MAINTAINING JUDICIAL STRUCTURE

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What a beautiful venue to give a speech about the Constitution! Thank you to the Georgetown Center for the Constitution for inviting me to give the 5th Thomas M. Cooley Judicial Lecture.[1] My understanding is that many of you are law students or recent law-school graduates participating in Georgetown's originalism seminar. My guess is that most of you, if not all of you, are planning on doing a clerkship in either a federal or state court someday. I will start by speaking directly to you. Clerking is the best job you will have, bar none. You will learn as much in one year of clerking as you did in law school, or at least I did. So I decided to do the next best thing as a career, which is become a judge. Whatever you end up deciding to do, having clerked will make you better at it. Not to mention that you will make lifelong connections with your judge and their clerk network.

Speaking of courts, that is exactly what I would like to discuss tonight. I have been studying them, serving them, or thinking about them my entire adult life. First as a federal clerk (three times), next as a federal-courts professor, then as a state-court judge, and now as a federal circuit judge. You might imagine I have a few thoughts on the subject. Having served in multiple roles, I want to help you understand how state and federal courts fit together, including pointing out a few places where we have deviated from the vision of our Founders. Tonight's talk is about maintaining judicial structure.

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I. THE REVIEW SESSION

First, the big picture. Call this part the review session. The original Constitution is mostly structural. The Founders knew that a government of limited powers is what protects liberty, so they started there. We have a horizontal separation of powers that allocates those limited powers among the three branches of government: the executive, legislative, and judicial. The remaining powers stay with the states, ensuring a vertical separation of powers. As James Madison wrote in Federalist 45, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those that are to remain in the State governments are numerous and indefinite."[2] Multiple redundancies, what we call checks and balances, would protect liberty.[3]

Only later, in the Bill of Rights, did the Founders focus on individual protections like the right to a jury trial, to confront one's accusers, and to associate with others. They knew they had to get the structure right or the rest would not matter. Those constitutionally protected rights needed someone, something, to protect them. Each of the three branches play their own special role, but I want to focus on the one I know best: the judiciary.

II. COURTS AND THE CONSTITUTION'S ORIGINAL DESIGN

Alright, with the review session over, let's start at the beginning. No, not with the Constitution, but with its precursor, the Articles of Confederation. Under it, there was no federal judiciary, no Supreme Court.[4] It is hard to imagine today, with so many interstate disputes, that the parties had to pick a state court, with all its local biases, to resolve them. And sometimes it did not work. Parties would file in multiple courts, which could result in conflicting determinations

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[2] THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

[3] *See* THE FEDERALIST NO. 51, *supra* note 2, at 322 (James Madison).

[4] *See generally* ARTICLES OF CONFEDERATION OF 1781.

about their rights and obligations, creating a real mess.[5] So by the time of the Constitution's ratifying convention, many saw the need for *at least* the creation of a Supreme Court.[6] Division brewed, however, about whether to create inferior federal courts too.[7]

On one side were John Rutledge of South Carolina and Roger Sherman of Connecticut, who strongly opposed their creation. They viewed them as an unnecessary expense and a potential threat to the primacy of state courts.[8] Luther Martin of Maryland echoed similar concerns and stated that the federal courts would "create jealousies" as the country grew.[9] In the opponents' view, why not just rely on the courts that already existed, instead of creating new ones? There would, after all, be a single Supreme Court to clean up any messes.[10] My, oh my, how different the country would look today if Rutledge, Sherman, and Martin had their way. I venture to guess that the Supreme Court would be hearing more than the fifty-five or sixty cases per year on its plenary docket. And I would still be on the Minnesota Supreme Court.

On the other side of the debate were James Madison and Edmund Randolph, both from Virginia, who wanted the Constitution to create lower federal courts from the beginning.[11] Madison thought that a single Supreme Court could run into state-court stonewalling, because on remand, state courts could simply reenter a prior judgment.[12] In Federalist 81, Alexander Hamilton made a similar observation. He worried that the "local spirit" of some state

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[5] *See* Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, DUKE L.J. 1421, 1428–29 (1989).

[6] *See* Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787–1792*, 89 FORDHAM L. REV. 1895, 1907 (2021).

[7] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., 1911).

[8] *Id.* at 124–25.

[9] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 45–46.

[10] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Rutledge).

[11] *Id.* at 124 (Madison); *id.* at 21 (Randolph).

[12] *Id.* at 124 (Madison).

courts would "disqualify [them] for the jurisdiction of national causes."[13]

For Madison, Randolph, and Hamilton, inferior federal courts would also stand between out-of-state parties and the inherent bias of state courts and local juries.[14] Those fears may sound quaint to modern ears, but they were very real to the Founders. For one thing, interstate travel was a difficult ordeal. Think of the Supreme Court justices who rode circuit on horseback during the early years.[15] Once, all six Supreme Court Justices wrote a letter to President George Washington complaining about the practice. They described the burden as "so excessive that [they] cannot forbear representing them in strong and explicit terms."[16] They went on to say it was like "existing in exile from [their] families, and of being subjected to a kind of life, on which [they] cannot reflect, without experiencing sensations and emotions, more easy to conceive than proper for [them] to express."[17] Indeed, one Justice (Stephen Field) was almost shot by an unhappy litigant while riding circuit, and many others had harrowing experiences of their own.[18]

Another problem was the different customs, currencies, and laws. Ben Franklin recounted a three-day journey from Boston to Philadelphia as a runaway at the age of seventeen. The simple act of buying bread, familiar to many, was a wholly foreign experience for him. In his words:

> [I] ask'd for Bisket, intending such as we had in Boston, but it seems they were not made in Philadelphia, then I ask'd for a threepenny Loaf, and was told they had none such: so

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[13] THE FEDERALIST NO. 81, *supra* note 2, at 486 (Alexander Hamilton).

[14] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Madison).

[15] *See* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1714–17 (2007).

[16] *Supreme Court Justices to George Washington*, Aug. 9, 1792, *in* 10 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, 1 MARCH 1792–15 AUGUST 1792, at 643–45 (Robert F. Haggard & Mark A. Mastromarino eds., 2002).

[17] *Id.*

[18] *See In re* Neagle, 135 U.S. 1, 52–53 (1890).

> not considering or knowing the Difference of Money and the greater Cheapness nor the Names of his Bread, I bad him give me three penny worth of any sort. He gave me accordingly three great Puffy Rolls. I was surpriz'd at the Quantity, but took it, and having no room in my Pockets, walk'd off, with a roll under each Arm, and eating the other.[19]

Now imagine, if you will, that this bread-buying experience took a turn for the worse, and the baker wanted to take young Franklin to court. If buying bread was a daunting task, surely navigating a foreign, and potentially hostile, court would be truly overwhelming. A neutral federal forum, still likely alarming to a young man buying bread, made a lot of sense in these circumstances.

Still, for those fearful that the federal courts would overwhelm their state counterparts, the risks outweighed the benefits. So Madison, ever the clever politician, met his opponents halfway.[20] Now known as the Madisonian Compromise, the plan left the creation of inferior federal courts for later.[21] We would have one national Supreme Court, but anything more would be up to Congress. Not only whether inferior courts would exist, but what their jurisdiction would be. We would have none of the mess accompanying the Articles of Confederation. Or at least that was the idea.

The genius of the original structure is in its simplicity. The Supreme Court retains original jurisdiction in limited categories of cases (state v. state, cases involving ambassadors, among others), with appellate jurisdiction over everything else within the judicial power of the United States.[22] Congress could then see how

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[19] BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN (1791), *reprinted in* THE HARVARD CLASSICS 26 (Charles W. Eliot ed., 1909).

[20] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 125 (Madison).

[21] *Id.*

[22] U.S. CONST. art. III, § 2.

everything worked and create inferior federal courts down the line if needed. And state courts would still have a large role to play, particularly in adjudicating intrastate disputes. What an elegant solution, given that state courts would continue with what they already knew how to do.

Madison got his wish, better late than never, when Congress passed the Judiciary Act of 1789.[23] It created thirteen federal district courts, one for each state, with a single district judge in each district.[24] Congress also established three regional circuit courts: the Eastern, Middle, and Southern circuits.[25] Circuit courts were very different back then. They were staffed with a single district judge from within the circuit, and two Supreme Court Justices "riding circuit."[26] Although the practice of riding circuit no longer exists, much to my consternation, this original structure foreshadowed how federal courts would eventually look. Replace district judges and Supreme Court justices with circuit judges like me, and we finally get to how I exist, thank goodness.

Here is the main thing I hope you take away from tonight: the original structure of the judiciary, the Madisonian Compromise, protects two important principles. First, federalism. State courts continue to play a role in hearing most cases. For perspective, my home state of Minnesota has 289 state-trial-court judges and just seven authorized federal district court judgeships. Those seven, as incredibly hard as they work, do not work 42 times as hard as 289 state judges. The reason is that the bread-and-butter of judicial work happens in state courts: family law, probate, property disputes, petty crimes. The list goes on and on. There are close to seventy million cases filed in state court every year compared to less than a million in federal court.[27]

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[23] Judiciary Act of 1789, ch. 20, 1 Stat. 73.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Compare State Courts Play a Key Role in American Life*, PEW CHARITABLE TRS. (Oct. 15, 2024), https://www.pew.org/en/research-and-analysis/issue-briefs/2024/10/state-courts-play-a-key-role-in-american-life [https://perma.cc/845J-V6QV], *with*

Second, the separation of powers. That is, to the extent we have federal courts, Congress gets to make them and decide what cases they hear. In other words, the same structural protections that are woven throughout the Constitution are imbued in the structure of the judiciary. Throughout my remarks, I will come back to this point again and again.

III. HOW IT REALLY WORKS

With the table-setting over, let's get into the specifics. What is working well today? What is not? Where have things broken down, and ultimately, how can we get back to the original structure our Founders had in mind?

Let's start with the bad and then end on a good note. The idea behind the Madisonian Compromise was to give federal and state courts their own lanes. These days, however, the lines between them get blurred. I have three examples in mind.

The first is so-called "arising under" jurisdiction, most recently expanded in *Grable & Sons Metal Producers., Inc. v. Darue Engineering & Manufacturing*.[28] As we all know, the Constitution permits federal courts to hear cases arising under "the Constitution, laws, and treaties of the United States."[29] Seems pretty straightforward: if the Constitution, a federal law, or a treaty creates the cause of action, federal jurisdiction exists.

Yet, for more than 100 years, the Supreme Court has moved between two extremes. The first, the "creation" test from a 1916 case called *American Well Works Co. v. Bowler Co.*, premises federal-question-jurisdiction on "the law that creates the cause of action."[30] Just five years later, the Supreme Court went back to the other extreme in *Smith v. Kansas City Title & Trust Co.*, which recognized

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Federal Judicial Caseload Statistics 2023, U.S. CTS., https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2023 [https://perma.cc/RB2S-QR6Q].

[28] 545 U.S. 308 (2005).

[29] U.S. CONST. art. III, § 2.

[30] 241 U.S. 257, 260 (1916).

federal-question-jurisdiction for state-law causes of action when "the right to relief depends upon construction or application of federal law."[31] Since then, the pendulum has been swinging back and forth between them, from the *American Well Works*-like rule in *Merrell Dow Pharmaceuticals Inc. v. Thompson*[32] to the *Smith*-like rule in *Franchise Tax Board v. Construction Laborers Vacation Trust*.[33] *Grable* was supposed to fix things. Instead, we received an exceedingly complicated four-part test. In order for a question to arise under federal law, it must: (1) "necessarily raise a stated federal issue" that is (2) "substantial," (3) "actually disputed," and (4) capable of resolution without "disturbing any congressionally approved balance of federal and state judicial responsibilities."[34] That is a mouthful, and like most multi-part tests, it is about as clear as mud.

Divorced from the text of the Constitution and the federal-question-jurisdiction statute, it lets a lot more cases into federal court than it should.[35] For starters, how do we determine whether a federal issue is "substantial"? It is invariably "substantial" to the parties, or else they would not be in court litigating it! That cannot be it. The Court says in *Grable* that it depends on whether there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum."[36] Not helpful either. The point is that pinning down substantiality is often difficult, because it is in the eye of the beholder, which is hardly a principled way to make a jurisdictional judgment.

And that is one of the easier elements to evaluate! By the time we get to the fourth requirement, we ask whether giving the parties a federal forum will "disturb[] [the] congressionally approved

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[31] 255 U.S. 180, 199 (1921).

[32] 478 U.S. 804, 808–810 (1986).

[33] 463 U.S. 1, 9 (1983). Under *Smith*, more cases will end up in federal court because any substantial federal issue can give rise to federal jurisdiction. Less will end up in federal court under *American Well Works*, which exclusively depends on which sovereign created the cause of action.

[34] *Grable*, 545 U.S. at 314.

[35] *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

[36] *Grable*, 545 U.S. at 313.

balance of federal and state judicial responsibilities."[37] Good luck with that one. I have a hard time figuring out what type of case will disturb the congressionally approved balance. And I have held both jobs and co-authored a federal-courts casebook.

You know who *is* well positioned to make these kinds of calls? Congress! The very branch of government that the Founders decided should make the call about whether inferior federal courts should exist at all.[38] Why not just stick to the federal-question-jurisdiction statute that Congress first gave us in 1875?[39] The *Grable* test, after all, acknowledges that *Congress* is supposed to allocate jurisdiction between federal and state courts.[40] I may be stating the obvious, but didn't it already do that 150 years ago? Profound, I know, but why not just follow the statute?

Sure, my job would end up being a little less interesting, but why not return to the simplicity and textual grounding of *American Well Works*?[41] A legal question "arises under" the law that creates it.[42] It *could be* that simple.

Unfortunately, other areas are almost as complicated. Consider the completely un-originalist doctrine of complete preemption. Some statutes are "so powerful" in the Court's eyes that they both preempt state law and provide a ticket into federal court—all without Congress or the parties saying so![43] It is the ultimate jurisdictional trump card.

Wait, you might say, everyone knows the Constitution contains the Supremacy Clause, which allows federal law to preempt state law.[44] But the complete-preemption doctrine extends that preemptive effect to create federal jurisdiction where none otherwise exists. Preemption, after all, is normally a defense to a

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[37] *Id.* at 314.

[38] U.S. CONST. art. III, § 1.

[39] *See* Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.

[40] *See Grable*, 545 U.S. at 313.

[41] *See* Am. Well Works Co. v. Bowler Co., 241 U.S. 257, 259–60 (1916).

[42] *Id.* at 260.

[43] *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 7–8 (2003).

[44] U.S. CONST. art. VI, cl. 2.

state-law claim, not a cause of action of its own.[45] Typically, we look to the facts in a well-pleaded complaint and see whether there is a federal issue. If not, the case stays in state court, even if it is painfully obvious a defendant will raise a federal defense like preemption. The well-pleaded complaint rule allows federal and state courts to each remain in their respective lanes.

Complete preemption, like the *Grable* doctrine, upsets the Madisonian Compromise by providing an on ramp into federal court for cases that should not be there. It all started in 1968, in a labor-law case called *Avco Corp. v. Aero Lodge No. 735*.[46] An employer sued in state court to stop a union from striking at one of its facilities. Its sole claim was for state-law breach of contract based on a collective-bargaining agreement.[47] Even if the union wanted to raise a preemption defense, it should not have created federal jurisdiction. Or so everyone thought.

The Supreme Court, in an opinion authored by Justice Douglas, went the other way on the theory that the Labor Management Relations Act, which governs employer-union relations, completely preempts Avco's breach-of-contract claim.[48] And over the next 40 years, courts expanded the doctrine to include other statutes, like ERISA and the National Bank Act.[49] Each time, the rationale was basically the same: some federal statutes are simply "so powerful" that they displace any state-law causes of action in the same neighborhood.[50] I cannot help but wonder whether the Supreme Court really just thought that these areas are just *too* federal for state judges to handle. Rutledge, Sherman, and Martin—

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[45] *Beneficial Nat'l Bank*, 539 U.S. at 12–13 (Scalia, J., dissenting) ("Of critical importance here, the rejection of a federal defense as the basis for original federal-question jurisdiction applies with equal force when the defense is one of federal pre-emption.").

[46] 390 U.S. 557 (1968).

[47] *See id.* at 558.

[48] *Id.* at 559.

[49] *Beneficial Nat'l Bank*, 539 U.S. at 9–10 (discussing "this Court's longstanding and consistent construction of the National Bank Act as providing an exclusive federal cause of action"); *see also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54–55 (1987).

[50] Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 24 (1983).

the opponents of a powerful federal judiciary—were turning in their graves.

The anti-federalists, however, saw it coming. Brutus once remarked that, "in the course of human events it is to be expected, that they [meaning federal courts] will swallow up all the powers of the courts in the respective states."[51] What an accurate way to describe the effect of the complete-preemption doctrine. In those areas, federal law swallows state law, leaving state courts in the cold.

Justice Scalia would echo Brutus's concerns in his *Beneficial National Bank v. Anderson* dissent.[52] There, he recognized that complete preemption "represent[ed] a sharp break from our long tradition of respect for the autonomy and authority of state courts."[53] Keep in mind what I told you at the very beginning. Without the Judiciary Act of 1789, we would have no inferior federal courts.[54] And labor-relations cases are not within the Supreme Court's original jurisdiction. So how can it possibly be that federal inferior courts—those created by the grace of Congress—are the only ones that can hear them? It makes no sense. And it does not align with the principles of our structural Constitution.

Now, I just gave you two examples of cases that creep into federal court, even when they really belong in state court. At least if we followed the original structure of the Constitution. In some cases, however, the problem runs in the other direction. I am talking about cases that are currently stuck in state court that really belong in federal court.

I will use a recent case of mine as an example. My home state of Minnesota sued some energy producers in state court for violating its state consumer-protection laws.[55] Except here is the

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[51] 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 103 (John P. Kaminski et al. eds., 2003).

[52] *Beneficial Nat'l Bank*, 539 U.S. at 17–18 (Scalia, J., dissenting).

[53] *Id.* at 18.

[54] *See supra* note 23 and accompanying text.

[55] *See* Minnesota v. Am. Petroleum Inst., 63 F.4th 703, 717 (8th Cir. 2023) (Stras, J., concurring).

catch: the suit was based on *global* greenhouse gas emissions.[56] And Minnesota was explicit in what it wanted: for the companies to reduce their energy production, which would lessen pollution and emissions.[57] In other words, because Minnesota felt strongly about climate change, it wanted its state courts to find a global solution to the problem. And make no mistake, Minnesota is not alone in bringing this kind of lawsuit. Many states are currently bringing similar lawsuits in state courts all over the country.[58] When the energy companies tried to remove the case to federal court, the district court had to send it back, and we had no choice but to affirm on appeal.[59] The suit nominally arose under state law. Even under the theories I have discussed tonight, like complete preemption, and *Smith* and *Grable*, there was simply no federal question present in the complaint, even if we all knew it was really a federal case. So back to state court it went.[60]

As I wrote in a concurrence, this result would have surprised the Founders.[61] Although Minnesota was suing a private party, let me pull back the curtain and explain what was really happening. Minnesota was effectively trying to use its own state laws to exact *nationwide* compliance from energy companies that operate worldwide. In other words, it was using its own laws and its own courts to dictate energy policy for everyone else.[62] When states try to impose their own standards on other states, things start to get messy. Recall what Hamilton said in Federalist 81, that the "local spirit" of state courts could "disqualify [them] from

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[56] *Id*.

[57] *See id.*

[58] *Id.* at 708 (majority opinion); *see also* Katie Hoffecker, *The Heat is on: Will Climate Change Suits Pressure the Supreme Court to Evolve its Federal Question Jurisdiction?*, 67 ST. LOUIS U. L.J. 117, 118–19 (2022).

[59] *Am. Petroleum Inst.*, 63 F.4th at 707–08.

[60] *See id.* at 720 (Stras, J., concurring).

[61] *See id.* at 718–19.

[62] *See id.* at 719 ("The problem, of course, is that the state's attempt to set national energy policy through its own consumer-protection laws would 'effectively override . . . the policy choices made by' the federal government and other states." (quoting Int'l Paper Co. v. Ouellette, 479 U.S. 481, 495 (1987))).

jurisdiction" over "national causes."[63] That is exactly why disputes between states were heard in the first instance by the United States Supreme Court. Remember original jurisdiction?[64]

And, in fact, a group of states led by Alabama recently tried to sue Minnesota directly in the Supreme Court, using original jurisdiction as the hook.[65] The Supreme Court declined to hear the case, but Justice Thomas, joined by Justice Alito, dissented.[66] He observed that, "[t]he plaintiff States allege that the defendant States are attempting to 'dictate interstate energy policy' through the aggressive use of state-law tort suits . . . 'based on out-of-state conduct with out-of-state effects,' for the purpose of placing a 'global carbon tax on the traditional energy industry.'"[67] Those two Justices, in other words, would have allowed the case to proceed in the Supreme Court. And I agree with them, because the Supreme Court is exactly where this kind of interstate dispute belongs.

Let me explain why. When it comes to interstate disputes, what law do you apply? How can one co-equal sovereign use its laws to bind another? Recall the problems with the Articles of Confederation. In the absence of a national court, state courts could apply their own law and create a real tangled web of conflicting rights and obligations.[68] Since then, federal courts have solved this problem by applying federal common law—which at the time of the Founding would have been called general law[69]—as a neutral means of adjudicating and addressing national issues.

I think if we were truly being faithful to the original structure of

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[63] THE FEDERALIST NO. 81, *supra* note 2, at 486 (Alexander Hamilton).

[64] *See supra* note 22 and accompanying text.

[65] Alabama v. California, 145 S. Ct. 757 (2025).

[66] *Id.* at 757 (Thomas, J., dissenting from the denial of motion for leave to file complaint).

[67] *Id.* at 758.

[68] *See supra* notes 4–5 and accompanying text.

[69] *See* Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 628 (2023) ("Moreover, because certain rights were presumptively embodied in each state's fundamental law, they were defined by general law—a body of legal rules and principles, identified through reason and custom, that operated across jurisdictions and that lacked any final interpretive authority.").

the Constitution, we would recognize that disputes like these are really between states. But sadly, until Congress or the Supreme Court does something about it, these cases will stay in state court.

IV. A RETURN TO OUR CONSTITUTIONAL ROOTS

My sincere hope is that the pendulum is starting to swing back toward the Constitution's original structure. We now have a Court in which a majority of its members take originalism seriously, one that has been sending more issues back to the states.[70]

Consider one recent example. The first case argued in October at the Supreme Court during the 2024 Term came from the Eighth Circuit.[71] It was a case about dog food.[72] Anastasia Wullschleger bought some of it in Missouri from a company called Royal Canin U.S.A.[73] She thought the company had misled consumers by using a prescription label, even though it contains no medicine.[74] Her solution was to file an action in state court under the Missouri Merchandising Practices Act and state antitrust law.[75] But in the complaint were some references to federal law, such as the Food, Drug, and Cosmetic Act.[76]

Royal Canin predictably removed the case to federal court based on what it believed were state claims that had federal issues.[77] Remember where we started, with *Smith* and *Grable*.[78] Except this time, Wullschleger did not want to be stuck in federal court, so she gambled by removing all references to federal law in an amended complaint she filed.[79] The question was whether it was too little,

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[70] *See* Trump v. CASA, Inc., 145 S.Ct. 2540, 2553 (2025); *see also* Rodgers v. Bryant, 942 F.3d 451, 460 (8th Cir. 2019) (Stras, J., concurring in part and dissenting in part).

[71] Royal Canin U.S.A., Inc. v. Wullschleger, 145 S. Ct. 41, 44 (2025).

[72] *See id.* at 48.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *See supra* notes 28–33 and accompanying text.

[79] *See Wullschleger*, 145 S. Ct. at 49.

too late. The parties initially thought it was, because supplemental jurisdiction had already attached.[80]

The Eighth Circuit panel I was on was unsure, which prompted us to ask the parties about whether the case still belonged in federal court. Seems straightforward enough: with no federal questions remaining, Wullschleger's case belonged in state court, right? The problem is that every circuit had ruled exactly the opposite.[81] For post-removal amendments, courts were supposed to look at the original complaint and figure out if jurisdiction existed back then.[82] If it did, then the district court could choose to keep it on a case-by-case basis.[83] Even if that meant deciding a case that otherwise would be in state court.

Without any directly on-point precedent, I returned to first principles. And those first principles, exactly the ones I have discussed tonight, led me to the right answer: no federal jurisdiction.[84] The case had to be remanded to state court.

Not only did other circuits disagree, but my own clerks did too. How could the panel go against what every other court had done, and how would we write the opinion? They pointed out that there was even an opinion from one of my judicial heroes, Justice Scalia, that suggested the other circuits might be right.[85] I told them that it was time to just go back to basics, and we did.

Now to the most important part of the story. The Supreme Court unanimously agreed.[86] What was clear from the oral argument is that the Justices, all of them, went back to first principles too.[87] No,

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[80] *Id.* at 50.

[81] *See, e.g.*, Ching v. Mitre Corp., 921 F.2d 11, 13 (1st Cir. 1990); Collura v. Philadelphia, 590 Fed. App'x 180, 184 (3d Cir. 2014) (per curiam); Harless v. CSX Hotels, 389 F.3d 444, 448 (4th Cir. 2004); Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 210–11 (6th Cir. 2004); Behlen v. Merril Lynch, 311 F.3d 1087, 1095 (11th Cir. 2002).

[82] *See Wullschleger*, 145 S. Ct. at 47–49.

[83] *See id.*

[84] *See* Wullschleger v. Royal Canin U.S.A., Inc., 75 F.4th 918, 922 (8th Cir. 2023).

[85] *See* Rockwell Int'l Corp. v. United States, 549 U.S. 457, 474 n.6 (2007).

[86] *Wullschleger*, 145 S. Ct. at 42.

[87] *See* Transcript of Oral Argument, Royal Canin U.S.A., Inc. v. Wullschleger, 145 S.

they did not overrule *Grable*, which Wullschleger's attorney also asked them to do, but they reinforced that cases without a federal question, and no other basis for federal jurisdiction, belong in state court.[88] It may sound elementary, but the Supreme Court reaffirmed that state cases belong in state court.

Now I will admit, not everyone shares my love for jurisdiction. Some judges even think it stands in the way of getting to the heart of cases, the merits. Sometimes it does, but that is no reason to ignore our constitutional structure. Some disputes belong in state court, others in federal court, and some just belong to the executive and legislative branches.

One small case about dog food may not seem like a very big deal in the grand scheme of things. But to Founders like Rutledge, Sherman, Martin, Madison, and Hamilton, it mattered profoundly *where* each and every case would be decided. So yes, even in a case about dog food, jurisdiction matters. And federal courts play their part when they police their own jurisdiction. That is one of the takeaways from tonight's speech.

Another is even more foundational: the Founders hotly debated how federal and state courts would interact with one another. Each had their own role to play, assuming Congress decided to create inferior federal courts. The system they envisioned was inspired by, and imbued with, the liberty-protecting principles of federalism and the separation of powers.

But keep in mind we must be vigilant about maintaining that structure. We have, after all, moved away from the original vision through adopting doctrines like the *Grable* test and complete preemption. I think Justice Thomas, my old boss, realizes it, because he regularly starts oral argument these days by asking, like he did recently in the birthright-citizenship case, about "historical analogues" and "historical pedigree," exactly the questions we should all be asking.[89]

Ct. 41 (2025) (No. 23-677).

[88] *See Wullschleger*, 145 S. Ct. at 56–57.

[89] Transcript of Oral Argument at 6, Trump v. CASA, Inc., 145 S. Ct. 2540 (2025)

And last, I think there is reason for great optimism. There are many inspiring jurists who are now asking the right questions and working hard daily to uphold our system of federalism and separation of powers. And then, of course, there are students like you, who devote your time to learning and studying the original structure of the Constitution. I hope you continue to commit yourselves to upholding it as you embark on your own legal careers. The future gives me optimism. I hope it does for you too. Thank you.

(No. 24-884).