpretative Equality as a Structural Imperative (or "Pucker Up and Settle This!")*, 20 CONST. COMMENT. 379, 384 (2003) (arguing that interpretive authority should be divided just as, for example, legislative and executive authority is divided); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law is*, 83 GEO. L.J. 217 (1994) (arguing for the independent constitutional assessment of each branch not tied to the assessment of the judiciary).

The issue of the interpretation of the power of the judiciary versus the power of competing constitutional actors has not been addressed even though scholars from a variety of perspectives have argued that the power of the judiciary is increasing. *See* Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 700 (1997) (describing the increasing power of judges in civil cases); Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959, 960 (2004) (discussing "conspicuous enlargement of judicial power"); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995) (proposing solutions for the judiciary in a time when judicial power is increasing and is unchecked); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Court and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (describing increasing power of federal judges); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing the role of judges in case management and informal resolutions which has increased the power of judges).

vant during the past several terms,[5] and the relationship between the judiciary and the civil jury also is of particular interest now as judges increasingly use devices which have the effect of fewer cases being heard by juries.[6]

In this Article, I propose that the judiciary should narrowly construe its own power when engaged in the interpretation of its power versus the power of the jury. I describe this judicial construction as "modesty."[7] Six specific characteristics of the relationship between the judiciary and the jury call for this treatment. The relevant text of the Constitution limits the power of the judiciary; the Constitution grants related power to the jury; the judiciary must choose between the exercise of its power and the power of the jury; the judiciary can prevent the jury from any exercise of power; the jury cannot protect itself against the exercise of power by the judiciary over it; and another constitutional actor cannot fully protect the jury against the judiciary's exercise of power over it.

Under the auspices of the doctrines of separation of powers and federalism, the Court has sometimes self-policed its own power by imposing limitations on its power in relationship to the powers of the legislative and executive branches and in relationship to the power of the states. Examples include the political question doctrine and abstention.[8] In contrast, structural doctrines similar to the separation of powers or federalism have not been recognized in the context of limitations on the judiciary's powers in relationship to the power of the jury.

An examination of the jurisprudence of the Supreme Court on the Sixth Amendment reveals that, even in the absence of a structural limitation similar to separation of powers or federalism, the Court has sometimes narrowly construed the judiciary's power versus the power of the

5. *See* United States v. Booker, 125 S. Ct. 738 (2005) (holding Sixth Amendment applies to Federal Sentencing Guidelines and certain parts of the Guidelines violate the jury trial right under the Amendment); Blakely v. Washington, 124 S. Ct. 2531 (2004) (holding Sixth Amendment violated when defendant sentenced above standard maximum range based on judge's finding of facts); Ring v. Arizona, 536 U.S. 584 (2002) (holding that Sixth Amendment requires that jury, not judge, decide any aggravating factors that influence death sentence); Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that due process requires that, except for prior conviction, jury must decide beyond a reasonable doubt the existence of facts that affect a sentence beyond the statutory maximum).

6. *See* Suja A. Thomas, *The Seventh Amendment, Modern Procedure and the English Common Law*, 82 WASH. U. L.Q. 687, 688 n.9 & 10 (2004) [hereinafter Thomas, *Modern Procedure*].

7. Other scholars have written about a different concept described as judicial "humility." *See, e.g.*, Paul L. Caron & Rafael Gely, *Affirmative Refraction:* Grutter v. Bollinger *Through the Lens of the Case of the Speluncean Explorers*, 21 CONST. COMMENT. 63, 83 (2005) (arguing that "judges and lawyers hold no monopoly on wisdom and that institutions other than courts may be better positioned in certain situations to resolve a particular issue").

8. *Cf. infra* note 101.

criminal jury, or in other words, has acted modestly. On the other hand, the Court's jurisprudence on the Seventh Amendment reveals a lack of similar restraint regarding the judiciary's power versus the power of the civil jury, or in other words, a lack of modesty. For example, the judiciary has been given significant power over the power of the civil jury in large part through the constitutionalization of many procedural devices that permit judges to exercise power over juries, including the power to remove cases from juries before and after trial.[9] This Article concludes that if the judiciary exercised modesty in the interpretation of its power versus the power of the civil jury, the judiciary might then deem certain of these modern procedural devices unconstitutional.

Part I describes the structural role that separation of powers and federalism have played in the division of authority among, and limits on, the legislative, executive, and judicial branches and the states. The relationship between the judiciary and the jury set forth in the Constitution and envisioned by the Framers is then discussed. This Part then explains the lack of the development of any doctrine similar to the separation of powers or federalism that specifically recognizes the jury as a significant independent constitutional actor in comparison to the judiciary. Part II describes particular limits on the power of the judiciary that have developed under the doctrines of separation of powers and federalism. Next, Part III argues that the special relationship between the judiciary and the criminal and civil juries calls for the judiciary to narrowly construe its own power in relationship to the power of the jury. An examination of the Supreme Court case law demonstrates that the Court has exercised some modesty in its interpretation of the Sixth Amendment, but has not exercised similar restraint in the interpretation of the judiciary's power under the Seventh Amendment. Finally, this Part sets forth examples of how the exercise of modesty by the Court in the interpretation of the Seventh Amendment could affect federal procedure. In the conclusion, I assert that the model of judicial behavior proposed here—that of judicial modesty—may be found to apply to relationships between the judiciary and other constitutional actors.

I. A GOVERNMENT OF DIVIDED AND LIMITED POWERS

The Constitution was premised on a government of divided and limited powers.[10] Accordingly, under the Constitution, power was granted

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9. *See* Thomas, *Modern Procedure*, *supra* note 6; Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003) [hereinafter Thomas, *Remittitur*].

10. *See infra* Parts IA, IB, & IC.

to several different actors, including the legislative branch, the executive branch, the judicial branch, the states, the criminal jury, and the civil jury.[11] These powers are set forth in Article I,[12] Article II,[13] Article III,[14] the Tenth Amendment,[15] the Sixth Amendment,[16] and the Seventh Amendment.[17]

The constitutional actors may attempt to voluntarily comply with the boundaries of their powers by acting within what they believe are the limits of their authority. Additionally, the judiciary as one of the actors plays a unique role in the enforcement of the boundaries.[18] As the final decision-maker under the Constitution, the judiciary must decide what powers each constitutional actor possesses.[19]

In policing the boundaries of the powers of the constitutional actors, the Court has emphasized the separation of powers and federalism.[20] The separation of powers and federalism are two well-known doctrines developed to prevent the aggrandizement of the powers of the branches, the federal government, and the states.[21] The doctrine of the separation of powers highlights the division of authority between the branches and the doctrine of federalism marks the similar division between the states

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11. The criminal and civil juries can be said to be part of the judicial branch. *See, e.g.*, *infra* Part I.C. (discussing jury as part of judicial branch and also the jury and judiciary as separate institutions). Regardless of this fact, the civil and criminal juries serve roles independent of the role of the judiciary. *See infra* Part III.

12. U.S. CONST. art. I.

13. U.S. CONST. art. II.

14. U.S. CONST. art. III.

15. U.S. CONST. amend. X.

16. U.S. CONST. amend. VI.

17. U.S. CONST. amend. VII.

18. While other actors may possess certain powers to prevent the exercise of power by another actor, i.e., the executive veto or congressional power over war, only the judiciary has final authority to decide what the Constitution means. *See supra* note 4.

19. This Article assumes the legitimacy of judicial review. *See* United States v. Lopez, 514 U.S. 549, 575 (1995) (citations omitted) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)) ("Judicial review is also established beyond question . . . and though we may differ when applying its principles . . . its legitimacy is undoubted."); *see also* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003) (arguing that judicial review is supported by the text and structure of the Constitution, as well as by history).

20. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 38 (2d ed. 2002) ("Examination of constitutional and statutory limits on the federal judicial power . . . inevitably entails consideration of separation of powers and federalism concerns."); LARRY W. YACKLE, FEDERAL COURTS 3 (2003) ("The law governing federal courts is largely concerned with allocating power among the three branches of the national government and between the national government and the states.").

21. While the separation of powers and federalism may be said to be implicit to the Constitution, in its exercise of judicial review, the Court has formally "developed" these doctrines by an interpretation of the text of the Constitution, in addition to an analysis of the intent of the Framers. *See infra* text accompanying notes 22–57.

and the federal government. Moreover, these doctrines emphasize the limits on the powers of each of these actors. As discussed below, a doctrine similar to the separation of powers or federalism has not developed to mark the analogous division of power between the judiciary and another constitutional actor—the jury.

A. Separation of Powers: Division of Power Among and Limits on the Powers of the Legislative, Executive and Judicial Branches

The importance of the separation of powers among the legislative, executive, and judicial branches of the government has been discussed since the founding of the Constitution. In THE FEDERALIST PAPERS, James Madison wrote

> [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[22]

"[T]he fundamental principles of a free constitution [were said to be] subverted" if one department exercised all of the power of another department.[23] Madison emphasized that limits must be imposed on the powers of the branches vis-à-vis the other branches.

> [N]either of [the departments] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectively restrained from passing the limits assigned to it.[24]

Among the substantial limits suggested were insuring

> that each department should have a will of its own; and consequently should be so constituted, that the members of each should have as lit-

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22. THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan ed., 2001).

23. *Id.* at 251. Montesquieu did not mean, however, that "departments ought to have no *partial agency* in, or no *control* over the acts of each other." *Id.*

24. THE FEDERALIST NO. 48, at 256 (James Madison) (George W. Carey & James McClellan ed., 2001); *see also* THE FEDERALIST NO. 49, at 261 (James Madison) (George W. Carey & James McClellan ed., 2001) ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.").

tle agency possible in the appointment of the members of the others.[25]

The Framers had interpreted the respective powers of the legislative, executive, and judicial branches set forth in Articles I, II, and III. The Supreme Court in turn has invoked the Framers' intentions and the doctrine of separation of powers in its interpretation of the branches' powers.[26]

Immigration and Naturalization Service v. Chadha[27] is an often noted example of the Supreme Court acting to prevent the aggrandizement of the power of the branches using the separation of powers.[28] Under the Immigration and Nationality Act, the Executive Branch could suspend the deportation of an alien and then one House of Congress could override the decision of the Executive Branch.[29] The Court held this action by only one House unconstitutional.[30] The Court discussed the powers delegated to the different branches.[31] "Although not 'hermetically' sealed from one another, the powers delegated to the three Branches [were] functionally identifiable."[32] The Court decided that because the action by the House was legislative, Article I of the Constitution required both houses of Congress and the President to pass on the

25. THE FEDERALIST NO. 51, at 268 (designating James Madison as author although other editions have noted that Alexander Hamilton or Madison could have authored the paper) (George W. Carey & James McClellan ed., 2001).

26. "Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances." United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (citing Prize Cases, 67 U.S. 635 (1863); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); United States v. Nixon, 418 U.S. 683 (1974); Buckley v. Valeo, 424 U.S. 1 (1976); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)); *see also* Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 HASTINGS L.J. 47, 52–53, 55 (2000) (describing among other constitutional constraints, the constraint on the legislative branch that legislation be presented to the President, the constraint on the executive by the required approval of the Senate of certain appointments, and the constraint on the judicial branch to decide only cases and controversies and to be subject to impeachment by the Senate).

27. 462 U.S. 919 (1983); *see also* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994) (discussing *Chadha)*; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (same).

28. *But see infra* note 36 (discussing possible criticism of *Chadha* as an example of separation of powers).

29. *See Chadha*, 462 U.S. at 923–25.

30. *Id.* at 959.

31. *See id.* at 951–52.

32. *Id.* at 951 (citations omitted).

legislation.[33] Adherence to these requirements was an important check on the powers of the branches. The Court stated that

> [t]he bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.[34]

While the procedure set forth in the Act might be convenient and efficient, the Court emphasized that the text of the Constitution sets forth certain requirements to check the branches' powers and that those requirements could not be circumvented based on considerations such as convenience and efficiency.[35]

Chadha is an example of the Court acting to prevent the aggrandizement of the powers of the branches using the doctrine of the separation of powers.[36] Following the direction of the Framers, the Court emphasized the division of authority among the branches, the limits on the authority of the branches and the consequent checks of the branches on each other.

More recently, the Court has emphasized the importance of the doctrine of the separation of powers as

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33. *See id.* at 954–58. The Court made this decision despite the presumptive constitutionality of the congressional action. *See id.* at 952–54.

> When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere.

Id. at 951–52 (citations omitted).

34. *Id.* at 957–58.

35. *See id.* at 944, 958–59.

36. While in *Chadha*, the Court emphasized the separation of powers of the branches, the decision may be viewed as a questionable example of separation of powers because it is arguably unclear which branch's power is being compromised to the aggrandizement of another branch. For example, it could be the president's veto power but the president already has control over the deportation decision through control over the Justice Department. It could be the executive power exercised in the Justice Department but the Court refers repeatedly to the deportation decision as legislative (at least when Congress makes it). It could be the power of the other branch of Congress but bicameralism is usually not thought of as an aspect of separation of powers. *See* Robert F. Nagel, *The Legislative Veto, the Constitution, and the Courts*, 3 CONST. COMMENT. 61 (1986). Regardless of this potential criticism, *Chadha* presents an example of the examination by the Court of the particular powers of the branches.

> a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features . . . it 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.[37]

B. Federalism: Division of Power Between and Limits on the Powers of the Federal Government and the States

In addition to the separation of powers of the three branches of the federal government, the Framers discussed the distinct powers of the states and the federal government in the governmental structure. There was disagreement on this subject however. "[I]t is widely recognized that 'The Federalist reads with a split personality' on matters of federalism."[38] While Hamilton and Madison appeared to agree on most matters, federalism was different.[39] As a general matter, Hamilton was very

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37. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995). There are many other examples of the division of authority and limitations on the powers of the branches under the separation of powers doctrine. For example, in *Plaut*, the Court invoked the doctrine of separation of powers to protect its own power in relation to the powers of the other branches. *See* 514 U.S. 211. A statute passed by Congress required courts to permit re-litigation of certain cases which had been dismissed by courts under a final judgment. *Id.* at 214–15. The Supreme Court discussed the history that surrounded the adoption of Article III including legislation to set aside judgments by courts. *See id.* at 219–23. The balance established in the Constitution was a judiciary separate and independent from the legislature such that the legislature was to enact the laws and the judiciary was to interpret the laws. *Id.* at 221–22. The statutory requirement that courts permit the re-litigation of dismissed cases constituted a violation of the separation of powers between the judiciary and the legislature. *Id.* at 218–19. Article III gave courts the power to decide cases with review by only superior courts and not by the legislature. *Id.* The legislature had violated the separation of powers by not granting effect to final judicial decisions. *Id.* at 228. Power, "[n]ot favoritism, nor even corruption . . . is the object of the separation-of-powers prohibition." *Id.*; *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); United States v. Brown, 381 U.S. 437 (1965); United States v. Klein, 80 U.S. 128 (1871). *Ex parte McCardle* is another example of the Court using the separation of powers to prevent the aggrandizement of power in one branch. 74 U.S. 506 (1868); *see also* William W. Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229 (1973); Clinton v. City of New York, 524 U.S. 417 (1998); United States v. Johnson, 383 U.S. 169 (1966); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See generally* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075 (2003); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 662–63 (1978); Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers:* The Federalist Papers *as Political Narrative*, 74 TEX. L. REV. 447 (1996).

38. Printz v. United States, 521 U.S. 898, 915 n.9 (1997) (quoting DAAN BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 199 (3d ed. 1996)).

39. *Printz*, 521 U.S. at 915 n.9.

nationalistic in his interpretation of the Constitution.[40] On the other hand, Madison interpreted the powers of the states more broadly.[41] Madison had stated "[t]he powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite."[42]

For approximately the last decade, in decisions interpreting the power of the states and the federal government, including as set forth in the Tenth and Eleventh Amendments, the Court has emphasized the division of and limits on the powers of the federal government and the states. In that time, the Court has held ten federal statutes unconstitutional based, at least in part, on violations of federalism.[43]

The beginning of this trend of an active limit on the federal government was *New York v. United States*.[44] *New York* concerned the State of New York's challenge to the Low-Level Radioactive Waste Policy

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40. *Id.*

41. *See* THE FEDERALIST NO. 45, at 241 (James Madison) (George W. Carey & James McClellan eds., 2001). Some argue that Madison's views on federalism changed significantly during his life. *See, e.g.*, GEORGE W. CAREY, IN DEFENSE OF THE CONSTITUTION 75–119 (1989).

42. THE FEDERALIST NO. 45, *supra* note 41, at 241. The power of the states extended to the aspects of "the ordinary course of affairs . . . and the internal order" of the state. *Id.* The states' powers were greatest in "times of peace and security." *Id.* In contrast, the federal government was primarily limited to externalities and its power was most extensive in the rare events of war and danger. *Id.* This natural emphasis on local interest would serve as a check on the power of the federal government because the officers would retain their state concerns while state officials were unlikely to consider national interests within their own government. THE FEDERALIST No. 46, at 244–48 (James Madison) (George W. Carey & James McClellan eds., 2001). After some other discussion of the powers of the states and federal governments, Madison concluded

> that the powers proposed to be lodged in the federal government, are as little formidable to those reserved to the individual states, as they are indispensably necessary to accomplish the purposes of the union; and that all those alarms which have been sounded, of a mediated and consequential annihilation of the state governments, must, on the most favourable interpretation, be ascribed to the chimerical fears of the authors of them.

THE FEDERALIST NO. 46, *supra*, at 248. *But see* LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN NO. 18, at 122–23 (Walter Hartwell Bennett ed., The University of Alabama Press 1978) ("All these enumerated powers we must examine and contemplate in all their extent and various branches . . . in order to see the full extent of the federal powers, which will be supreme, and exercised by that head at pleasure, conforming to the few limitations mentioned in the constitution.").

43. Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002). Before that time, from 1937 through 1991, the Court had held only one federal statute invalid on the basis of federalism and that decision was expressly overruled within a decade in *Garcia v. San Antonio Metropolitan Transit Authority*. *Id.* (referencing Nat'l League of Cities v. Usery, 426 U.S. 833 (1976); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

44. 505 U.S. 144 (1992).

Act.[45] The statute included incentive provisions designed to encourage states to enact policies for the management of waste generated within their borders.[46] The Court examined the question of the proper distribution of authority between the federal and state governments[47] and held that Congress possessed the authority to encourage states to plan for disposal of this waste, including with monetary and other incentives.[48] Congress lacked, however, the authority to compel states to enact such legislation—the practical consequence of the Act's invalidated "take title" provision, which forced the states to take title to waste if unable to provide a site for appropriate disposal.[49] New York had argued that the method chosen by Congress to require states themselves to enact laws to regulate the waste violated the Tenth Amendment's limit of federal power.[50] The Court decided that while Congress could have required the states to choose between implementing their own regulatory programs and accepting a program created by Congress—an arrangement of "cooperative federalism"[51]—the "take title" provision was an unconstitutional "commandeering" of state governments.[52] The Court cited *Texas v. White*[53] that

> the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[54]

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45. *Id.*
46. *See id.* at 151.
47. *See id.* at 149.
48. *See id.* at 173–74.
49. *Id.* at 149, 153, 176.
50. *See id.* at 160. New York State had not argued that Congress could not enact legislation that pre-empted state law on this matter by, for example, the direct federal regulation of the waste. *See id.*
51. *Id.* at 167.
52. *Id.* at 161.
53. 74 U.S. (7 Wall.) 700 (1869).
54. *New York*, 505 U.S. at 162 (quoting Texas v. White, 74 U.S. 700, 725 (1869)). Additionally, the Court rejected the contention that the Act was constitutional because it was the result of bargaining of the states, including New York, and had been supported by representatives of New York. *See id.* at 180–81. This view represented a misunderstanding of the purpose of federalism in its function to protect the states. *Id.* at 181. The division of power between the states and federal government was to protect individuals, not the states as entities. *See id.* at 181. Addressing the proper understanding of this function, the Court stated:

> [t]he Constitution does not protect the sovereignty of States for the benefit of the states or state governments as abstract political entities . . . . [T]he Constitution divides authority between federal and state governments for the protection of indi-

The Court compared the protection under federalism to the protection under the separation of powers.[55]

> 'Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'[56]

Through the passage of the Act, Congress had exceeded its own power under the Constitution and had impinged the power of the states.[57]

> viduals. . . . [F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.

Id. (citations omitted).

55. *See id.* at 181–82.

56. *Id.* at 181–82 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)); *see also* Alden v. Maine, 527 U.S. 706, 713–14 (1999) ("The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government . . . underscore the vital role reserved to the States by the constitutional design."); Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 285 (1991) ("[F]ederalism . . . in turn theoretically protects the rights of the people no less than separation-of-powers principles."). At least two Justices have stated that the standards for federalism have been more uncertain than the other constitutional "structural" doctrines of separation of powers, checks and balances and judicial review. *See* United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy and O'Connor, JJ., concurring).

57. *See New York*, 505 U.S. at 182–83. The consent of the state could not correct this violation of federalism principles. *See id.* There are other examples of the division of authority and the limitation of the power of the federal government in relationship to the states. As an example, in *Lopez* the Court held unconstitutional a statute that criminalized the possession of a firearm in a school zone. The Court decided that Congress had exceeded its authority to regulate commerce. *See Lopez*, 514 U.S. at 561–62. The Act did not regulate a commercial activity and did not require that the possession of the firearm had been associated with interstate commerce. *See id.* While a number of decisions had deferred to Congress's enactments, the Court declined to extend this deference. *See id.* at 567–68.

> To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local.

Id. (citations omitted). The same year, in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the Court held unconstitutional as violative of the power of a state an amendment to the Arizona Constitution that placed term limits on the election to Congress. Later, in *Alden v. Maine*, in which the Court held Congress could not require states to be sued in private actions for damages in state court, the Court noted the importance of federalism to the decision.

> Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.

Alden, 527 U.S. at 748; *see also* United States v. Morrison, 529 U.S. 598 (2000); Printz v. United States, 521 U.S. 898 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Boyle v. United Technologies Corp., 487 U.S. 500, 517 (1988) (Brennan, J., dissenting). To maintain the balance of power between the federal government and the states, the Court has developed sub-doctrines to federalism including "absten-

New York is an example of the Court acting to protect the division of power between the federal government and the states using the doctrine of federalism. Following the direction of the Framers, the Court emphasized the division of and limits on the powers of the federal government and the states to the structure of the government.

C. Other Structural Limitations Under the Constitution: Division of Power Between and Limits on the Powers of the Judiciary and the Jury

In addition to the division of power among the branches and the division of power between the federal government and the states, the Constitution creates a division of power between the judiciary and the jury. Article III, section 2 provides for the trial of all crimes by jury except impeachment cases.[58] Additionally, the Sixth Amendment provides that a person accused of a crime has a right to a jury trial.[59] Finally, the Seventh Amendment grants a right to a jury trial in "[s]uits at common law"

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tion, the rules for determining the primacy of state law, the doctrine of adequate and independent state grounds, the whole jurisprudence of preemption, and many of the rules governing . . . habeas jurisprudence." *Lopez*, 514 U.S. at 578–79 (citations omitted). Additionally, much of the Court's jurisprudence on federalism is set forth in cases regarding the Commerce Clause. *See id.* at 579.

For a discussion of the proper role of the Court with respect to federalism, compare Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing "political safeguards of federalism" are sufficient), and Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) ("whether federal action is beyond the authority of the central government and thus violates 'states' rights' should be treated as nonjusticiable, with final resolution left to the political branches"), with Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001) (urging greater judicial role). Scholars have discussed federalism in great detail. *See generally* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995); Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745 (2004); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995); David Freeman Engstrom, *Drawing Lines Between* Chevron *and* Pennhurst*: A Functionalist Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197 (2004); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

58. U.S. CONST. art. III, § 2.

59. U.S. CONST. amend. VI.

and grants the judiciary limited authority to re-examine facts tried by juries.[60]

The Founders recognized the importance of the division of power between the judiciary and the jury. Generally discussing the jury, Thomas Jefferson expressed a strong belief in the power of the people in the form of the jury as a check on the judiciary. Specifically emphasizing the importance of the jury in this role, he stated that were the people to be left out of a branch of the government, it would be better that the people be left out of the legislature because "[t]he execution of the laws [of which the jury plays a role] is more important than the making" of the laws.[61] John Adams also addressed the role of the jury as a check on the judiciary.[62]

> As the constitution requires that the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of the government, it requires that the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature.[63]

60. U.S. CONST. amend. VII. The grand jury has characteristics unlike the criminal and the civil juries and as a result is not considered in this Article. In discussing the grand jury established by the Fifth Amendment, the Court has stated that the grand jury is not part of any of the branches and instead is an independent entity "serving as a kind of buffer or referee between the Government and the people." United States v. Williams, 504 U.S. 36, 47 (1992). With respect to its own specific role in grand jury proceedings, the Court has characterized the grand jury as "an institution separate from the courts, over whose functioning the courts do not preside" and has stated "as a general matter at least, no such 'supervisory' judicial authority exists." *Id.* Courts have been said to serve little role in these proceedings and judges do not attend sessions although they may issue some rulings with respect to the proceedings. *See* Gregory T. Fouts, Note, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L. J. 323, 326, 328 (2004). While the Fifth Amendment grand jury is not perceived as a check on the judiciary, it has been stated to serve an important role as "a check on prosecutorial power." United States v. Cotton, 535 U.S. 625, 634 (2002). Most scholars agree, however, that the grand jury in essence is now the agent of the prosecution, not such a check on the prosecution. *See* Fouts, *supra*, at 329.

61. 3 THE WRITINGS OF THOMAS JEFFERSON 82 (H.A. Washington ed., J.B. Lippincott & Co. 1864) (appearing to discuss both the criminal and civil juries); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 n.10 (1979) (Rehnquist, J., dissenting) ("I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution.") (quoting 3 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 71). The people were part of every department of the government. *See* 3 THE WRITINGS OF THOMAS JEFFERSON 81. They choose the President and the legislators and they participate on juries. *See id.*

62. *See* 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 253 (Charles Francis Adams ed., 1850) (discussing both the criminal and civil juries and stating the "important boundary between the power of the court and that of the jury").

63. *Id.*

In THE FEDERALIST PAPERS, Hamilton also discussed the role of the jury. He stated that the criminal jury trial was considered "a valuable safeguard to liberty" while others more strongly considered it "the very palladium of free government."[64] Hamilton also discussed the civil jury. He argued that the civil jury could be stated to be "a security against corruption" of judges.[65] Hamilton further explained the importance of the dual existence of the judiciary and the civil jury to the integrity of both institutions.[66] The judiciary and the civil jury were called

> a double security; and it will readily be perceived, that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution, which the judges might have to surmount, must certainly be much fewer, while the co-operation of a jury is necessary, than they might be, if they had themselves the exclusive determination.[67]

Thus, similar to the Framers' recognition of the importance of the division of and limits on the power of the branches and on the power of the federal government and the states, the Founders and Framers recognized the importance of the division of and limits on the power of the judiciary and the jury.[68] Despite these similarities, the Court has not

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> In the administration of justice, too, the people have an important share. Juries are taken, by lot or by suffrage, from the mass of the people, and no man can be condemned of life, or limb, or property, or reputation, without the concurrence of the voice of the people.

Id.

64. THE FEDERALIST NO. 83, at 432–33 (Alexander Hamilton) (George W. Carey & James McClellan, eds., 2001).

65. *Id.* at 434.

66. *See id.*

67. *Id.* at 434. In another source from the time period, the author stated "by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department." LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN NO. 15, at 102 (Walter Hartwell Bennett ed., The University of Alabama Press 1978). The Court has stated that "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, *or, it might be added, to that of the judiciary*." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (citing 3 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 61, at 71) (emphasis added).

68. *See also* Vikram David Amar, *Jury Service As Political Participation Akin To Voting*, 80 CORNELL L. REV. 203 (1995) (arguing that jury service is a political right, as it was understood by the Framers, and is in need of broader protection using the Equal Protection doctrine); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995) (examining the power structure between judge and jury and suggesting the modern jury is losing the prestige and respect it has historically been given); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L.

emphasized nor developed any doctrine analogous to the separation of powers or federalism to enforce the constitutional division of power between the judiciary and the jury, including the jury's power to act as a check on the judiciary.[69]

II. THE JUDICIARY'S INTERPRETATION OF ITS OWN POWER PURSUANT TO THE SEPARATION OF POWERS AND FEDERALISM

The doctrines of the separation of powers and federalism act to protect the divisions of power between constitutional actors and to enforce limitations on the powers of the actors. These doctrines apply to the judicial branch as well as to the other branches and the states. Specifically, the doctrines are stated to protect the divisions of power between the judicial branch and the other branches as well as the division of power between the federal judiciary and the states.

Because the judicial branch serves as the final decision-maker under the Constitution, the final enforcement of these divisions of power depends upon the judiciary. Thus, the judiciary itself must protect against its impingements on the other actors' powers. The judiciary itself must limit its own power under the Constitution.[70]

There is evidence that the Framers had downplayed concern over the power of the judiciary. Hamilton characterized the judiciary as "the least dangerous" branch of the government.[71] In discussing the power of the judiciary to review the constitutionality of acts of Congress, Hamilton wrote that the judiciary was unable to exercise any significant power over the legislative branch.

REV. 289 (1966) (discussing the importance of the civil jury to the Framers, the varying practices of the states, and the relevance of current criminal practices); Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325, 1336–42 (1996) (describing the early conception of the jury); Peterson, *supra* note 4, at 45 (noting that the Framers believed that in addition to the judiciary not possessing much power, the judiciary had an internal separation of powers with it sharing power with juries, being subject to precedent and being subject to appellate review); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) (examining the history of the Seventh Amendment and the federal right to civil jury trial).

69. Certainly criticisms of the jury abound. *See, e.g.*, Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1498–99 (2003). This Article addresses only the constitutional right to a jury trial, not whether the right is effective in the court system.

70. Of course, Congress has the power to control federal jurisdiction. This power does not affect the judiciary's ultimate authority to decide questions relating to jurisdiction and other aspects of the judiciary's power.

71. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

> [T]he supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is, in reality, a phantom. Particular misconstructions and contraventions of the will of the legislature, may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness; and from its total incapacity to support its usurpations by force.[72]

Hamilton also noted that the judiciary was not superior to the legislature. The power of the judiciary to evaluate acts of Congress did not

> suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.[73]

In summary, while the Framers had emphasized the prevention of the aggrandizement of the powers of the branches and the states,[74] the Framers, through the FEDERALIST PAPERS, expressed at least some belief that the judiciary itself could not exercise excessive power over the other branches and the states. As described in the remainder of this part, despite this belief, the Supreme Court has placed certain specific limitations on the judiciary's power in relationship to the other branches and the states.

A. Limitations on the Power of the Judiciary

One of the first limitations by the Supreme Court of the judiciary's power might be stated to be found, indeed, somewhat ironically, in *Marbury v. Madison*,[75] the case best known for the power that the Court granted itself.[76] There, the Court considered the issue of whether it

72. THE FEDERALIST NO. 81, at 420 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

73. THE FEDERALIST NO. 78, *supra* note 71, at 404. Hamilton stated that impeachment was the only control of the judiciary. *See also* THE FEDERALIST NO. 81, *supra* note 72, at 420.

74. *See supra* text accompanying notes 22–25 and 38–42.

75. 5 U.S. (1 Cranch) 137 (1803).

76. There is a large amount of scholarship on *Marbury*. *See generally, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888 (1985); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 114–27 (2004) (discussing *Marbury* and scholarly commentary on the

could order a mandamus directing Madison, the secretary of state, to deliver to Marbury his commission as justice of the peace.[77] Congress had passed a law purporting to authorize the Court to issue such writs.[78] The Court explained that the Constitution grants original jurisdiction to the Court in only certain types of cases, and appellate jurisdiction in other cases.[79] Because the case here fell under the appellate jurisdiction of the Court, the Court did not have jurisdiction under the Constitution to order a mandamus.[80] In discussing the limitations on the power of the legislature (as applied to the judiciary), the Court had proclaimed

> [t]o what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed . . . .[81]

While this decision is most often cited for the proposition that *the judiciary possesses the power to decide what the Constitution says*, by the interpretation that *it did not have power to order the mandamus*, the Court simultaneously limited its own power under the Constitution.[82]

In other cases since *Marbury* the Court has limited the judiciary's own power under the Constitution. Even though the Framers expressed some doubt that the judicial branch's authority over the other branches and states should be feared and thus, it seems, had imposed few direct checks on the judiciary in the Constitution,[83] the Court has exercised some care in its interpretation of the power of the judiciary under the Constitution.

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case, including that *Marbury* is "trivial"); WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (2000); James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1 (1969).

77. *See Marbury*, 5 U.S. (1 Cranch) at 137.

78. *See id.* at 173. Some scholars question whether the Judiciary Act, properly read, authorized the Court to issue such writs. *See supra* note 76.

79. *See Marbury*, 5 U.S. (1 Cranch) at 174.

80. *See id.* at 175–76.

81. *Id.* at 176.

82. Scholars have argued that the Court had no choice but to not order the mandamus because the order would not have been followed had it been given. *See supra* note 76. As a result, one could argue that this was not really self-policing by the Court to limit its power but rather the Court attempting in actuality to preserve its own power. I note that the relevance of these types of facts to the law is not clear.

83. *See supra* notes 73 & 70.

1. Limits on the Power of the Judiciary Under the Separation of Powers

The Supreme Court has developed specific doctrines to enforce the limited role of the judiciary under the separation of powers. For example, the constitutional requirement that a federal court hear only "[c]ases" or "[c]ontroversies" has been defined by the Court to require that a plaintiff have standing, that a case is not moot, that a case is ripe, and that a case does not involve a political question.[84] The Court has specifically described these doctrines as "'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'"[85]

A description of these Court-developed requirements of standing, mootness, ripeness, and political questions gives an example of the self-policing in which the Court has engaged in the interpretation of the judiciary's power under the Constitution. Under the doctrine of standing, a court decides whether the plaintiff has the right to have the court decide the merits of the case.[86] In discussing the requirement of standing, the Court has emphasized that standing is "about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[87] Under the first constitutional requirement for standing, the plaintiff must have been injured by the violation of her legal interest.[88] The injury must be "concrete and particularized" and "actual or imminent."[89] Second, the injury and the alleged illegal conduct must be causally related.[90] Finally, a verdict in the plaintiff's favor must be "likely" to provide a remedy for the alleged wrong.[91] Under this doctrine, the Court has imposed additional prudential limits including

> the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the re-

84. *See* Allen v. Wright, 468 U.S. 737, 750 (1984).

85. *Allen*, 468 U.S. at 750 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

86. *See id.* at 750–51.

87. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2308 (2004) (quoting *Allen*, 468 U.S. at 750 (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (Bork, J., concurring))); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 125 n.20 (1998) ("standing doctrine is rooted in separation-of-powers concerns").

88. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

89. *Id.* (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

90. *See id.*

91. *Id.* at 561 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)); *see also Allen*, 468 U.S. at 751.

> quirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.[92]

Under the mootness doctrine, again created by the judiciary under the auspices of separation of powers, a case is moot if the alleged issues are not "live" anymore[93] or the parties do not have "a legally cognizable interest in the outcome."[94] Under the next doctrine, ripeness, the court

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92. *Allen*, 468 U.S. at 751; *see also Elk Grove Unified Sch. Dist.*, 124 S. Ct. at 2311–12 (declining to find standing for a father suing as the "next friend" on behalf of his daughter challenging the constitutionality of the school district's policy requiring teacher-led recitation of Pledge of Allegiance); *Whitmore*, 495 U.S. at 166 (declining to find standing for a third party who wished to challenge a death sentence on behalf of a defendant who had chosen to forego his right to appeal); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 489–90 (declining to find standing outside "traditional" Article III standing based on the assertion that traditional standing could not be satisfied by anyone regarding this claim); Warth v. Seldin, 422 U.S. 490, 508 (1975) (declining to find standing "[a]bsent the necessary allegations of demonstrable, particularized injury"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (declining to find "citizen standing" based on the lack of concrete injury separate from what any member of the public would share or "taxpayer standing" based on the lack of a nexus between the action complained of and the injury suffered). *See generally* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004); Gene Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Mark Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

93. City of Erie v. Pap's A.M., 529 U.S. 277, 277 (2000) (quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)).

94. City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 278 (2001) (quoting *Davis*, 440 U.S. at 631); *see also* Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) (finding the case moot where a state employee, after succeeding at the district court level in having a state statute denoting English as the official language of the state declared unconstitutional, resigned from her state employment prior to the hearing of the appeal, thereby failing to satisfy the case and controversy requirement during the appeal); Burke v. Barnes, 479 U.S. 361 (1987) (finding the case moot because the bill being challenged had expired by its own terms prior to the Court's reviewing of the case, thereby failing to satisfy the live case or controversy requirement); Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) (finding the case moot because the relief sought, compelling the Secretary of Health and Human resources to interpret Title IX in a manner that did not prohibit the all male honor society's initiation ceremony, would not redress the injury because the University President subsequently stated the society could not conduct the initiation ceremony on campus unless it complied with Title IX by admitting women); United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (discussing mootness and standing); Local No. 8–6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri, 361 U.S. 363 (1960) (finding the case moot where a labor union's challenge to a state statute allowing the governor to seize the industry for the public welfare came before the Court after the seizure giving rise to the challenge had ended). *See generally* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992); Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Corey C. Watson, Comment, *Mootness and the Constitution*, 86 NW. U. L. REV. 143 (1991).

"evaluate[s] [both] the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[95] Finally, under the political question doctrine, a court will not exercise jurisdiction if one of the following six tests apply:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[96]

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95. Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967)) (finding the case is not ripe among other reasons because only particular types of concession contracts might be covered under the Contract Disputes Act, and no such specific dispute is presented here); *see also* Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998) (finding the case is not ripe because the plan of the Forest Service to allow increased logging of Wayne National Forest at issue does not grant, alter, or remove the legal rights of anyone and there will be sufficient opportunity to challenge its validity when specific decisions to log have been approved and are imminent); Texas v. United States, 523 U.S. 296 (1998) (finding the case is not ripe because applicability of the preclearance provisions of the Voting Rights Act to sanctioning provisions of the state's education codes was speculative and may not occur at all and granting the relief sought would require the Court to affirmatively determine that the sanctions could never impermissibly interfere with voting in violation of the VRA); Hodel v. Va. Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264 (1981) (finding the case is not ripe because appellees failed to attempt procedures for obtaining administrative relief such as a variance or waiver of the surface mining restrictions being challenged). *See generally* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

96. Vieth v. Jubelirer, 541 U.S. 267, 277-78, (2004) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)); *see also* Nixon v. United States, 506 U.S. 224, 235 (1993) ("Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers.") (quoting THE FEDERALIST No. 81, *supra* note 72, at 420); *cf. Nixon*, 506 U.S. 224 (declining to rule on the constitutionality of a Senate rule allowing committees to hear evidence and report it to the full Senate because the rules of impeachment proceedings are entirely the province of the Senate and a non-justiciable political question); Mistretta v. United States, 488 U.S. 361, 383 (1989) ("In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,' and, second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.'") (quoting Morrison v. Olson, 487 U.S. 654, 680–81 (1988) and Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)); South v. Peters, 339 U.S. 276 (1950) (dismissing case regarding how a state allocates it electoral votes within its geographic boundaries as a non-justiciable political question); Coleman v. Miller, 307 U.S. 433 (1939) (finding that whether the Lieutenant Governor can cast the deciding vote

As described here, these judicially-created doctrines of standing, mootness, ripeness, and political question are examples of the judiciary's self-policing of its own power under the Constitution pursuant to the separation of powers.

2. Limits on the Power of the Judiciary Under Federalism

As described previously, the principles underlying federalism include the division of and limits on the power of the federal government and the states.[97] In the federalism scheme, the federal judiciary possesses the power to decide the scope of its own power versus the competing power of the states. Similar to under the separation of powers, under federalism, when determining questions related to its own power, the judiciary has at times self-policed in reviewing its own power in relationship to the power of the states. Examples of such self-policing include development of specific doctrines that limit the judiciary's power including state sovereign immunity and abstention.

Sovereign immunity has been stated to be "an essential component of federalism."[98] Under this doctrine the judiciary's power to hear suits against states has been limited. The Court has emphasized that

> each State is a sovereign entity in our federal system . . . [and] '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'[99]

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in the state senate is a political question); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (discussing that political questions cannot be reviewed by the judiciary). *See generally* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165 (2002); Martin Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1984).

97. *See supra* Part I.B.

98. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 n.10 (1984) (quoting Nevada v. Hall, 440 U.S. 410, 430–31 (1979) (Blackmun, J., dissenting)).

99. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (quoting Hans v. Louisiana, 134 U.S. 1, 13 (1890)); *see also* Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002) (holding that the state's sovereign immunity precludes the Federal Maritime Commission from bringing a claim on behalf of a private party for a violation of the Shipping Act without the state's consent); Raygor v. Regents of Univ. of Minn., 534 U.S. 533 (2002) (finding waivers of sovereign immunity cannot be implied from states, as with the federal government, thus a state university must consent to suit); Alden v. Maine, 527 U.S. 706 (1999) (state could not be sued in state court without consent); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (sovereign immunity not validly abrogated or waived in context of false advertising claim); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (Congress lacked authority to abrogate state sovereign

While federal courts may order prospective enforcement of federal laws against the states, sovereign immunity sets limitations on the power of the federal courts to order states to pay damages.[100] Abstention also has been stated to be "a significant contribution to the theory of federalism and to the preservation of the federal system in practice."[101] Limitations by the Court of the judiciary's power through abstention include

> when the federal action raises difficult questions of state law bearing on important matters of state policy, or when federal jurisdiction has been invoked to restrain ongoing state criminal proceedings. . . .[and deferral is required] when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case.[102]

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immunity in context of patent infringement claim); Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775 (1991) (sovereign immunity bars other sovereigns, such as Alaska Native villages, from bringing suits just as it bars individuals). *See generally* Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

100. *See Ex parte* Young, 209 U.S. 123 (1908).

101. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 733 (1996) (Kennedy, J., concurring); *see also* Growe v. Emison, 507 U.S. 25, 32 (1993) ("principles of federalism and comity" may require abstention). Professor Redish has criticized abstention as usurping the role of the legislature under separation of powers. *See* Martin H. Redish, *Abstention, Separation of Powers and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984). If one agrees with Professor Redish's position, not exercising jurisdiction under abstention principles would not be an example of the judiciary acting modestly in relationship to the power of the legislature. Even so, abstention does show restraint by the federal courts in the exercise of its jurisdictional power versus the power of the states. *Cf.* Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989); Michael Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

102. *Growe*, 507 U.S. at 32; *see also* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (finding federal courts should abstain from interfering with state disciplinary hearings against an attorney based on the importance of the state interest in the matter); Younger v. Harris, 401 U.S. 37, 44–45 (1971) ("'Our Federalism' . . . is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. . . . [T]he *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."); *Ex parte* Hawk, 321 U.S. 114 (1944) (abstaining from deciding on the basis that petitioner has not exhausted state court remedies); Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943) ("a sound respect for the independence of state action requires the federal equity court to stay its hand"); Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941) (abstaining from deciding the case on the grounds that the action is properly a matter to be decided under state law without need for the constitutional issue to arise).

Through the federalism-based doctrines of abstention and sovereign immunity,[103] the judiciary has recognized specific limits on the power of the federal judiciary in relationship to the states.

III. JUDICIAL MODESTY AND THE JURY

As described above, under the doctrines of separation of powers and federalism, the Court has sometimes imposed limitations on the judiciary's power under the Constitution.[104] By the Court's use of these doctrines to limit the judiciary's power, the Court has acknowledged in some manner the judiciary's position in a government of divided and limited power.

As set forth in this part, certain circumstances presented by the relationship between the judiciary and the jury suggest the need for restraint by the judiciary in the interpretation of its own power versus that of the jury. Section A describes the unique relationship between the judiciary and the jury and the six factors which are argued to counsel for the exercise of what this Article terms "judicial modesty." Sections B and C present two areas in which judicial modesty is appropriate—the judiciary's interpretation of its power versus the power of the criminal jury and the judiciary's interpretation of its power versus the power of the civil jury. Section B describes the modesty the Court has exercised in the interpretation of the judiciary's power versus the power of the criminal jury. In contrast, Section C describes the general lack of modesty by the Court in the interpretation of the judiciary's power versus the civil jury's power and proposes an approach for modesty by the judiciary in this area.

A. The Unique Relationship Between the Judiciary and the Jury

Like the review of the power of other constitutional actors in relationship to its own power, the judiciary may review the power of the jury in relationship to its own power. The jury, however, occupies a particularly unique place in the constitutional structure in relationship to the judiciary. As a general matter, any review of the power of the jury involves the review of the judiciary of its own power in comparison to

103. Another example of the federal judiciary exercising limits on its own power occurs when defining district courts' power in equity to frame injunctive relief. This often occurs in the context of school desegregation cases. While the Court has allowed broad displacement of state authority, the Court has also emphasized the maximum exercise of authority by local officials in the desegregation schemes. *See, e.g.*, Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 534–38, 534 n.253 (1999) (discussing school desegregation and confinement cases).

104. *See supra* Part II.

the jury. As such, the judicial review of the power of other constitutional actors is unlike the judicial review of the power of the jury. If the jury is interpreted to have power under the Constitution, the judiciary generally has less power. Also, while the judiciary's review of the power of other constitutional actors often takes place after the branch or the state acts in the first instance,[105] the judiciary can prevent the jury from acting at all. Moreover, the jury, unlike other actors, does not have any power to counter impingement by the judiciary upon its authority,[106] and other constitutional actors also do not have power to counter fully any impingement on the jury's power.[107]

The general circumstances presented by the relationship between the judiciary and the jury are described here. First, the relevant text of the Constitution limits the power of the judiciary. Second, the Constitution grants related power to another constitutional actor. Third, the judiciary must choose between the exercise of its power and the power of another actor. Fourth, the judiciary can prevent the actor from any exercise of power. Fifth, the other actor cannot protect itself against the exercise of power by the judiciary over it. Finally, another actor also cannot protect the primary actor against the judiciary's exercise of power over the primary actor.

As described here, these circumstances which describe the relationship between the judiciary and the jury also underlie the doctrines of the separation of powers and federalism under which the Court has at times limited the judiciary's power. With respect to the first circumstance where the relevant text of the Constitution limits the power of the judiciary, under the separation of powers and federalism, the Constitution limits the power of each of the branches and the states, including the judiciary.[108] With respect to the second circumstance where the Constitution grants related power to another constitutional actor, under the separation of powers and federalism, the Court has discussed the division of power among constitutional actors and the necessity of each actor ac-

105. *See supra* Part I. U.S. CONST. art. I, II, and III provide each of the branches with some control over the other branches. For example, the President appoints judges with the advice and consent of the Senate, the Senate tries all impeachments and the Supreme Court interprets the laws made by Congress and approved by the President.

106. The criminal jury arguably has some power by its ability to nullify. *See infra* note 131 and accompanying text.

107. Arguably Congress can legislate a jury trial right for crimes or claims that the Court has deemed not to require a jury trial right. Once a jury trial right exists, however, the Court continues to possess significant power to affect that right without congressional intervention, particularly under the second clause of the Seventh Amendment. U.S. CONST. amend. VII. Moreover, other actors and parties, like the government, plaintiffs, and defendants, may also exercise power over the jury through the use of peremptory challenges.

108. *See supra* Part I and Part II.

knowledging the powers of the other actors.[109] With respect to the third circumstance where the judiciary must choose between its power and the power of another actor, under the separation of powers and federalism, the Court has sometimes been required to choose between the exercise of the power of the judiciary and that of another actor. For example, under the political question doctrine, the Court has examined the power of the judiciary versus the power of other constitutional actors.[110] With respect to the fourth circumstance where the judiciary can prevent the actor from any exercise of power, the Framers and the judiciary have emphasized the separation of the powers of constitutional actors. They have abhorred the possibility of one branch possessing all power.[111] Also a branch was not to have complete authority over the other branches.[112] Moreover, each branch was to have its own will and thus there was to be as little interdependence among the other branches in the appointment of the members of the other branches.[113] With respect to the fifth circumstance where the other actor cannot protect itself from the exercise of power by the judiciary over it, under the separation of powers and federalism, each of the constitutional actors has some ability to protect its own power. Even in these circumstances where the actor has some ability to protect its own power, the Court has recognized the importance of some protection of those actors.[114] With respect to the sixth circumstance where another actor cannot fully protect the primary actor from the judiciary's exercise of power over the primary actor, under the separation of powers, the importance of checks and balances between the branches was recognized.[115]

In summary, as described above, under the separation of powers and federalism, there is an implicit recognition by the Court of the significance of the characteristics that are exhibited in the relationship between the judiciary and the jury. Under the separation of powers and federalism, the judiciary has, in some manner, limited its own power in relationship to the branches and the states. Because the branches and the states have more independent power in relationship to the judiciary than the jury has in relationship to the judiciary, some modesty by the judiciary

109. *See supra* Part I and Part II.

110. *See supra* note 96 and accompanying text.

111. *See supra* text accompanying notes 22–37.

112. *See supra* text accompanying notes 22–37.

113. *See supra* text accompanying notes 22–37.

114. *See* discussion *supra* Part II. In *United States v. Nixon*, the Supreme Court noted that "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." 418 U.S. 683, 703 (1974).

115. *See supra* text accompanying notes 22–37.

appears appropriate in the context of the judiciary's interpretation of the power of the jury. In this setting where the judiciary has a high degree of self-interest in granting power to itself, and there is no manner, other than by the judiciary itself, by which the power of the jury may be protected,[116] it is appropriate for the judiciary to act modestly.

Modesty can carry different meanings. Modesty could be, for example, a complete deferral by the judiciary to the power of the other constitutional actor. Modesty could be, on the other hand, a narrow construction of the judiciary's power in relationship to the other constitutional actor. This last iteration seems most appropriate in order for the judiciary to be able to assert its own power adequately.

Such an interpretation of the judiciary's power as a narrow construction of its own power in relationship to the other constitutional actor would, I argue, involves an examination of the text of the Constitution. Wherever the scope of the judiciary's constitutional power is possibly ambiguous, the judiciary would narrowly construe its own power in favor of power to the other actor. Thus, the judicial modesty proposed here is simply a narrow construction of the judiciary's power under the text of the Constitution in favor of the power of the other actor.

An examination of *Marbury*, one of the first exercises of the Court's limitation of its own power,[117] is arguably illustrative of this model of construction, although to be fair, the case might also be discounted as a political show. In *Marbury*, the Court considered whether it had power to order a mandamus in the case.[118] While only the first factor for modesty—the constitutional limitation of the judiciary's power—was present in *Marbury*, the Court's approach to the examination of its own power is relevant to the modesty analysis. Even though the power of another constitutional actor was not at stake,[119] in its decision as to whether it possessed jurisdiction, the Court was careful to look to the specific text and construction of the Constitution.[120]

116. Another consideration to the exercise of modesty may be that the Framers showed an intention to limit the power of the Court. This is not offered here as a formal factor in the event that there may be inconsistency between the text and the understanding of the Framers.

117. *See supra* text accompanying notes 75–82.

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

119. U.S. CONST. art. III specifically limited the jurisdiction of the Court to decide only certain cases. *See Marbury*, 5 U.S. (1 Cranch) at 147. The Court was not required to choose between its exercise of power and the exercise of power by another body. While the question presented ultimately was whether the Court could issue a command to the secretary of state forcing him to do his legal duty (as the Court saw it) and thus the power of the executive was implicated, the exercise of power by another actor in the six factor test refers to the court's choice between its power and the power of another actor. That type of choice was not involved in *Marbury*.

120. *See id.* at 147.

The Court emphasized that if the legislature could give the Court original jurisdiction over matters in which the Constitution stated it had only appellate jurisdiction, then this part of the Constitution was "surplusage."[121] The Court stated that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."[122] The Court stated

> the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.[123]

As seen in *Marbury*, the Court interpreted the Constitution to limit its own power and confined its interpretation to the meaning that the Court decided was most consistent with the text of the Constitution.

The next sections discuss the concept of judicial modesty in the contexts of the criminal and civil juries. As described above, the inherent conflict that the judiciary faces in its decisions to give itself power over giving power to the jury has not been recognized. Moreover, the role of the judiciary as the only check on the judiciary's exercise of power over the jury has not been recognized. As described below, while some modesty has been exercised in the judiciary's interpretation of the power of the criminal jury, similar modesty has not been shown toward the civil jury.

B. The Criminal Jury: An Exercise of Judicial Modesty Under the Sixth Amendment

As stated previously, the Framers valued the role of the criminal jury and it was viewed as an important check on the judiciary.[124] Accordingly, the Sixth Amendment specifically provided

121. *Id.* at 174.

122. *Id.*

123. *Id.* at 175. Some scholars have stated that instead of interpreting U.S. CONST. art. III as a ceiling to its jurisdiction, the interpretation adopted in *Marbury*, the Court could have interpreted Article III to provide a floor to its jurisdiction. Thus, this possible interpretation also supports the reading that the Court exercised limits on its own power. *See supra* note 76.

124. *See supra* text accompanying notes 61–64.

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .[125]

In the interpretation of the right to a jury trial, the Court has been more generous in its allocation of power to the criminal jury under the Sixth Amendment as compared to its allocation of power to the civil jury under the Seventh Amendment. In discussing the power of the criminal and civil juries, one commentator recently noted that "[t]he Supreme Court has not allowed the kinds of limits on the criminal jury that it has condoned in the civil context."[126] Indeed, the Court's interpretation of the judiciary's power in relationship to the criminal jury provides an example of the Court's exercise of some significant degree of modesty. As described here, such modesty by the judiciary[127] is appropriate because of the special relationship between the judiciary and the criminal jury. In other words, the specific circumstances for judicial modesty present themselves here.

Under the first circumstance for modesty, the text of the Constitution limits the power of the judiciary. The Sixth Amendment provides for the right to a jury trial for the accused in criminal prosecutions and thus the judiciary does not have the power to hear such cases unless that right is waived. Second, the text grants power to another actor—the criminal jury. The Amendment provides that a jury hears a case unless the right is waived by the accused. Third, the judiciary must choose between the exercise of its power and the grant of power to the criminal jury. The judiciary itself decides whether a case or issue is determined by a jury. Fourth, the judiciary may prevent the criminal jury from any exercise of power. The jury cannot act without in essence the permission of the judiciary. Fifth, the criminal jury cannot protect itself against the judiciary's infringement of its power. If the judiciary improperly does

125. U.S. CONST. amend. VI; *see also* U.S. CONST. art. III, § 2.

126. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 69 (2003) ("Devices to correct errors of law that are permissible in the civil context—such as judgments notwithstanding the verdict and appeals—are not available to the government in criminal cases."); *cf.* Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 469 (2004) ("[A]ppellate courts are quite willing to reexamine the work of juries and trial judges in civil cases, while they almost never do so in criminal cases."). The Supreme Court has stated "civil and criminal juries' required roles are obviously not identical, or else there could be no directed verdicts for civil plaintiffs." United States v. Gaudin, 515 U.S. 506, 517 (1995).

127. For a discussion of how the Court could be much more modest toward the criminal jury by the grant of the power to sentence, see Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003).

not give a case to the jury, the jury itself has no recourse to regain its power. Sixth, no other actor may fully prevent the judiciary from its exercise of power over the jury.[128] None of the other actors can grant power to the jury if the judiciary has improperly acted in taking power from the jury.[129]

Because of this special relationship between the judiciary and the jury, it seems appropriate for the Court to exercise modesty in the interpretation of the judiciary's power versus the jury's power. Indeed, to a significant degree, the Court has done so. The Court has interpreted the Amendment such that the criminal jury holds important powers including the power to decide every element of a crime with which the defendant is charged.[130] Moreover, the jury has been held to have the power to decide both fact and law and thus to acquit without review by a court.[131] Additionally, a judge may not direct a verdict for the government nor may a judge overturn an acquittal[132] nor may a judge generally require a special verdict.[133] Moreover, the Court recently held unconstitutional provisions of the Federal Sentencing Act that permitted a judge, instead of a jury, to decide certain sentencing facts.[134] In an earlier decision also on the role of the jury to decide facts the Court called the criminal jury "a fundamental reservation of power in our constitutional structure."[135] Further the Court emphasized that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."[136] Through the criminal jury, the people had control in the judicial branch.[137]

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128. Only by indirect means, for example, impeachment, may the legislative branch affect the judiciary's actions with respect to the jury. U.S. CONST. art. I, § 3.

129. *See supra* note 107. Additionally, the Framers valued the role of the criminal jury in relationship to the judiciary. *See supra* text accompanying notes 61–64.

130. *See* United States v. Gaudin, 515 U.S. 506, 510 (1995).

131. *See* Barkow, *supra* note 126, at 48–49. While the Court has placed evidentiary limits on the criminal jury, its core powers remain. *See id.* at 68. *See generally* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996); Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999).

132. *See* Connecticut v. Johnson, 460 U.S. 73, 84 (1983).

133. *See* Barkow, *supra* note 126, at 49–50 & n.67 (citing cases in which courts decline to permit special verdicts and describing rare exceptions).

134. *See* United States v. Booker, 125 S. Ct. 738 (2005); *see also* Blakely v. Washington, 124 S. Ct. 2531 (2004) (finding unconstitutional sentencing procedure that permitted judge, instead of jury, to decide facts, other than prior conviction, that increased penalty above statutory maximum). *But see* Harris v. United States, 536 U.S. 545 (2002) (jury need not find facts for mandatory minimum).

135. *See Blakely*, 124 S. Ct. at 2538–39.

136. *Id. at* 2540; *see also* Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial despite short sentence and small fine).

137. *See Blakely*, 124 S. Ct. at 2539.

These decisions have demonstrated the importance that the Court has attached to the criminal jury trial right. Thus, one could characterize the Court as having exercised significant modesty in the interpretation of the judiciary's power in relationship to the criminal jury's power by narrowly construing its own power in favor of the jury's power.[138] As described below, however, on the whole, the Court has not been as generous in its interpretation of the power of the civil jury in relationship to the judiciary's power.

C. The Civil Jury: A Lack of Judicial Modesty Under the Seventh Amendment

As previously stated, the Framers valued the civil jury and it was viewed as an important check on the judiciary.[139] Accordingly, the Seventh Amendment specifically provided that

> [i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.[140]

Under the first clause, a right to a trial by jury existed in certain cases, and under the second clause, facts could not be re-examined by the judiciary except according to certain rules. In other words, the Amendment was a limitation on the power of the judiciary to try cases and to re-examine facts tried by a jury.

The general characteristics of this relationship between the judiciary and the civil jury established in the Constitution can help inform how the judiciary should approach the interpretation of its power versus the competing power of the civil jury. As a preliminary matter, the Amendment explicitly limits the judiciary's power in relationship to the civil jury. Under the Amendment, the judiciary cannot hear certain types of cases unless the parties have waived their right to a jury trial, and where the jury trial right has not been waived, the judiciary's role is limited to the re-examination of facts only according to the rules of the common

138. *See id.* at 2537; United States v. Booker, 125 S. Ct. 738 (2005); Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); *see also supra* note 134. *But see* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. REV. 621 (2004) (stating *Apprendi* reverses trend against jury involvement in sentencing).

139. *See supra* text accompanying notes 61–63 & 65–67.

140. U.S. CONST. amend. VII.

law.[141] Second, the Amendment grants specific power to the jury. Under the Amendment, the jury—not the judiciary—decides certain cases and the judiciary may re-examine facts tried by a jury only in a certain manner.[142] Third, the judiciary must choose between the exercise of its power and the grant of power to the jury. In the interpretation of the Amendment, the judiciary must decide whether it hears a case or a jury hears a case. Fourth, the judiciary can prevent the jury from any exercise of power. The judiciary may prevent juries from deciding cases by hearing the cases themselves or re-examining facts tried by a jury. Fifth, the jury has no mechanism by which to protect itself from the exercise of power over it by the judiciary. If the judiciary improperly does not give a case to the jury, the jury has no recourse to decide the case. Sixth, no other constitutional actor may fully protect the jury's power.[143] There is no method by which another branch can affect the judicial determination of whether the jury has power.[144]

These characteristics of the relationship between the judiciary and the civil jury demonstrate the self-interest of the judiciary in its decisions relating to the power of the jury and the absence of a significant check on the judiciary's authority over the jury. With this special intertwined relationship, it seems that the judiciary itself would need to impose some form of a check on itself to decide effectively what power it possesses versus the power that the jury possesses. The judiciary has not, however, imposed any formal check on its power versus the competing power of the jury. Instead, any modesty displayed by the judiciary toward the civil jury has in essence been piecemeal. The result of this jurisprudence, on the whole, has been a deference to itself—the judiciary. While the Court has interpreted the first clause of the Amendment with some modesty such that there is a right to a jury trial in a variety of cases beyond the cases strictly existing under the common law, the second clause has been interpreted with almost no modesty, such that even methods of re-examination that were prohibited under the common law have been held constitutional. The current approach to the judiciary's power in relationship to the civil jury's power allows the judiciary to exercise a significant degree of discretion over the power of the civil jury.

141. *See supra* text accompanying note 140.
142. *See supra* text accompanying note 140.
143. *See supra* notes 107 & 128.
144. *See supra* notes 107 & 128.

1. The First Clause: A Positive Use of Judicial Modesty

The first clause of the Seventh Amendment sets forth the general right to a jury trial. In *Parsons v. Bedford*,[145] the Supreme Court began to explore the meaning of "[s]uits at common law" in the first clause.[146] Justice Story stated that a right to a jury trial existed when a suit determined a legal right, in contrast to a suit in equity or admiralty.[147] In *Baltimore & Carolina Line, Inc. v. Redman*,[148] the Court explained that the right to a jury trial discussed in *Parsons* referred to cases that existed at "English common law when the amendment was adopted."[149] In *Curtis v. Loether*,[150] the Court gave further meaning to the suits at common law language. A jury trial existed in suits at common law that provided legal rights, as well as in some suits based on causes of action statutorily provided by Congress.[151] Over the years, the Supreme Court has continued to interpret common law in the first clause of the Amendment to permit the determination by juries of causes of action that did not exist under the English common law in 1791.[152] Also in cases which involved a mix of

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145. 28 U.S. 433 (1830).

146. *Cf.* Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 187 (2000) (shortly after the passage of the Bill of Rights, courts and scholars discussed whether the "suits at common law" language in the first clause meant suits at common law in England or the common law of the United States, as well as whether it was static or dynamic such that it changed with the common law over time).

147. *See Parsons*, 28 U.S. at 447. The passage commonly cited from *Parsons* is:

> By *common law,* they meant what the constitution denominated in the third article 'law;' not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit.

Id.

148. 295 U.S. 654, 657 (1935).

149. *Id.*

150. 415 U.S. 189 (1974).

151. *See id.* The plaintiff, who had sought damages under the Civil Rights Act of 1968's fair housing provisions, was entitled to a jury trial because Congress provided a right to damages in the statute and that type of damages was typical of those provided under the traditional common law. *See id.* at 195–96.

152. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 693–94 (1999) (discussing lack of clarity regarding availability of jury trials in condemnation proceedings under the common law and holding case here properly submitted to jury); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 342–43 (1998) (jury should determine not only the right to statutory damages, but also the amount of damages); Markman v. Westview Instruments, Inc., 517 U.S. 370, 377 (1996) (actual construction of the patent claim, the particular narrow issue within the larger claim being tried to the jury, was an issue for the court); Wooddell v. Int'l Bhd. of Elec. Workers, 502 U.S. 93, 98 (1991) (traditionally "equitable" injunctive relief was incidental to the damages, which here were to punish the union and pay him

legal and equitable issues, the Court has resolved these cases to be decided by juries.[153]

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for jobs the union "failed to refer [to] him;" plaintiff was denied right to jury trial); Local No. 391 v. Terry, 494 U.S. 558 (1990) (duty of fair representation claim involved both a legal issue similar to a breach of contract claim and an equitable issue similar to a breach of fiduciary duty claim by a trustee; remedy legal because Congress did not define it as "equitable" like it did under Title VII—also backpay damages under Title VII restitutionary, unlike the character of the backpay damages in this case); Granfinanciera v. Nordberg, 492 U.S. 33, 36 (1989) (Congress had improperly attempted to make a private action triable to a bankruptcy judge and eliminated the right to a jury trial); Tull v. United States, 481 U.S. 412, 414 (1987) (jury trial right to determine liability but setting civil penalties was not a "fundamental element" of the jury trial system; the plaintiff could seek only the amount set in the statute); Pernell v. Southall Realty, 416 U.S. 363, 381, 375 (1974) (holding plaintiff was entitled to a jury trial in a case regarding statutory ejectment because even though the statutory cause of action did not directly match a claim available at common law, it still "encompasse[d] rights and remedies which were enforced, at common law, through trial by jury" and whether there was a comparable common law action to the right at issue is "irrelevant," "provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty").

In *Local No. 391*, in his concurrence in discussing whether the right to a jury trial exists in a particular case under the historical test, Justice Brennan stated "[i]f, in the rare case, a tie breaker is needed, let us break the tie in favor of the jury trial." *Local No. 391*, 494 U.S. at 580 (Brennan, J., concurring).

153. The final case in a trilogy of cases was *Ross v. Bernhard*, where the issue was whether the plaintiffs in a stockholders' derivative suit had the right to a jury trial under the Seventh Amendment. *See* Ross v. Bernhard, 396 U.S. 531, 531 (1970); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510–11 (1959) (trial court should have allowed the jury trial to go forward, try all the issues at once, and after the jury rendered its verdict on the legal issues, the court should have made its ruling on the equitable issues; "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims"); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (district court erred in denying the demand for a jury trial where substance of the complaint was a request for money damages to recover for the breach of the contract and infringement of the plaintiff's trademark, which was wholly legal in nature). The trial court held that only the shareholders' claim to speak for the corporation had to be tried before the judge; the liability phase was triable to the jury. *See Ross*, 396 U.S. at 532. Upon its review via an interlocutory appeal, the Court of Appeals reversed the district court, holding that a derivative suit by shareholders of a corporation was completely equitable, and therefore the plaintiffs were not entitled to a jury trial right. *See id.* The Supreme Court began by discussing the historical rights of corporations and shareholders to bring suit. *See id.* at 533–534. At common law, shareholders were not permitted to sue the leaders of the corporation to account to them, which provided room for abuse. *See id.* at 534. The actual corporation, on the other hand, had always been able to demand a jury trial when legal issues were presented. *See id.* at 538–39. Eventually, the Court made it possible in *Dodge v. Woolsey* for shareholders to recover against corporate officers and third parties who damaged corporate property. *See id.* at 534 (citing Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1856)). The remedy provided by that case was equitable, in the form of a derivative suit. *See id.* Ultimately, the shareholders' derivative suit became a two step process: their right to sue on behalf of the corporation, followed by the actual merits of the claim. *See id.* at 534–35. The problem arises when the claim brought in this equitable proceeding is legal in nature. *See id.* at 535. Here, the Supreme Court determined that the action was legal; the shareholders sought money damages, which were legal in nature. *See id.* at 542. As such, the Court held that in a shareholder derivative suit, when the issues are both equitable and legal in nature as they were

Moreover, in interpreting the jury trial right in the first clause, the Court has emphasized that the substance of the jury trial right must be protected. As an example, in *Colgrove v. Battin*,[154] the Court decided that the substance of the jury trial right was met by a jury of less than twelve jurors, even though under the common law, juries consisted of twelve jurors.[155] The Court had stated that "constitutional history reveals no intention on the part of the Framers 'to equate the constitutional and common-law characteristics of the jury.'"[156] Further, it was emphasized that the Seventh Amendment did not bind the judiciary to the exact procedural incidents that existed at common law.[157]

In summary, in the interpretation of the first clause of the Amendment, the Court has permitted the trial by jury in a broad set of cases including cases with legal remedies, cases that involve new causes of action and cases which involve both legal and equitable claims. The Court has not strictly followed the common law and generally appears to have exercised some modesty by narrowly construing the judiciary's power in relationship to the jury's power.

2. The Second Clause: A Need for Judicial Modesty

Similar to the interpretation of the first clause of the Seventh Amendment, the Court has decided that the rules of the common law in the second clause refer to the rules of the English common law in 1791 and that the substance of the jury trial right must be preserved.[158] Essentially the comparison between how the Court has interpreted the first and second clauses ends there. In the interpretation of the second clause,[159] almost invariably, every new procedure that permits the judiciary either to remove a case from the consideration of a jury or to re-examine a ver-

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here, the shareholders should be given the right to a jury trial that was traditionally provided to corporations when they pursued legal claims. *See id.*

154. 413 U.S. 149 (1973).

155. *See id.* at 157–60. A previous decision held that a jury of six met the criminal "trial by jury" requirement and was based on studies comparing different sized juries in civil cases. Using this precedent, the Court held that a jury of fewer than twelve members met this part of the Seventh Amendment's requirements. *See id.* at 158.

156. *Id.* at 156 (quoting Williams v. Florida, 399 U.S. 78, 99 (1973)). In *Williams*, the Court had upheld a Florida statute that allowed for six-member juries in some criminal cases. *See Colgrove*, 413 U.S. at 151.

157. *See id.* at 156.

158. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

159. In *Parsons v. Bedford*, one of the first Supreme Court cases to address the interpretation of the second clause, the Court called this clause "more important" than the first clause and an "independent clause." 28 U.S. 433, 447 (1830).

dict of a jury has been upheld. These include remittitur,[160] the partial new trial for damages,[161] the directed verdict,[162] judgment notwithstanding the verdict,[163] and the appellate review of a motion for a new trial.[164] None of these procedures existed under the English common law in 1791.[165] In almost every case deciding that these modern procedures were constitutional under the Seventh Amendment, the Court has emphasized that the substance of the jury trial right must be preserved.[166] In determining the substance of the jury trial right, however, very little significant comparison of the common law to the modern procedure has been made.[167]

As an example, in *Galloway v. United States*, the Supreme Court decided that the modern directed verdict was constitutional although it did not exist under the English common law in 1791.[168] The Court emphasized that

> the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.[169]

The Court opined that the modern directed verdict was not significantly different from the common law demurrer to the evidence and the new trial.[170] Moreover, the common law was not to be followed directly because it had changed over time and also was inconsistent.[171] The Court concluded that "the essential requirement [under the Seventh Amendment] [was] that mere speculation be not allowed to do duty for proba-

160. *See Dimick*, 293 U.S. 474. *But see* Thomas, *Remittitur*, supra note 9, at 732 (while *Dimick* is cited for the constitutionality of remittitur, the discussion on remittitur was dicta).

161. *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931).

162. *See* Galloway v. United States, 319 U.S. 372 (1943).

163. *See* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935).

164. *See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 419 (1996).

165. I have advanced this argument elsewhere. *See* Thomas, *Modern Procedure, supra* note 6, at 706–48.

166. *See id.* at 695–702. In *Dimick*, the Court incorrectly found that remittitur existed under the common law and this was the basis upon which remittitur was deemed constitutional. *See* Dimick v. Schiedt, 293 U.S. 474, 487–88; Thomas, *Remittitur, supra* note 9, at 747–50.

167. *See* Thomas, *Modern Procedure, supra* note 6, at 706–48.

168. *See* Galloway v. United States, 319 U.S. 372, 373 (1943).

169. *Id.* at 392.

170. *See id.* at 390–96. The Court also had stated that the question of the constitutionality of the directed verdict came "too late" because many decisions and a federal rule had approved of the practice. *Id.* at 389.

171. *See id.* at 391–93.

tive facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."[172]

This final formulation, which is repeated day in and out in federal court proceedings, was specifically prohibited under the common law. Under the common law, the Court did not weigh whether an alleged fact or inference was reasonable.[173] "'[E]very fact, and every conclusion, which the evidence given for the Plaintiff conduce to prove'"[174] must have been admitted and even when "'offered to be proved only by presumptions or probabilities.'"[175] Thus, here in its analysis of the constitutionality of the directed verdict, the Court appears not to have given significant substance to the common law rule, and arguably favored instead the judiciary's own power.

Some scholars have supported the Court's articulated interpretation of the Seventh Amendment that the substance of the jury trial right under the English common law must be preserved and also have supported the result of the Court's analysis upholding the new procedures under the Court's test; other scholars have advocated an analysis less associated with the English common law.[176] None of these analyses—neither the

172. *Id.* at 395.

173. *See* Thomas, *Modern Procedure*, *supra* note 6, at 706–48.

174. Gibson v. Hunter, 126 Eng. Rep. 499, 510 (1793).

175. *Id.* (quoting Wright v. Pyndar, 82 Eng. Rep. 499, 499 (1647)).

176. *See* Henderson, *supra* note 68, at 337 (following Supreme Court, where a court must provide the parties with their right to a jury trial and adjust procedures in an effort to preserve the substance of the common law; concluding that "it seems both unnecessary and undesirable to read that amendment as imposing any but the most general limitations on the Court's power to make such procedural changes"); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS 89 (1998) (arguing that the Seventh Amendment created a state law floor, which allowed Congress to provide the right to a jury trial in cases beyond that provided by state law); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 590–91 (2001) (arguing that increased judicial control of juries is consistent with Seventh Amendment and due process); Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 417–18 (1999) (juries should not have the power they had in 1791 because the judicial institution and its procedures have changed too much); Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1034 (1992) (if Congress has provided the right, there is no Seventh Amendment right to a jury trial guarantee unless Congress specifically provides one; if the courts have developed the right, the right to a jury trial exists); Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 479 (1999) ("suits at common law" meant that the framers intended for Congress to define when the right existed); Wolfram, *supra* note 68, at 731–36 ("common law" refers to a developing set of legal rules and processes); Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 516–17 (1998) (giving courts the power "to articulate those norms concerning reexamination that are sufficiently fundamental to override contrary considerations"). *But see* Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 636 (2003) (calling for retreat to the traditional notions of the historical test when interpreting both clauses of the Seventh Amendment).

Court's, nor scholars'—have taken into account the special relationship between the judiciary and the jury.[177]

Although the Court and scholars have recognized significant limits on the judiciary based on its relationship to other branches, the states and the criminal jury, they have not recognized such limits in the context of the special relationship between the judiciary and the civil jury.[178] The next section explores how such modesty by the Court in the future interpretation of the Seventh Amendment could affect federal procedure.

3. Judicial Modesty in the Future Interpretation of the Seventh Amendment

As described above, the Supreme Court has exercised some modesty in its interpretation of the first clause of the Seventh Amendment such that there often seems to be almost a presumption that the right to a jury trial will attach. On the other hand, such modesty has not been exercised in its interpretation of the second clause of the Amendment. The Court has held constitutional almost every new procedural device that removes cases from the consideration of juries or that re-examines facts found by juries. One might argue that taking into consideration both clauses of the Seventh Amendment, the Court has, on the whole, exercised modesty in the interpretation of the judiciary's power versus the jury's power.

Assuming, however, that the Court has exercised modesty in the interpretation of the judiciary's power under the first clause, the Court's interpretation of the second clause, in contrast, essentially grants the judiciary the power to remove any case from the consideration of the jury and to re-examine every case decided by a jury. This power that the judiciary may exercise under the second clause can, in effect, eliminate the power that the judiciary has interpreted the civil jury to possess under the first clause.[179] Thus, the Amendment itself can become relatively meaningless.[180] In other words, the right to a jury trial can become illusory if

177. *See supra* text accompanying notes 104–115.

178. *See supra* text accompanying notes 139–176.

179. On the other hand, one could argue that these interpretations could in essence eliminate the effect of the other. The Court may have given the jury too much power under the first clause and too little power under the second clause. With that said, however, constitutional interpretation, it seems, should not rest on such intertwined interpretations. For example, few would argue that if the Senate's power is improperly enhanced under one part of the Constitution, the proper method for the Court to correct this interpretation would be to improperly lessen its power under another part of the Constitution.

180. *See supra* text accompanying notes 117–123 (interpreting text of Constitution to give meaning to every clause).

the judiciary is free to prevent the jury from hearing cases or is free to eliminate jury verdicts. To prevent this possibility of the jury trial right being subject to the unfettered discretion of the judiciary and to give appropriate meaning to the Amendment, the assessment of the constitutionality of modern procedures should, it seems, be tied to the text of the Seventh Amendment and a standard least capable of change by the judiciary.

As stated above, the "common law" is the phrase in the Seventh Amendment that the Court interprets to assess the constitutionality of modern procedures. The Court has decided that the English common law in 1791 is the "common law" to which the Amendment refers.[181] While some scholars have agreed with the Supreme Court, others have advocated other standards instead of the English common law in 1791 including rules from the legislature, rules from the states or rules as judges determine over time.[182]

Criticisms have been leveled against these various interpretations of "the rules of the common law." Some hesitate to interpret "the rules of the common law" as fixed by English, state or federal procedures in 1791, under the reasoning that the modern procedural system should not be tied to procedures in existence over two hundred years ago.[183] Others emphasize that with respect to the English common law, English procedures were inconsistent.[184] Also, state procedures varied such that no procedure could be put in place in all of the federal courts that adequately accounted for the different procedures in the states.[185] Moreover, federal practices in 1791 were not sufficiently developed for federal practice to have been codified in the Seventh Amendment.[186]

The interpretation of the rules of the common law as ever changing unrelated to any particular practice also can be criticized. To state that the common law changes, and therefore use of the phrase "common law" in the Seventh Amendment means the common law would change over time, ignores the precedential value common law would have at the time of the adoption of the Amendment. Moreover, if the Amendment means

181. *See supra* text accompanying notes 145–172.

182. *See supra* note 176; *see also* Thomas, *Remittitur*, *supra* note 9, at 751–61.

183. *See* Thomas, *Remittitur*, *supra* note 9, at 761–62 n.143 (citing a number of scholars).

184. *See id.* (citing a number of scholars); Thomas, *Modern Procedure*, *supra* note 6, at 726.

185. The flux of the state law is illustrated by the statement of a judge in New York: "We had no law of our own, and nobody knew what it was." Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 519 (quoting WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT 117 (Boston, Little, Brown & Company 1898)). The colonial courts did not exist in 1791, so this practice may be considered irrelevant to the Seventh Amendment analysis.

186. *See* Thomas, *Remittitur*, *supra* note 9, at 761–62 & n.143.

whatever the legislature or courts deem appropriate at a given time, the re-examination clause of the Seventh Amendment arguably would be rendered superfluous.[187]

An interpretation of the phrase "rules of the common law" not strictly tied to the common law but somehow related to the common law appears to address some of the criticisms. With such an interpretation, procedural modifications of the common law can occur, yet the Seventh Amendment is not rendered superfluous by an interpretation of the common law that can change at any time.

Under this analysis, an interpretation of the common law to be the English common law in 1791, already recognized by the Supreme Court, appears preferable to the federal or state common law. At the time of the adoption of the Amendment, there was no developed federal common law and no consistent state common law to apply to all federal courts. There was, however, a well-developed English common law.

A comparison of other parts of the Constitution to the Seventh Amendment adds to this analysis of the meaning of the rules of the common law. Without fully entering the debate on the role of the text of the Constitution,[188] some meaning, it seems, can be derived from the text

187. *See* Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 22, 51 (1987). In *Parklane Hosiery Co. v. Shore*, Justice Rehnquist argued that "if the degree of invasion of the jury's province is greater than allowed in 1791 . . . [this would be] judicial repeal of the Seventh Amendment because nearly any change in the province of the jury, no matter how drastic the diminution of its functions, can always be denominated 'procedural reform.'" 439 U.S. 322, 346 (1979). In *Nixon v. United States*, the Supreme Court stated that "judicial review [of impeachment] would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature." 506 U.S. 224, 234–35 (1993). One could argue that if indeed this is the only check by the legislature on the judiciary, then "common law" in the Seventh Amendment cannot refer to legislation that Congress can enact that could change the power of the Courts in the Seventh Amendment.

188. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 399–408 (1985) (distinguishing between "easy" and "hard" cases of constitutional interpretation by examining the text, the purpose and moral, social and political ramifications of the decision); H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1434 (1986) (arguing for an important role for the text stating that "the objectivity of the text, the undeniable existence in the document of these [equal protection] and other words, has played an indispensable role in our constitutional history"); Redish & Drizin, *supra* note 187 (arguing for the importance of the text of the Constitution in judicial review; also arguing for a view of the Constitution as "counter-majoritarian" and the importance of judicial review of certain parts of the Constitution including U.S. CONST. art. I, § 8 and U.S. CONST. amend. X); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 373–77 (1982) (discussing different interpretations of the Constitution); Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 487 (1975) (discussing changing Constitution).

of the Seventh Amendment in relationship to the other parts of the Constitution.[189]

No other part of the Constitution refers to the "common law"[190] and only Article IV (in addition to the Seventh Amendment) refers to "[r]ules."[191] The use of different words "law" or "Law" (referred to as "law" herein), as opposed to "common law," in other parts of the Constitution contributes to the analysis of the meaning of "common law" in the Seventh Amendment. In a number of sections, the Constitution provides that Congress may enact laws that will modify or supplement the Constitution.[192] Also the Constitution specifically provides that the states may legislate with respect to the elections of senators and representatives.[193] By these uses of law, a very different meaning should, it seems, be given the term "law" as opposed to "common law" in the Seventh Amendment. Because of the specific use of law in the Constitution referring to federal statutory law, state statutory law, and possibly the common law, the specific reference to "common law" should not then be a reference to federal or state statutory law. Consistent with this conclusion, an American dictionary from 1839 defined "common law" as "that which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature, by any express act, which is the criterion by which it is distinguished from statute law."[194] An interpretation of the common law as a reference to

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189. *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748–49 (1999) (arguing for use of intratextualism in interpretation of Constitution); Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 731 (2000) (criticizing Amar's argument on the grounds of "the heterogeneity of the Constitution").

190. *Cf.* Schauer, *supra* note 188, at 430–31 ("The language of the text . . . remains perhaps the most significant factor in setting the size of the frame. Those clauses that look quite specific are those where the frame is quite small, and thus the range of permissible alternatives is equivalently small. Those clauses that look much more general are those with a substantially larger frame, giving a much wider range of permissible alternatives."); Redish & Drizin, *supra* note 187, at 21 ("the significance of our thesis that the Court's constitutional pronouncements are limited by the outer linguistic reaches of the text, while limited in its scope, should not be underestimated").

191. U.S. CONST. art. IV; *cf. Nixon*, 506 U.S. at 230–31 (indicating significance of only two uses of the word "sole" in the Constitution).

192. *See, e.g.*, U.S. CONST. art. I, §§ 2, 4, 6, 9; art. II, §§ 1–2; art. III, § 2; art. IV; amend. III; amend. XIV, § 4; amend. XX, §§ 2–4.

193. U.S. CONST. art. I, § 4.

194. 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND THE LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION; WITH REFERENCE TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW (1839). An English dictionary from the late eighteenth century defined "common law" as "[c]ustoms which have by long prescription obtained the force of law; distinguished from the statute law, which owes its authority to acts of parliament." 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1773). *Nixon v. United States* cited this dictionary to interpret "try"

English judge-made law would be most meaningful then because of the emphasis on the history behind the common law and because of the paucity of federal and state common law at the time of the adoption of the Amendment.[195]

The word "rule," also to which the Seventh Amendment refers, is defined by an American dictionary from 1839 as "formed by the courts, who having observed what is common to many particular cases, announce this conformity by a maxim, which is called a rule."[196] This definition of "rule" suggests that procedural devices should be assessed by some specific standard. This supports an interpretation of common law as the English common law at the time of the adoption of the Amendment.[197] Again, federal or state common law do not appear to be plausible interpretations of "rules." Federal common law was almost non-existent and the common law of the different states could not be interpreted as the rules unless the rules were different in each state and undefined in states not in existence in 1791—a seemingly implausible reading of "rules."

An interpretation of "common law" in the Amendment as the English common law in 1791 thus appears to be most consistent with the text of the Constitution and least susceptible to significant discretion by the judiciary.[198] In other words the application of modesty to interpret the

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language in the Constitution. *See Nixon*, 506 U.S. at 229–30. However, the Court cited other dictionaries including modern dictionaries and stated that the definitions differ. The Court concluded that "[a]s a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require." *Nixon*, 506 U.S. at 230 (quoting Dillon v. Gloss, 256 U.S. 368, 376 (1921)). It is arguable that the meaning of the words at the time that the Seventh Amendment was enacted should be discerned to give meaning to the Seventh Amendment. *Cf.* Redish & Drizin, *supra* note 187, at 19–20 (arguing that generally the present meaning will govern in the absence of a showing that the meaning of the words in the Constitution has changed). In any event "common law" is presently defined as consistent with the early nineteenth century definitions.

195. In *Seminole Tribe*, Justice Souter recognized that the English common law had a more specific role to play with respect to the meaning of the Seventh Amendment than its role in the interpretation of the Eleventh Amendment which does not specifically refer to the common law. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 164 n.59 (1996) (Souter, J., dissenting).

196. BOUVIER, *supra* note 194, at 375. An English dictionary from the late eighteenth century defined a "rule" as a "[c]annon; precept by which the thoughts or actions are directed." 2 JOHNSON, *supra* note 194; *cf. Nixon*, 506 U.S. at 231 (using different dictionary to ascertain the "commonsense meaning" of "sole" in the Constitution).

197. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339–40 (1979) (Rehnquist, J., dissenting) ("scope and effect of the Seventh Amendment [is] perhaps more than with any other provision of the Constitution . . . determined by reference to the historical setting in which the Amendment was adopted").

198. *See, e.g.*, Krauss, *supra* note 176, at 451 ("What other (singular) set of common-law reexamination rules [other than the English common law rules] was there?"); *see also* Thomas, *Remittitur*, *supra* note 9, at 751–62 (discussing text of Amendment and Supreme Court deci-

sions interpreting Amendment's common law language). Additionally, the English common law is recognized as a significant influence on the states and thus arguably provides the consistency among any varied procedures in the states. *See, e.g.*, Thomas, *Remittitur*, *supra* note 9, at 782–84; *cf.* MD. CONST. ART. V ("[i]nhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury"); *In re* Aftercare of Clark County, 82 P.3d 931, 932 (Nev. 2004) ("Nevada's jury trial right is defined by England common law"). Lettow asserts that in the nineteenth century, courts of the states of Massachusetts, New York and South Carolina significantly followed English practice and were most influential on the practices of the other states. *See* Renee B. Lettow, *supra* note 185, at 506–07, 527.

It is generally recognized that states granted even greater rights to juries than under the English common law. A number of scholars have described judges under the colonial system as more deferential to juries than English judges. *See* Lettow, *supra* note 185, at 515–16. In colonial times, the jury was said to have far-reaching rights including the right to decide law. *See* William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904–05, 909, 916 (1978); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 173 (1964). At the time of the adoption of the Seventh Amendment, American judges were more deferential to juries than were English judges. *See* Jonathon T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 66–69 (2003); Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 581 (2003); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 439–45 (1996). *But see* Lettow, *supra* note 185, at 517–18, 531 ("the courts of the new government began to assert as much control over the consciences of the jury, as had been claimed by the most arbitrary Judges of the Monarch whom that Revolution had overthrown") (quoting Horace Gray, *Note on* Erving v. Cradock, *in* JOSIAH QUINCY, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 571–72 (Boston, Little, Brown & Company 1865)).

Another argument that the rules of the common law should be interpreted as the rules of the English common law is the common law in the first clause is interpreted as related to the English common law, thus the more specific reference to "rules of the common law" in the second clause also should relate to the English common law.

Early on, there was no question that the common law in the Seventh Amendment was the *common* law in England in 1791. It seems inappropriate to change that assessment now, particularly when that common law is used only to guide the assessment of the constitutionality of modern procedural devices. "[T]rial by jury . . . is taken from the English common law, known and used in the colonies, before the revolution. It is not a loose and vague expression, but of definite signification." Lessee of Edward Livingston v. Moore, 32 U.S. (7 Peters) 469, 517 (1833).

Rules of the common law appear in cases decided prior to the adoption of the Seventh Amendment. In these cases, the reference is to the English common law. *See, e.g.*, Porteous v. Snipes, 1 S.C.L. 86, 1 Bay 215, (S.C.L. 1791); Strudwick v. Shaw, 2 N.C. 22, 1 Hayw. 5 (N.C. 1791); McHard v. Whetcroft, 3 H. & McH. 85, 86, 88 (Md. 1791); Braxton v. Winslow, 8 Va. (4 Call) 308, 309–16 (Va. 1791); Clark v. Litchfield County, 1 Kirby 318, 320 (Conn. 1787); Huntington v. Champlin, 1 Kirby 166, 167–70 (Conn. 1786); Davis v. Richmond, 14 Mass. 473, 482 (Mass. 1768) (presenting common law as static by referring to "rule at common law, unless that rule be altered by some statute or law of the province"); Pleasants v. Meng, 1 Dall. 380, 381 (Pa. C. 1788) (referring to "rigorous rules of the common law"); Vanhorn's Lessee v. Harrison, 1 Dall. 137, 138–39 (Pa. 1785); Brice v. The Nancy, 4 F. Cas. 86, 87 (A. Ct. Pa. 1783) (No. 1855) (referring to "the formalities required by the rules of common law").

The Supreme Court has referred repeatedly to the English common law in its interpretation of other parts of the Constitution. *See, e.g.*, Carmell v. Texas, 529 U.S. 513, 521–30 (2000) (*ex post facto* laws); Minnesota v. Carter, 525 U.S. 83, 93–97 (1998) (Scalia, J., conjudiciary's power under the second clause of the Seventh Amendment would involve the English common law in 1791, already recognized by the Supreme Court.[199]

Instead of rigidly applying the English common law, however, which has been opposed by members of the Court and many scholars,[200] or only facially examining the English common law, as the Court has done at least on occasion,[201] application of the specific principles of the English common law, which to date the Court has not derived,[202] may best represent the "substance" of the common law. A requirement of the application of the actual principles of the English common law would limit the judiciary's discretion to remove cases from juries and to review jury decisions while at the same time not unduly preventing the development of new procedures.

Perhaps most interesting, application of these principles may result in a reconsideration of whether certain procedural devices should be deemed constitutional.[203] For example, the principles of the common law would show that courts generally condemned judicial interference with the jury verdict and the principles show that nothing similar to remittitur existed under the English common law.[204] As another example, the principles of the common law would show that after a jury decided a verdict, the court would not revisit what the facts presented to the jury

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curring) (searches and seizures); Felker v. Turpin, 518 U.S. 651, 663 (1996) (habeas corpus); Landgraf v. USI Film Prods., 511 U.S. 244, 265 n.17 (1994) (no retrospective effect to statutes); United States v. Dixon, 509 U.S. 688, 715 (1993) (no double jeopardy); Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (no public or press right to attend pretrial hearings).

I note that in *Markman v. Westview Instruments, Inc.*, the Supreme Court stated that "[o]ur formulations of the historical test [as to the English common-law] do not deal with the possibility of conflict between actual English common-law practice and American assumptions about what that practice was, or between English and American practices at the relevant time. No such complications arise in this case." Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 n.3 (1996). This Article argues that regardless of such a conflict, English common law practice governs.

199. Interestingly, *Marbury v. Madison*, decided just twelve years after the adoption of the Seventh Amendment, extensively cited William Blackstone and English common law although that opinion related to a constitutional provision that did not contain the phrase "common law." *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163–169 (1803). Thus, even outside any constitutionally required application of the English common law, from early on, the English common law has been an important consideration for the Court. *See also supra* note 198.

200. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 436 n.20 (1996); *supra* note 176.

201. *See supra* text accompanying notes 168–175.

202. *See* Thomas, *Modern Procedure*, *supra* note 6, at 748–54.

203. I have advanced this argument elsewhere. *See* Thomas, *Modern Procedure*, *supra* note 6, at 748–54.

204. *See id.* at 737–48; *see also* Thomas, *Remittitur*, *supra* note 9, at 751–82.

showed, other than to order a new trial.[205] Nothing similar to the modern judgment as a matter of law existed under the English common law;[206] only where there were problems with the pleadings would a court order judgment for the party who had lost the jury trial.[207]

A look at the actual principles of the English common law is, I assert, necessary to give the judiciary particular guidance in the review of its own power versus the power of the jury—a competing constitutional actor. We know that under the principles of both the separation of powers and federalism we have feared the impingement of the power of one actor upon another actor. The judiciary's adherence to particular principles of the English common law would prevent the judiciary from any tendency to stray into the realm of the jury's power. Also adherence to the principles, as opposed to a rigid adherence to the specific procedures under the common law, may ensure that the development of federal procedure is not unduly hampered and truly may give substance to the common law.

With that stated, federal judges currently rely on many procedural devices which might be called into question using the constitutionality analysis proposed here. Once the courts re-examine the substance of the common law under this new analysis, the courts will, however, apply the principles of stare decisis to determine whether a constitutional change is warranted.[208]

CONCLUSION

This Article has proposed judicial modesty, a new model of judicial behavior for the interpretation by the judiciary of its own power in relationship to the competing power of other constitutional actors. The relationship between the judiciary and the jury—highlighted by the jury's lack of power to independently exercise power—suggests that the Court should interpret the Seventh Amendment with modesty—narrowly construing the power of the judiciary in relationship to the competing power of the jury. As stated here, the exercise of modesty by the judiciary in the interpretation of the Seventh Amendment would involve an adherence to the principles of the English common law in 1791. Such modesty has not been exercised to date, however. The Court has employed many procedural devices that did not exist under the common law that

205. Sward, *supra* note 176, at 579 n.34; Thomas, *Modern Procedure*, *supra* note 6, at 748–54.

206. Sward, *supra* note 176, at 575; Thomas, *Modern Procedure*, *supra* note 6, at 737–48.

207. Sward, *supra* note 176, at 581; Thomas, *Modern Procedure*, *supra* note 6, at 737–42.

208. *See, e.g.*, Thomas, *Remittitur*, *supra* note 9, at 264–78.

remove cases from the consideration of juries or re-examine facts tried by juries. In the future study of the relationships between the judiciary and other constitutional actors, the new model of judicial behavior described herein can be modified and defined as appropriate to recognize the distinctive circumstances of particular relationships. This study may then argue for an alteration of the judiciary's behavior in its interpretation of its own power in relationship to the competing power of other constitutional actors.[209]

209. Such modesty by the judiciary may be appropriate when one considers that when the judiciary reviews its own power, no other branch may directly affect this interpretation. Moreover, the judiciary has an interest in the outcome of whether it will be granted power and accordingly may tend to be biased in the decision. Indeed, under public choice theory, judges are said to have some "self-centered motivation," including possibly increasing their own power. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 85–86 (1991); *see* Tushnet, *supra* note 4, at 948–60. As one Justice stated long ago, judges may "amplify[] their own jurisdiction and powers at the expense of those entrusted by the Constitution to other bodies." Sparf v. United States, 156 U.S. 51, 176 (1895) (Gray, J., dissenting). One could argue that the interest of the judiciary might be to avoid work and thus not exercise power. However, if judges seek to avoid work, they might be able to do so by exercising power in the first instance. For example, a judge could dismiss a case instead of giving it to a jury.