

**“Questions Involving National Peace and Harmony”  
or “Injured Plaintiff Litigation”?**  
**The Original Meaning of “Cases” in Article III of the Constitution**  
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**I. Introduction**

If a federal official is deliberately violating the Constitution, is it possible that no federal court has the power to halt that conduct? Federal judges have been answering “yes” for more than a century – dismissing certain kinds of lawsuits alleging unconstitutional conduct by ruling that the lawsuits were not “cases” as meant in the phrase “The judicial Power shall extend to all cases” in Article III, Section 2, of the Constitution.<sup>2</sup>

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<sup>2</sup> The full text of Section 2 is: “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.”

For example, in July 2019 the U.S. Court of Appeals for the Fourth Circuit dismissed a lawsuit brought against President Donald Trump by the State of Maryland and the District of Columbia claiming that he is deliberately violating the Constitution's prohibition against receiving emoluments from foreign states.<sup>3</sup> (The lawsuit alleged that foreign governments pay substantial sums for using the Trump International Hotel in Washington D.C. and that President Trump is sole owner of that hotel.) The court said: "the District and Maryland's interest in constitutional governance is no more than a generalized grievance, insufficient to amount to a case or controversy within the meaning of Article III."<sup>4</sup>

In 1911 the United States Supreme Court declared: "[T]he exercise of the judicial power is limited to 'cases' and 'controversies.' ... By cases and controversies are intended the claims of litigants. ... The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication."<sup>5</sup> The Supreme Court has subsequently further specified the meaning of "case" within the meaning of Article III to include the following "essential core": a plaintiff who has suffered a concrete and particularized injury that is likely to be redressed by a judicial decision.<sup>6</sup> Thus, at least in the civil setting, the Court has restricted the meaning of "cases" to adversary litigation initiated by a plaintiff with a personal and concrete injury --- in brief, "injured plaintiff litigation."

The claims of Maryland and the District of Columbia against President Trump were therefore dismissed by the Fourth Circuit without consideration of the merits because, in the court's view, they had failed to show "concrete and particularized injury" that was different than the alleged harm suffered by all citizens if the President is corrupted by receipt of foreign payments.<sup>7</sup> Failure to meet the Supreme Court's definition of "case" is described as a "lack of standing."<sup>8</sup> Responding to the argument that if the District of Columbia and Maryland "could not obtain judicial review of [the President's] action, then as a practical matter no one can," the Fourth Circuit cited the answer provided in a 1974 Supreme Court

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<sup>3</sup> In re Trump, 928 F.3d 360 (4<sup>th</sup> Cir. 2019) (petition for rehearing *en banc* pending).

<sup>4</sup> *Id.* at 378.

<sup>5</sup> *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911).

<sup>6</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Spokeo Inc. v Robins*, 136 S. Ct. 1540, 1547 ("Injury in fact is a constitutional requirement").

<sup>7</sup> In re Trump at 378-79. The court also rejected claims that plaintiffs were injured based on their ownership interests in convention centers that competed with the Trump Hotel, on their raising the claims of their residents competing with the Trump Hotel, and on their interest in not being pressured to grant favorable treatment to businesses owned by the President. *Id.* at 374-78.

<sup>8</sup> In re Trump at 374-80.

decision: “The assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.”<sup>9</sup>

The empirical research reported in this article suggests that this “injured plaintiff litigation” interpretation of the meaning of “cases” may be more narrow – perhaps indeed entirely different – than how the word in its Article III context would have been used and understood by those who drafted and ratified the Constitution.

For the first two months of a constitutional convention that lasted less than three-and-a-half months, various versions of what would eventually become Section 2 of Article III consistently provided that federal courts should have the power to “hear and determine ... questions which may involve the national peace and harmony.”<sup>10</sup> On July 18, 1787, the Convention unanimously adopted the following resolution proposed by James Madison: “the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony”.<sup>11</sup>

The authors of this article, comprised of a research team of lawyers and linguists, used a variety of computer-aided methods for examining very large data sets of Founding Era texts to explore linguistic implications suggested to them by Madison’s July 18 resolution. This research indicated that those who drafted and ratified the Constitution:

- (1) Would have understood “cases arising under laws passed by the general Legislature” to be a type or example of “questions as involve the National peace and harmony”;
- (2) Would have understood “such other questions” to be a more general category of jurisdiction than “cases arising under laws”; and
- (3) Would not have understood “cases” as having a stable, inherent meaning such as “injured plaintiff litigation” – instead “cases” in each context of use in Article III would have been read as having a different meaning, constructed through its combination with accompanying words.<sup>12</sup>

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<sup>9</sup> *Id.* at 379 (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 226-27 (1974)).

<sup>10</sup> See notes \_\_ - \_\_, *infra*, and accompanying text.

<sup>11</sup> 2 *The Records of the Federal Convention of 1787* 39 (Max Farrand ed. 1966)(*hereinafter* “*Records*”)(emphasis added). As to Madison’s authorship of this resolution, see note \_\_, *infra*, and accompanying text.

<sup>12</sup> The linguistic description of this third finding is that “cases” was being used as part of a “shell noun phrase” and thus its meaning was vague and abstract requiring accompanying words to provide a “shell content”; the combination of shell noun and shell content creates a complete concept but one that is entirely contingent on the particular context of use. See notes \_\_ - \_\_, *infra*, and accompanying text.

## **II. Legal Context and Relevance of Linguistic Analysis**

As famously stated by U.S. Supreme Court Justice Antonin Scalia in the case of *District of Columbia v Heller*, in interpreting the Constitution's text, courts "are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning'."<sup>13</sup> As Justice Scalia explained in an equally famous speech, the focus of constitutional interpretation should not be "original intent" but rather "original meaning": "What was the most plausible meaning of the words of the Constitution to the society that adopted it – regardless of what the Framers might secretly have intended?"<sup>14</sup> Justice Scalia quoted in support of this position a letter written by James Madison, who has been described as the "master builder of the Constitution":<sup>15</sup>

"[W]hatever respect may be thought due to the intention of the Convention, which prepared and proposed the Constitution, *as a presumptive evidence of the general understanding at the time of the language used*, it must be kept in mind that the only authoritative intentions were those of the people of the States, as expressed through the Conventions which ratified the Constitution."<sup>16</sup>

In looking for "presumptive evidence of the general understanding at the time of the language used" courts have generally relied on dictionary definitions and selected quotations from texts dating from the period of ratification.<sup>17</sup> This article presents a different approach by applying the tools of linguistic analysis to "big data" about how written language was used at the time of ratification.

The science of linguistics has made dramatic progress in the past thirty years due to developments in computer technology making it possible to acquire, store, and process large amounts of digitized data representing actual language use. Such a data set when used for linguistic analysis is called a *corpus* (plural: *corpora*). When properly executed, corpus-based linguistic research meets the scientific standards of *generalizability*, *reliability*, and *validity*.

For empirical research into original meaning of the Constitution, the standard of generalizability is met by use of a corpus sufficiently large and varied

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<sup>13</sup> *District of Columbia v Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

<sup>14</sup> *Original Meaning*, SCALIA SPEAKS 183 (Christopher J. Scalia & Edward Whelan eds. 2017).

<sup>15</sup> Max Farrand, *The Framing of the Constitution of the United States* 196 (1913).

<sup>16</sup> *Id.* at 185 (emphasis in Madison's original letter).

<sup>17</sup> See, e.g., *District of Columbia v. Trump*, 315 F.Supp.3d 875, 889-95 (D.Md. 2018) (discerning "original public meaning" of emolument from dictionaries and sixteen sentences from a handful of 18th century texts).

that it represents – in the words of James Madison -- the “language used by the people of the States” when the state conventions ratified the Constitution. The authors have used the *Corpus of Founding Era American English (COFEA)*.<sup>18</sup> *COFEA* contains in digital form over 126,000 texts created between 1760 and 1799, totaling more than 136,800,000 words.<sup>19</sup> The texts in *COFEA* come from the six sources: the National Archive Founders Online; HeinOnline; Evans Early American Imprints from the Text Creation Partnership; Elliot - The Debates in the State Conventions on the Adoption of the Federal Constitution; Farrand – Records of the Federal Constitutional Convention of 1787; and the U.S. Statutes-at-Large from the first five Congresses.<sup>20</sup> The sample of Evans Early American Imprints included in *COFEA* contains over 3000 books, pamphlets, and other written materials published in America between 1760 and 1799.<sup>21</sup> Founders Online is a free on-line resource maintained by the National Archives providing digital copies of over 90,000 records found in the papers of six major figures of the founding era: George Washington, Benjamin Franklin, John Adams, Thomas Jefferson, Andrew Hamilton, and James Madison.<sup>22</sup> Founders Online contains official documents, diaries and personal letters written by and to these six persons. *Hein* contains over 300 legal materials published during the founding era, primarily federal and state statutes, executive department reports, and legal treatises.<sup>23</sup>

The texts in *COFEA* come from six sources: the National Archive Founders Online collection of papers of six founding figures (Washington, Franklin, Adams, Jefferson, Hamilton and Madison); legal materials published by HeinOnline; Evans Early American Imprints containing over 3000 books and other publications; Debates in the State Conventions; Records of the Constitutional Convention; and

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<sup>18</sup> *Corpus of Founding Era American English* (BYU Law Law & Corpus Linguistics), <https://lawcorpus.byu.edu>. *COFEA* was created by the J. Reuben Law School at Brigham Young University. See Stephanie Frances Ward, *New web platform helps users research meanings of words used in Constitution, Supreme Court Opinions*, ABA JOURNAL (Sep. 17, 2018). Both the data in *COFEA* and basic on-line search tools are freely available at: <https://lawnci.byu.edu/> Access to *COFEA* requires registration using a Google or Gmail account to guard against hacking.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* *Evans-TCP: Evans Early American Imprints* (the Text Creation Partnership, NewsBank/Readex Company, and the American Antiquarian Society have created accurately keyed and fully searchable text editions from among the 40,000 titles available in the [Evans Early American Imprints Collection](https://www.americanantiquarian.org/evans-early-american-imprints-collection) of the American Antiquarian Society), <https://www.textcreationpartnership.org/tcp-evans/>

<sup>22</sup> *About Founders*, Founders Online (National Archives), <https://founders.archives.gov/> Founders Online contains 27,639,683 words, distributed as follows: Washington Papers 12,044,694; Adams Papers 7,274,489; Hamilton Papers 3,895,699; Franklin Papers 2,578,518; Jefferson Papers 1,726,603; and Madison Papers 119,680. About 70% of the words in Founders come from either the Washington Papers (44%) or the Adams Papers (26%).

<sup>23</sup> *Corpus of Founding Era American English* (BYU Law Law & Corpus Linguistics), <https://lawcorpus.byu.edu>.

Statutes-at-Large from the first five Congresses.<sup>24</sup>

The reliability standard requires that a research method produce consistent results, allowing a different researcher applying the same method to duplicate the outcome. The results reported in this article can be replicated by anyone who applies the computerized search methods herein described to the identified databases.

*Validity* refers to how well the results from a method reflect real world patterns. Validity was built into the research reported here by beginning with observations of systemic features of real language use in the Founding Era, discovering patterns from the ground up, with no preconceptions, and subjecting hypotheses to empirical testing using the corpus data.

The origins of this article are in a research seminar paper written by Heather Kuhn for a course taught by Clark Cunningham at the Georgia State University College of Law in Atlanta, Georgia. Noor Abbady, then completing an MA in Applied Linguistics at Georgia State,<sup>25</sup> was a research and teaching assistant to Cunningham and assisted Kuhn in her linguistic research.

As an expert in data privacy and security, Kuhn was particularly interested in the implications of the Supreme Court's narrow interpretation of "cases" for litigation brought by victims of data theft and hacking ("data breaches"). There is currently disagreement among the federal courts of appeal as to what type of injury relating to a data breach must be alleged to state a "case" within the Supreme Court's interpretation of Article III.<sup>26</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> One of the research and teaching foci of the GSU Department of Applied Linguistics and ESL (<http://alsl.gsu.edu>) is Corpus Linguistics. Four of the graduate faculty members in the department (Viviana Cortes, Scott Crossley, Eric Friginal, Ute Römer) specialize in this area.

<sup>26</sup> *Compare* *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625 (3d Cir. 2017) (holding that Article III standing is established from the unauthorized dissemination of private information as a de facto injury based on Congress passing the Fairness in Credit Reporting Act establishing that it was an injury in and of itself); *Galaria v. Nationwide Mut. Ins. Co.*, 663 Fed. Appx. 384 (6th Cir. 2016) (holding that the complaint satisfies Article III standing because the alleged theft of personal data placed them at a continuing risk of fraud and identity theft) with *Kerin v. Titeflex Corp.*, 770 F.3d 978 (1st Cir. 2014) (holding that the consumer's injury was too speculative to establish standing under U.S. Constitution Article III and dismissed the case); *Whalen v. Michaels Stores, Inc.*, 689 Fed. Appx. 89 (2d Cir. 2017) (holding that the possible future threat of harm after her credit card information was exposed following a data breach at a retail store did not reach the level of a cognizable injury); *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613 (4th Cir. 2018) (holding that Article III standing existed for plaintiffs' alleging personal information was stolen in a data breach by showing injury in the form of out of pocket costs due to the data breach and the time lost while waiting for a response from the defendant over the fallout of the data breach); *Bassett v. ABM Parking Servs.*, 883 F.3d 776 (9th Cir. 2018) (holding that Congress did not create substantive right based on a statutory violation of the Fairness in Credit Report Act and Article III standing is not established).

Data breach cases bring into sharp relief the Supreme Court's position – based on its interpretation of “cases” – that “a plaintiff [does not] automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.”<sup>27</sup> Thus in *Spokeo Inc. v. Robins* the Court considered a lawsuit under the federal Fair Credit Reporting Act (FCRA), which provided that a consumer could sue for either actual damages or statutory damages of \$100 - \$1000 per violation plus costs and attorney fees. Thus, in an apparent effort to encourage consumers to enforce the act, Congress specifically authorized a consumer to recover substantial statutory damages even if the consumer could not recover “actual damages.” The Court insisted that its interpretation of “cases” in Article III trumped the clear intent of Congress, holding that a lawsuit alleging that a “web search engine” company had disseminated incorrect information about him should still be dismissed unless plaintiff could further allege the company's action caused him a “concrete” injury.<sup>28</sup>

Kuhn's research raised questions in her mind as to whether the doctrine of standing is actually a relatively recent addition to constitutional law, rather than being rooted in the original meaning of Article III. She noted that many legal scholars argue that standing doctrine is a modern invention.<sup>29</sup>

In the late 1960s and early 1970s the Supreme Court appeared to adopt a more generous notion of what constituted a case when public-interested citizens challenged governmental action (or inaction). Thus in both *Sierra Club v. Morton*<sup>30</sup> and *U.S. v. SCRAP*<sup>31</sup> groups of citizens challenging government actions as negatively impacting the environment were found to have standing by alleging collective harms such as a likelihood to suffer a future injury.

However, the approach of considering lawsuits alleging collective standing to meet the definition of “case” sharply changed with *Lujan v. Defenders of Wildlife* in 1992. In *Lujan*, the U.S. Secretary of the Interior had distributed new interpretations of a provision of the Endangered Species Act of 1973.<sup>32</sup> As a result,

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<sup>27</sup> *Spokeo* at 1549. See Michael E. Solimine, *Law Review Symposium 2009: Congress, Separation of Powers, And Standing*, 59 CASE W. RES. 1023, 1027 (2009); Heather Elliott, *Congress's Inability To Solve Standing Problems*, 91 B.U.L. REV. 159, 165 (2011); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U.L. REV. 169 (2012).

<sup>28</sup> *Id.* at 1548.

<sup>29</sup> See, e.g., James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 BRIT. J. AM. LEGAL STUD. 85 (2017). See also Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004); Cass Sunstein, *What's Standing After Lujan: Of Citizen Standing, Injuries, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

<sup>30</sup> 405 U.S. 727 (1972)

<sup>31</sup> *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 410 U.S. 922 (1973).

<sup>32</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

consultations on development were only required within the U.S. or on the high seas.<sup>33</sup> The Defenders of Wildlife sought to obtain an injunction against this interpretation claiming that a more limited consultation would “increase the rate of extinction of endangered and threatened species.”<sup>34</sup> Like the situation in *Spokeo*, which cited *Lujan*, the Court was unwilling to honor Congressional intent to allow enforcement lawsuits. Even though Congress had enacted a “citizen suit” provision providing that “any person may commence a civil suit on his own behalf to enjoin any person, including the United States, who is alleged to be in violation of [the Endangered Species Act],” the Court held:

“a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangible benefits him than it does the public at large – does not state an Article III case or controversy.”<sup>35</sup>

Questioning whether cases like *Lujan* and *Spokeo* were in fact well-grounded in the original meaning of the Constitution, Kuhn, assisted by Abbady, embarked on a study of data in *COFEA* to investigate whether the word “case” was indeed closely associated with the idea of injury in the Founding Era.<sup>36</sup> Their research laid a foundation for the work reported in this article.

Shortly after both Kuhn and Abbady graduated from Georgia State, Cunningham became aware that a three-judge panel from the U.S. Court of Appeals for the Sixth Circuit had ordered that the following letter be sent on May 28, 2019, to the lawyers in *Wright v. Spaulding*,<sup>37</sup> a case brought by a federal prisoner asking that his sentence be revised:

- “1. What is the original meaning of the Article III Cases or Controversies requirement?
2. How does the corpus help inform that determination?
  - a. See <https://lcl.byu.edu/projects/cofea/>.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 562. Citing Complaint P5, Appl. 13.

<sup>35</sup> *Lujan* at 574.

<sup>36</sup> As the authors do in this article, even though the Supreme Court consistently speaks of “case and controversy” as a single unit of meaning, even those two words appear in different parts of Article III, Kuhn and Abbady focused only on the original meaning of *case*. *But see* Robert J. Pushaw Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 *Notre Dame L. Rev.* 447 (1999) (marshalling historical evidence that in the Founding Era “case” v. “controversy” invoked different court roles).

<sup>37</sup> *Wright v Spaulding*, Case No. 17-4257 (6<sup>th</sup> Cir. 2019).

3. How does that original meaning relate to the distinction between holding and dicta?
4. How does that ultimate determination relate to which test in *Hill* should govern?”<sup>38</sup>

This letter appeared to Cunningham to be the first time that an American court had asked the parties in a case to do corpus-based linguistic research and report the results. Cunningham asked Kuhn and Abbady if they were interested in turning Kuhn’s seminar paper into a friend of the court (*amicus*) brief, to be filed in support of neither party.

After Kuhn and Abbady indicated they were interested, over the span of the next three months a research team comprised of the authors was assembled.<sup>39</sup> An initial *amicus* brief of only 12 pages was submitted to the court on July 25, 2019, along with a motion for leave to appear as *amici*. This initial brief only reported the linguistic analysis of “such other questions” discussed below, in Part III (B).

In the motion for leave to appear as *amici*, the research team indicated that page limitations and time constraints prevented them from including all their research and that they were continuing to analyze the usage of “case” and “cases” in the Founding Era. The research team therefore requested leave to file an additional supplemental brief not to exceed 25 pages on or before August 29, 2019.

On August 2, 2019, the three-judge panel entered an order “direct[ing] the amici to file a supplemental brief no later than August 15, 2019.”<sup>40</sup> (This deadline was later extended to August 22.)<sup>41</sup> The authors believe this order was the first time an American court had directed a team including expert linguists to submit their research in the form of a brief.

The linguistic analysis supporting an alternative interpretation of “cases” in Article III as a “shell noun,” discussed below, in Part III (C), was developed in the three weeks following the filing of the preliminary brief and was the focus of a supplemental brief on August 22, 2019.

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<sup>38</sup> *Id.* (May 28, 2019) (Letter from the court to lawyers for the parties requesting supplemental briefs on original meaning of the Article III Cases or Controversies requirement).

<sup>39</sup> Cunningham and Egbert had previously collaborated on an *amicus* brief on the original meaning of “emolument” that was submitted to the Fourth Circuit in support of neither party in the lawsuit brought by Maryland and the District of Columbia discussed *supra* notes \_\_\_ - \_\_\_ and accompanying text. The brief is available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3334017](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334017). See also Clark D. Cunningham & Jesse Egbert, *Using Empirical Data to Investigate the Original Meaning of “Emolument” in the Constitution*, 36 Ga. St. L. Rev. \_\_\_ (2020) (also in this issue), and generally materials posted at *The original meaning of “cases” in Article III of the US Constitution*, <http://www.clarkcunningham.org/MeaningOfEmolument.html>.

<sup>40</sup> *Wright v. Spaulding* (August 2, 2019) (Order granting motion to file amicus brief and directing the amici to file a further supplemental brief no later than August 15, 2019).

<sup>41</sup> *Id.* (Aug. 12, 2019) (Letter to counsel granting extension to file a supplemental brief until August 22, 2019).

On September 19, 2019, a decision was issued in the *Wright* case dismissing the petitioner’s habeas case.<sup>42</sup> A footnote acknowledged that a “team of corpus linguistics researchers submitted two amicus briefs” and indicated that the court was “grateful to ... the amici for their hard work.”<sup>43</sup> However, the court did not end up addressing the original meaning of “cases or controversies” in Article III in its opinion and made no substantive use of the research reported in the two amicus briefs.

However, well before the *Wright* decision came down, the research team had moved forward to use the *amicus* research as the foundation for this article.

### **III.A linguistic analysis of the original meaning of “cases” in Article III**

#### **A. Introduction**

Searches for “case” and “cases” in the entire *COFEA* database produce 93,255 and 31,840 hits, respectively. This is too large a number for individualized qualitative analysis and is a daunting data set for pattern searching. Methodological approaches include selecting randomized samples, narrowing the search query, narrowing the source material, and/or using sophisticated linguistic analysis tools to look for recurrent patterns around the search term(s).

After the research team was assembled to explore whether linguistic analysis might produce results worth reporting to the *Wright* panel, the first steps involved *COFEA* searches using queries where *case*<sup>44</sup> appeared with either a pre-modifying adjective (e.g. “criminal case”) or post-modifying prepositional phrase (e.g. “cases of debt”). One of the more fruitful queries appeared to be a search for the phrase “the case of” which was found to be a dominant pattern around the word “case”. Although the team expected that this phrase would be productive of examples where *case* meant something like “lawsuit” (e.g. “the case of Smith v Jones”), the search in fact produced many examples where qualitative review suggested *case* had a broad, generic meaning not related to “adversarial litigation.”

The next step involved a combination of narrowing the source material and using analytic methods that go beyond what can be accomplished with *COFEA*’s on-line tools. The team elected to apply a widely-used tool called *AntConc*<sup>45</sup> to search for significant recurrent patterns. *AntConc* requires an off-line corpus that

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<sup>42</sup> *Id.* (Sep. 19, 2019) (affirming district court and dismissing habeas petition).

<sup>43</sup> *Id.*, slip op at 7 n.1.

<sup>44</sup> When italicized, *case* includes both the singular and plural form.

<sup>45</sup> *AntConc* is a program for analyzing electronic texts (that is, corpora) in order to find and reveal patterns in language. Laurence Anthony, *AntConc* (Version 3.5.8) (2019), available from <https://www.laurenceanthony.net/software>.

can be loaded into the tool. Fortunately, Cunningham had already employed a recent graduate of Georgia State's Applied Linguistics PhD program to create an off-line database taken from one of the *COFEA* sources: the National Archives Founders Online.

Within the off-line database derived from Founders Online, the research team decided to focus on two sub-corpora: documents from the National Archive collections of the papers of James Madison and Alexander Hamilton from the 1780-1789 time period.<sup>46</sup> Both men participated in drafting the Constitution at the Constitutional Convention; Madison has been described as the “master builder of the Constitution.”<sup>47</sup>

Based on the hypothesis that “case” might appear in similar syntactic structures to “cause” and “suit”, if it indeed referred to a lawsuit or court proceeding, the team used *AntConc* to search for instances of “case”, “cause” and “suit” followed by the post-modifying features of “case” appearing in the original drafting history (e.g. *of, which, in which, arising, etc.*). These searches returned total occurrences of post-modified “cause” and “suit” that provided sample sizes too small (64 and 6 respectively) for reliable analysis. A more adequate sample was produced by searches for post-modified *case* – over 400 occurrences.

However, in the process of examining the examples of post-modified *case* from the Madison corpus, the direction of research shifted when the team focused on the following passage found among the “cases arising” samples:

“the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony”

This text came to the research team from James Madison's famous notes of the Constitutional Convention, published after his death, available in the Founders Online database.<sup>48</sup> However, in the case of this text, Madison's notes conform to the rather cryptic official Journal of the Convention published in 1818, based on papers transferred to the Secretary of State by George Washington, who was the presiding officer at the Convention.<sup>49</sup>

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<sup>46</sup> Madison and Hamilton corpora are the smallest in the Founders Online database.

<sup>47</sup> Max Farrand, *The Framing of the Constitution of the United States* 196 (1913).

<sup>48</sup> James Madison took “full and careful notes of the proceedings in the Convention,” but did not allow them to be published until after his death in 1836. 1 *Records* xv ([A]ll other records paled into insignificance” once Madison's notes were published. *Id.*)

<sup>49</sup> I *Documentary History of the Constitution of the United States of America 1786-1870* 48, 101 (U.S. Dept. of State 1894). See 1 *Records* xi-xii.

As the team further investigated the context of this text, they discovered that it was an important predecessor of the final version of Article III of the Constitution.

**B. Analysis of “such other”**

The Constitution was developed from fifteen resolutions introduced during the first week of the Convention, on May 29, 1787, by the Virginia delegation (“the Virginia Plan”).<sup>50</sup> James Madison played a major role in devising and promoting the Virginia Plan.<sup>51</sup> Resolution 9 addressed the creation of a federal judiciary:

the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.<sup>52</sup>

On July 18, 1787, the Convention unanimously adopted the text discovered by the research team as a simplified version of Resolution 9:

Original Resolution 9	July 18 Replacement Resolution
the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony	the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature,  and to such other questions as involve the National peace and harmony <sup>53</sup>

<sup>50</sup> Farrand at 202.

<sup>51</sup> Richard Beeman, *The Penguin Guide to the United States Constitution* 150 (2010).

<sup>52</sup> 1 *The Records* 21-22.

<sup>53</sup> 2 *Records* 39.

The official Journal did not record who proposed the replacement resolution on July 18, but Madison's notes indicate that it was his proposal, in response to "several criticisms having been made" of the definition of the jurisdiction of the national judiciary.<sup>54</sup>

On July 27, 1787, the Convention adjourned until August 6, so that a Committee of Detail "might have time to arrange, and draw into method & form the several matters which had been agreed to by the Convention, as a Constitution for the United States."<sup>55</sup> The July 18 replacement resolution was one of the "matters which had been agreed to by the Convention" referred to this Committee. As discussed below, the draft reported back to the Convention by the committee became the template for the Constitution.

The team's linguistic analysis focused on the relationship between "...cases arising under the laws passed by the general Legislature" and "*such other questions as involve the National peace and harmony*" in the July 18 replacement resolution. Based on the understanding of "such other" in contemporary language use, one would interpret this excerpt from the drafting history to mean that "...cases arising under the laws passed by the general Legislature" was a type or example of "*questions as involve the National peace and harmony*".

In order to determine whether this contemporary understanding of the "such other" pattern was consistent with that of the founding era, the research team then returned to *COFEA* to examine the frequency and function of the "*a...such other b*" pattern in founding era documents.

The preliminary search query, "such other \*/n (noun)," returned 2,821 hits dispersed throughout *COFEA*, appearing in every sub-corpus, and in each time period. The frequency and extent of this dispersion indicated that the phrase, "*a...such other b*," was commonly used and recognized in the founding era.

The research team then moved to an in-depth, qualitative analysis of a random sample of 100 occurrences of the pattern generated from *COFEA* sources. Analysis revealed both regular *syntactic*<sup>56</sup> and *semantic*<sup>57</sup> features.

In assessing the semantic meaning of phrases in the form "*a...such other b*", it was clear to the research team that *a* is always a type or example of *b*. Consider the following text regarding extending navigation on the Potomac River found in the papers of George Washington:

"the said president and directors... shall have full power and authority ... to cut such canals, and erect such locks, and perform such other works as they

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<sup>54</sup> James Madison, *The debates in the Federal Convention of 1787* 279 (2007) (*hereinafter Madison's Notes*).

<sup>55</sup> George Washington, *DIARY*. 2 Records 65. *See also*, *DIARY*, *id.* at 67.

<sup>56</sup> Syntax describes how words are arranged to construct a sentence.

<sup>57</sup> Semantics addresses the meaning of words, phrases, and sentences.

shall judge necessary for opening, improving, and extending the navigation of the said river”<sup>58</sup>

“Cut canals” and “erect locks” are examples of the general category of “works” that can be done to improve navigation on a river.

Phrases using “such other” also have a set syntactic pattern, where the more general term *b* always follows the more specific term(s) *a*. Consider the following example:

“The second plowing ...will be turned upwards, and ... may be planted with potatoes or such other vegetables as may best suit the judicious husbandman’s inclination.”<sup>59</sup>

Potatoes (*a*) is a specific example from the general category of vegetables (*b*). The syntax cannot be reordered to say “planted with vegetables and such other potatoes.”

The research team carefully examined all 100 concordance lines (i.e. instances of the search string, plus surrounding context) in the random sample looking for counter-examples that might disconfirm these hypotheses about the semantic and syntactic features of “such other” phrases and found none.

The research team then conducted a second, more extended analysis of the “such other” pattern in *COFEA*.<sup>60</sup> For this second, more labor-intensive analysis, results coming from the Hein Online source in *COFEA* were excluded. Currently it is quite difficult to access through *COFEA* the full context of concordance lines obtained from Hein Online, and the team wanted to be able to review the full context of each occurrence.<sup>61</sup>

This second search returned 1,395 hits, appearing in a variety of different forms. Three additional sets of 100 randomized lines were extracted from the total of 1,395 hits and manually reviewed. In many instances it was necessary to access the full context to find the “a” that corresponded with the “b” following “such other.” Analysis of these 300 “such other” occurrences showed findings consistent with the original sample of “such other \*/n”, suggesting that regardless of the form that the phrase appears in, its function and meaning remain consistent.

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<sup>58</sup> <https://founders.archives.gov/documents/Washington/04-02-02-0173-0003> (emphasis added).

<sup>59</sup> John Spurrier, *The Practical Farmer* 5 (1793) (emphasis added).

<sup>60</sup> In order to broaden the search and gather varied forms in which the target phrase appeared, for these next three sets the noun tag was removed from the search query so the search term was just “such other.”

<sup>61</sup> Concordance lines based on Hein Online source materials are also much more likely to contain optical scanning errors and duplicate entries than search results from the other *COFEA* sources.

Five different forms of “*a...such other b*” were found in the samples from the second search. Each form appeared in each of the three samples at a similar frequency, suggesting an adequately representative sample of the corpus. Forms and their reported frequencies are presented in the chart below.

	Sample A	Sample B	Sample C
“ <i>a...such other + noun</i> ”	89	87	89
“ <i>a ...such other + pre-modifier + noun</i> ”	8	7	6
“ <i>a ...such other + of the + noun</i> ”	1	3	1
“ <i>a ...such other + as</i> ”	1	1	3
“ <i>a. Such other b</i> ”	1	2	1
Total	100	100	100

The function of the phrase, “*a such other*”, is consistent in all five forms, where *a* is considered a type, or example of *b*. No robust counter examples were found within the three samples. In the following examples of each of the four patterns discovered in the second search, both *a* and *b* are underlined for identification.

1) “*a...such other + noun*”

“...the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for the purpose.”

– United States Statutes at Large, 5-3stat743-1, Sample B, Line 58

2) “*a ...such other + pre-modifier + noun*”

In this form, the presence of the pre-modifier preceding the noun clearly displayed no alteration of the meaning of the previous form.

“...and proper funds provided, for raising money to cultivate or friendship with our Indian neighbors, and to support such of our fellow subjects, who are or may be in distress, and for such other like benevolent purposes.”

– Evans Early American Imprints, evans.N12833, Sample B, Line 31

3) “*a* ...such other + of the + (noun)”

The presence of the preposition before the noun here is clearly stylistic, and while the form is different, the function of the form remains unaltered.

“I have directed the Marshal ... to have invoices and such other of the shipping papers as are in the trunk faithfully translated and authenticated and sent on to me.”

- Founders Online, fndrs.washington.05-14-02-0360, Sample A, Line 53

4) “*a* ...such other + as”

Although *b* is not explicitly stated in the phrase at all, it is naturally understood by the reader based on our understanding of the meaning of the phrase, “such other”, in context.

“I afterwards wrote him another letter desiring expressly that if this route was likely to retard much his attendance on Congress, he would take such other as should be shortest.”

– Founders Online, fndrs.jefferson.01-10-02-0040, Sample C, Line 6

In the above example, the reader naturally understands the text as such: “...he would take such other route as should be shortest.”

5) “*a*. Such other *b*”

In lines of this form, “Such other” begins a new sentence. *a* is still present in the text preceding the sentence, and meaning remains unchanged.

“The principal means in the hands of genl. govmt. for encouraging our own manufacturers is to ensure a preference and encourage a demand for them by overcharging the prices of foreign by heavy duties. Such other means of encouragement as have not been confided to the general government must be left with those of states that each may deal them out...”

– Founders Online, fndrs.jefferson.01-23-02-0161, Sample B, Line 40

With no robust counter examples appearing in the three 100-line samples, the data show that regardless of the form in which the term, “*a*...such other *b*” appears, the meaning and function of the phrase remains unchanged, where *a* is considered an example, or type of *b*.

Further analysis revealed that not only did the form of the phrase, “*a* such other”, vary without effect on the meaning, the specific form, and placement of *a* and *b* within the passage, was similarly without effect. While *a* often appeared as a single or compound noun (*ex. 1*), it more frequently appeared in a form with multiple clauses (*ex. 2*), that were later included by *b*. This variation in the form of *a* had no effect on the function of the “*a* such other *b*”. Consider the two examples below.

*ex. 1*: “...the persons I have named be permitted, on the morrow, to come before your majesty, in the presence of Don Juan, and such other persons as your majesty may think fit...”

– Evans Early American Imprints, evans.N20640, Sample B,  
Line 66

*ex. 2*: “As I have observed before, Mr. Dodge appears to me a valuable intel intelligencer; and, if Congress are pleased to honor him with an opportunity, he will give them an account of the posts of Detroit and Niagara when he left them, and of that at Michilimachinac, - of the enemy’s naval force on Lakes Erie and Ontario, and of such other matters in Canada as he was able to inform himself of...”

– Evans Early American Imprints, evans.N23768, Sample C,  
Line 49

Similarly, while *a* often appeared in a series with *b* (*ex. 3*), it more frequently appeared somewhere in the text preceding *b* (*ex. 4*). Further examination of these instances similarly showed no effect on the function of the phrase. Consider the examples below.

*ex. 3*: “This is true, but in order to make this Demand, France must agree by Treaty to open all her Ports in the west Indies, to give us a right to import into them Flour, Bread, and Tobacco, and such other articles as Great Britain shall permit.”

– Founders Online, fndrs.hamilton.01-19-02-0087, Sample A,  
Line 2

*ex. 4: “Courts of sessions, common pleas, and orphan courts shall be held quarterly in each city and county; and legislature shall have power to establish such other courts as they may judge for the good of the inhabitants of the state.”*

– Evans Early American Imprints, evans.N13761,  
Sample C, Line 25

Applying these research findings to the July 18 resolution leads to these conclusions:

- 1) For the members of the Convention who considered and unanimously adopted the July 18 resolution, “cases arising under laws passed by the general Legislature” was a type or example of “questions as involve the National peace and harmony”; and
- 2) “other questions as involve the National peace and harmony” (*b*) was a more general category of jurisdiction than “cases arising under laws passed by the general Legislature” (*a*).

Due to time and space constraints, the linguistic analysis reported in the initial *amicus* brief submitted to the *Wright* panel was largely limited to these findings about the use of the “such other” pattern.

### **C. Case used as a shell noun**

After filing the preliminary brief, the team returned to a further bottom-up analysis of the public papers of James Madison,<sup>62</sup> this time using *AntConc* to look generally for phrases containing “case” or “cases” that were of high frequency. The team considered a phrase to be of “high frequency” if it appeared more than 50 times and in more than 10 different texts.<sup>63</sup>

This search produced 8,900 examples of “case” and 3,024 of “cases.” Analysis showed that uses of both “case” and “cases” were highly patterned, meaning both words occurred repeatedly in the same phrases. Over 79% of all occurrences of “cases” (7,066/8,900) appeared in one of 23 highly frequently recurrent phrases; 36% of all occurrences of “cases” (1,088/3,024) appeared in one of 10 frequently recurrent phrases.<sup>64</sup> Random samples respectively for “case” and

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<sup>62</sup> For this analysis, the team did not restrict itself to a particular time period but searched all the public papers of James Madison downloaded from Founders Online (27,416 files, 10,876,580 words).

<sup>63</sup> The second criterion excludes phrases that appear more than 50 times but only in a few documents.

<sup>64</sup> Tables listing all these patterns can be found in an on-line appendix posted in Clark D. Cunningham, *The Original Meaning of “cases” in Article III of the US Constitution*, Resources on

“cases,” each containing one fifth of the total examples of each word, were then subjected to line-by-line manual review.

The manual review brought to mind the term “shell noun,” introduced by Hans-Jörg Schmid.<sup>65</sup> Schmid developed this terminology to help explain why many of the most commonly used nouns in English can be hard to define.<sup>66</sup> In listing such nouns, Schmid twice begins the list with *case*.<sup>67</sup>

When a word is used as a shell noun, it is hard to define because the noun becomes semantically abstract and vague, and is not used to bring an inherent meaning to the context but instead serves to introduce and characterize what Schmid calls “chunks of information,”<sup>68</sup> found elsewhere in that context. The noun functions to form a “shell” around such (often complex) “chunks of information,” which are “contained” within that “shell” providing the “shell content.”<sup>69</sup> Thus, when a noun like *case* is used as a shell noun, it creates in combination with the shell content a complete concept but one that is entirely contingent on the particular context of use.

Consider the following two examples used in the same text, a letter written by Madison in 1805 when he served as Secretary of State in the Jefferson administration:

“In all cases where there may be no special grounds for suspecting an escape of the offender, by the departure of the vessel of war, or the removal of him beyond the reach of your warrant, you are to take no step towards applying the extraordinary force authorized by the law, until you shall receive such further directions as the President shall, in consequence of your report, think proper to be given.” 9 *Madison Papers* 414-15 (emphasis added)  
<https://founders.archives.gov/documents/Madison/02-09-02-0465>

“Whatever may be the result of these proceedings, you are, without delay, to transmit a full and exact report thereof to this department; and even to report for the information of the President, any important circumstance which may occur in the course of them; particularly in cases where there may possibly be time for his directions thereon to be received and pursued.” *Id.* (emphasis added)

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Law & Linguistics, [www.clarkcunningham.org/Law-Linguistics.html](http://www.clarkcunningham.org/Law-Linguistics.html) (“Meaning of Cases Website”)

<sup>65</sup> Hans-Jörg Schmid, *English Abstract Nouns as Conceptual Shells* (2000).

<sup>66</sup> *Id.* at 13.

<sup>67</sup> *Id.* at 3, 6.

<sup>68</sup> *Id.* at 14,

<sup>69</sup> *Id.* at 7.

The shell content in each example is underlined and is notably complex, especially in the first example. The meaning of “cases” is clearly different in the first and second example, even though occurring in the same short letter, because the shell content is different for each use of “cases.” Looking at the second example, it is particularly clear that “cases” does not bring any inherent meaning to the sentence; the underlined shell content is necessary to give meaning to “cases.” If the shell content is removed, the concluding phrase “particularly in cases” no longer makes sense.

Schmid conducted a systematic empirical analysis of a very large corpus of contemporary English to identify patterns likely to signal the usage of a shell noun phrase.<sup>70</sup> One of the strongest patterns he found was “noun” + “wh word” (where, when, why) + clause,<sup>71</sup> which is the pattern seen in both examples above. The research team found 82 examples of the pattern “in cases where” in the Madison corpus, typically followed by a clause. It was seeing patterns like this that brought the shell noun theory to mind.

The team’s manual review of the 1/5 samples of “case” and “cases” in the Madison corpus generally confirmed that *case* was used pervasively as a shell noun in ways consistent with Schmid’s analysis of shell noun phrases in contemporary English.<sup>72</sup>

When considering a text from the Founding Era that clearly has a legal context – like Article III – a reader may be “primed”<sup>73</sup> to assume that *case* brings to the context an inherent meaning, like “adversarial litigation.” However, a careful reading of the entire context may reveal that the meaning of *case* has to be understood instead as forming a “shell” around content found elsewhere in the text. Take for example this phrase from the Articles of Confederation in the section setting out a very complicated process for resolving disputes between two states: “the judgment or sentence and other proceedings being in either case transmitted to congress.”<sup>74</sup> Read in isolation and preceded by “judgment,” “sentence,” and

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<sup>70</sup> *Id.* at 38-62.

<sup>71</sup> *Id.* at 22, 44. A clause can be extracted from the sentence in which it is embedded and expressed as an independent, complete sentence, and therefore must always include a verb phrase, *e.g.* “There may possibly be time for his directions thereon to be received and pursued” extracted from the second example quoted above. Douglas Biber, Susan Conrad & Geoffrey Leach, *Longman Student Grammar of Spoken and Written English* (2002).

<sup>72</sup> Additional sample shell noun phrases from the Madison Papers are posted on the *Meaning of Cases Website*.

<sup>73</sup> Words can be “primed” for semantic association; such priming is sensitive to the domain in which a word is encountered. Michael Hoey, *Lexical priming and the properties of text*, in *CORPORA AND DISCOURSE* 385 (A. Partington et al eds. 2004) Thus, priming to associate “case” with “adversarial litigation” is particularly likely if the reader has legal training.

<sup>74</sup> *Articles of Confederation of 1781*, art. IX

“proceedings,” “either case” could easily be interpreted by a 21<sup>st</sup> century reader as referring to two alternate instances of litigation. But when the fuller context is examined, it becomes clear that “either case” instead refers to two complicated contingencies peculiar to this particular context, which together provide the essential shell content for “either case”:

Contingency 1: “if either party shall neglect to attend at the day appointed, without showing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive” *Id.*

Contingency 2: “and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive” *Id.*

At this point the research team had reached a working hypothesis that there is a plausible alternative to the Supreme Court’s interpretation of “cases” in Article III as meaning “injured plaintiff litigation.” That alternative interpretation is that “cases” in Article III functions as part of shell noun phrases. “Cases” would thus bring no inherent meaning to its use in Article III and would have different meanings for each differing shell content in that text.

To test this hypothesis, the research team conducted a top-down computerized search of the entire *COFEA* database for every text using one of the three patterns that follow the Article III phrase, “the judicial power shall extend to”: (1) all cases arising, (2) all cases affecting and (3) all cases of.<sup>75</sup> This search produced 79 examples of “all cases arising,” 50 examples of “all cases affecting,” and 608 examples of “all cases of.”

Because of the small number of examples for “arising” and “affecting,” the team was able to conduct a comprehensive manual review. First, each example was classified as to whether it was either an exact duplicate of the Article III text or obviously a discussion of that text, leaving a remainder to be analyzed:

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<sup>75</sup> For “arising” and “affecting” the search captured all phrases in which “all cases” preceded the verb by up to five words, accounting for the possibility of intervening words such as the phrase “both in law and equity” which separates “all cases” from “arising” in Article III.

	Duplicate of Article III	Example is discussing Article III	Remainder	Total
arising	49	25	5	79
affecting	42	6	2	50

This result suggests that the formulations “all cases arising” and “all cases affecting” were very unusual in the Founding Era outside the specific context of Article III, though they did occur.

Analysis of the remaining examples, including examination of surrounding text in the original sources, indicated that every use in the full *COFEA* database of either “all cases arising under” or “all cases affecting” that was not derived from Article III was a shell noun phrase.<sup>76</sup> Take for example this excerpt from a medical treatise:

“It is evident to the most superficial observer, that the sensibility, and irritability of every part of the body, are rendered less susceptible of impressions, by the use of opium. In all cases of pain arising from any cause, except that from inflammation, it is a sure and never failing palliative, and generally succeeds in procuring sleep, if given in doses sufficiently large” William Currie, *Observations on the causes and cure of remitting or bilious fevers* 75 (1798) (emphasis added)

According to this analysis, then, if the Supreme Court’s interpretation is applied to “all cases arising” and “all cases affecting” in Article III, Article III would be the only text among the over 126,000 texts in *COFEA* where these phrases were not shell noun usages.

Turning to the much larger set of 608 examples of “all cases of,” the first step reduced the number of examples by about 1/3 by removing all texts downloaded from Hein Online. Because identification of whether an example was a shell noun phrase often included viewing the full original contexts in the underlying source, Hein-sourced examples were removed because of the difficulty in *COFEA* of accessing full original texts in Hein.<sup>77</sup>

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<sup>76</sup> Each example was independently classified as a shell noun phrase by Ren, Abbady and Cunningham, using common criteria derived from Schmid. All seven “remainder” examples are posted as charts on the *Meaning of Cases Website*. One of the five examples in the “arising” chart appears twice because it was downloaded from two different sources.

<sup>77</sup> 242 Hein-based lines were excluded from the total data set of 608. Texts sourced from Hein Online also present far more instances of duplicated lines and severe Optical Character Recognition (OCR) corruption making recourse to the underlying texts all the more necessary. The research team did not believe that exclusion of Hein-sourced lines rendered the remaining examples

For the next step, the team extracted from the remaining 336 examples of “all cases of” three random samples of 20 concordance lines per sample, a total of 60 lines.<sup>78</sup> Manual review of each randomized sample set indicated that every line represented the use of *case* as a shell noun phrase.<sup>79</sup> Take for example:

“the court of wardens shall and may have, hold, and exercise, the same powers and authorities in all cases of debt or damage, by whatever means sustained, and which do not exceed in value 20 / (except where the title to lands may come in question) as the judges of the court of common pleas or admiralty have, hold, or do exercise, in their respective jurisdictions” *Zylstra v. Corporation of Charleston*, 1 S.C.L. (Bay) 382, 394 (1794) (S. Car.) (emphasis added)

#### IV. Applying linguistic analysis to Founding Era texts

##### A. Predecessor texts to the Constitution

During the drafting process the Constitutional Convention relied significantly on the Articles of Confederation and state constitutions.<sup>80</sup> In this section we look at the use of *case* in the Articles of Confederation and in two influential state constitutions as evidence of language use that can be considered comparable to how the drafters and ratifiers of the US Constitution used language. We find in these documents that *case* was used often, and always as a shell noun.

*Case* appears six times in the Articles of Confederation and is used each time as a shell noun. These sections appear below. We have numbered each of the six uses of *case* and then identified by bracket labeling and underscoring the corresponding shell content:

##### Article VI

[additional shell content of *case2*, from Article IX]

No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received

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unrepresentative of Founding Era usage; nonetheless all the excluded Hein concordance lines are [posted](#) on the *Meaning of Cases Website*.

<sup>78</sup> The random samples were extracted from Excel file by using the function EXCEL “= RAND()”. A column containing this function was inserted in the original spreadsheet of 335 lines, then, to extract three samples, the sorting function was used with each time a new random number was automatically assigned to each row by the function = RAND().

<sup>79</sup> Each example was initially classified as a shell noun phrase by Ren, then double-checked by Abbadly; Cunningham provided occasional consultation. Tables displaying each randomized sample set are posted on the *Meaning of Cases Website*.

<sup>80</sup> Farrand at 127-29.

certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the united states in congress assembled can be consulted: nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the united states in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the united states in congress assembled, [shell content of *case1*] unless such state be infested by pirates, in which *case1* vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the united states in congress assembled, shall determine otherwise.

#### **Article IX.**

The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the *cases2* mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities, whatsoever — of establishing rules for deciding in all *cases3*, what [first shell content of *cases3*] captures on land or water shall be legal, and in what manner [second shell content of *cases3*] prizes taken by land or naval forces in the service of the united states shall be divided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all *cases4* [shell content of *cases4*], of captures provided that no member of congress shall be appointed a judge of any of the said courts.

... [first shell content of *cases5*] and if either party shall neglect to attend at the day appointed, without showing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; [second shell content of *case5*] and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either *case5*

transmitted to congress, and lodged among the acts of congress for the security of the parties concerned:

... [*shell content of case6*]

unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which *case6* they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared.

The famous 1776 Constitution of Virginia, adopted even before the Declaration of Independence, uses *case* a number of times, but always as part of a shell noun phrase that is obviously not referring to adversarial litigation.

SEC. 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

Whereas George the third, King of Great Britain and Ireland, and elector of Hanover, heretofore intrusted with the exercise of the kingly office in this government, hath endeavoured to prevent, the same into a detestable and insupportable tyranny, by putting his negative on laws the most wholesome and necessary for the public good: ...

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever

A Governor, or chief magistrate, shall be chosen annually by joint ballot of both Houses (to be taken in each House respectively) deposited in the conference room; the boxes examined jointly by a committee of each House, and the numbers severally reported to them, that the appointments may be entered (which shall be the mode of taking the joint ballot of both Houses, in all cases)

he [the Governor] shall, with the advice of the Council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the law shall otherwise particularly direct: in which cases, no reprieve or pardon shall be granted, but by resolve of the House of Delegates.

They shall annually choose, out of their own members, a President, who, in case of death, inability, or absence of the Governor from the government, shall act as Lieutenant-Governor.

In case of death, incapacity, or resignation, the Governor, with the advice of the Privy Council, shall appoint persons to succeed in office, to be approved or displaced by both Houses.

The Governor, with the advice of the Privy Council, shall appoint Justices of the Peace for the counties; and in case of vacancies, or a necessity of increasing the number hereafter, such appointments to be made upon the recommendation of the respective County Courts.

In case of vacancies, either by death, incapacity, or resignation, a Secretary shall be appointed, as before directed; and the Clerks, by the respective Courts.

In case of vacancies, the Speaker of either House shall issue writs for new elections.

In the section stating that trial by jury “ought to be held sacred,” the Virginia Constitution uses the words “controversies” and “suits” rather than “cases.”

“SEC. 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.”<sup>81</sup>

The state constitution considered to have the greatest influence on the drafting of the U.S. Constitution was the 1780 Constitution of Massachusetts, largely written by John Adams.<sup>82</sup> In a provision apparently based on the Virginia protection of the right to trial by jury, Adams also used “controversies” and “suits” and added the word “causes.”<sup>83</sup>

“Art. XV. In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

The word “cases” also appears once in this provision, which is part of a prefatory “Declaration of Rights,” but can be seen as functioning as part of a shell noun phrase.

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<sup>81</sup> *Va. Const.* of 1776, sec. 11.

<sup>82</sup> *John Adams and the Massachusetts Constitution*, <https://www.mass.gov/guides/john-adams-the-massachusetts-constitution>.

<sup>83</sup> *Mass. Const.* of 1780, Part I, Art. XV.

When later in the Massachusetts Constitution its Article III establishes the judicial power, it uses a laundry list of words but does not include “cases”:

The general court shall forever have full power and authority to erect and constitute judicatories and courts of record or other courts ... for the hearing, trying, and determining of all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes, and things whatsoever” *Id.*, Ch. I, Art III (emphasis added)

## B. Drafting History of the Constitution

We now return to a more extensive review of the drafting history of Article III at the Constitutional Convention. In the course of this review, we feel that we have reconstructed a useful narrative of how Article III came to take its final form, and in particular how the drafters made the transition from talking in terms of “questions as involve the National peace and harmony” to instead using “cases” recurrently. Although it might appear in some parts of this section that we are trying to infer the intent of some of the delegates, we are doing so primarily in the context of trying to understand their language usage. As Madison advised, the words used by “[those who] prepared and proposed the Constitution” can be considered as “presumptive evidence of the general understanding at the time of the language used.”

Reviewing texts from the Constitutional Convention reveals a number of examples of language use consistent with an interpretation that “cases” was being used as a shell noun. Indeed, the shell noun interpretation provides a plausible explanation for statements by delegates that would otherwise be puzzling if “cases” was being used and understood as having the “injured plaintiff litigation” meaning the Supreme Court has assumed was intended.

As discussed above, Article III has its origins in the 9<sup>th</sup> of 15 resolutions introduced on May 29, 1787, during the first week of the Constitutional Convention by Virginia Governor Edmund Randolph on behalf of the Virginia delegation (“the Virginia Plan”). Resolution Nine proposed that “a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature.”<sup>84</sup> The “jurisdiction of the inferior tribunals” was to hear and determine in the first instance:

(1) all piracies & felonies on the high seas, (2) captures from an enemy; (3) cases

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<sup>84</sup> 1 *The Records of the Federal Convention of 1787* 21-22 (ed. Max Farrand 1966) (hereinafter “*Records*”).

in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; (4) impeachments of any National officers, and (5) questions which may involve the national peace and harmony.<sup>85</sup>

The supreme tribunal would have jurisdiction to hear and determine such matters “in the dernier resort.”<sup>86</sup>

Resolution Nine used *case* to describe only one of five categories of jurisdiction. This use, for the 3<sup>rd</sup> category, occurs in what Schmid has identified as a shell noun pattern – “noun + which” – that occurs with *case*.<sup>87</sup> This use of *case* appears to form a “shell” around two very different, complicated ideas that form the “shell content”: (a) situations of interest to foreigners and “citizens of other states applying to such jurisdiction” and (2) situations “respect[ing] the collection of the National revenue.”

The first part of this shell content seems to identify “foreigners or citizens of other States applying to such jurisdictions” as the persons who would be able to invoke federal jurisdiction but the basis for invoking jurisdiction is stated as whether such persons “may be interested,” a phrase that seems quite distant from the Supreme Court’s insistence that federal courts are only available to plaintiffs who have suffered a concrete and particularized injury.<sup>88</sup>

The second part of this shell content reads “cases ... which respect the collection of National revenue,” a jurisdictional category that has no apparent connection with the first part other than being within the same shell noun phrase introduced by “cases.” However, it is in fact characteristic of shell noun phrases to combine two or more very different ideas into a single complex concept the meaning of which is entirely specific to that particular context.<sup>89</sup> It is not at all clear who would be able to invoke federal jurisdiction “respect[ing] the collection of National revenue” and what federal courts would be expected to do in relation to such matters. Like the first part of the shell content, this second part does not obviously refer to “injured plaintiff litigation.”

For the last jurisdictional category, Resolution Nine used a phrase beginning with the word “questions.” According to Schmid, *question* is very commonly used in contemporary English as a shell noun, and the construction “noun + which” is also a typical shell noun pattern.<sup>90</sup> “Questions” in the 5<sup>th</sup> category

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<sup>85</sup> *Id.* (numbering inserted)

<sup>86</sup> *Id.*

<sup>87</sup> Schmid at 289.

<sup>88</sup> *Lujan*, 504 U.S. at 56-61.

<sup>89</sup> See Schmid at 14, 80, 370.

<sup>90</sup> Schmid at 4, 62.

certainly appears to be a vague and abstract noun which functions to form a shell around a complex set of ideas: “which may involve the national peace and harmony.”

The analysis presented above about the use of “such other” in the phrase “cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony” indicated that the Convention delegates understood “cases arising under laws passed by the general Legislature” to be a type or example of the more general jurisdictional category “questions as involve the National peace and harmony.” Our shell noun analysis indicates that if “case” or “question” are being used as shell nouns, the meaning of the phrase they introduce comes primarily from the shell noun content and not from the vague noun that introduces the phrase. If we combine the insights from both analyses, we would not be surprised if the drafters used “cases involving national peace and harmony” and “questions involving national peace and harmony” to express the same concept. And indeed we find two examples where influential delegates did shift from talking about “questions involving national peace and harmony” to “cases involving national peace and harmony” while still apparently referring to the same concept.

#### Shifting from *Questions* to *Cases*: Example One

The first example comes from reported discussion of a revised version of Resolution Nine, which was offered by Governor Randolph and James Madison on June 13, 1787:

“the jurisdiction of the national Judiciary shall extend to (1) cases which respect the collection of the National revenue, (2) impeachments of any National Officers, and (3) questions which involve the national peace and harmony.”<sup>91</sup>

The jurisdiction that would be established by this resolution can be interpreted as described by two shell noun phrases, introduced respectively by “cases” and “questions,” plus the specific category identified by the noun “impeachments.”

According to Madison’s notes, on June 16, 1787, James Wilson of Pennsylvania, an accomplished lawyer and one of the most influential delegates at the Convention,<sup>92</sup> rose to compare the June 13 resolution by Randolph and Madison

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<sup>91</sup> 1 *Records* 223 (numbers inserted).

<sup>92</sup> Wilson was one of the original signers of the Declaration of Independence and served on the Convention’s Committee of Detail, discussed below. He was one of the first persons appointed to the Supreme Court by George Washington and also served as the first professor of law at the College of Philadelphia (the predecessor of the University of Pennsylvania.). See Farrand at 21.

with a very different proposal for federal courts introduced as part of a June 15 resolution by William Patterson of New Jersey. (As Randolph was the spokesperson for the “large states” Virginia Plan, Patterson was the proponent for what is known as the “New Jersey Plan,” offered as a “small states” alternative.)<sup>93</sup> Wilson said:

“Here [the Randolph/Madison resolution] the jurisdiction is to extend to all cases affecting the National peace and harmony; there [the Patterson resolution], a few cases only are marked out.”

The brief statement by Wilson is consistent with the linguistic analysis of this article in two ways. First, his statement suggests that he understood “questions which involve the national peace and harmony” to be a general jurisdictional category that included more specific categories that preceded it, such as the category introduced with the word “cases.” Thus, he collapsed the three different jurisdictional categories, listed in the June 13 resolution, into one category, using the phrase “affecting the National peace and harmony.”

The statement by Wilson also suggests that he considered “cases affecting the national harmony” as including the same concept as “questions affecting the national harmony.” He described the federal jurisdiction proposed by Randolph and Madison by quoting the language of their resolution referring to “National peace and harmony” but substituted “cases” where the June 13 resolution used “questions”:

June 13 Resolution	Wilson paraphrase
“the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the National revenue, impeachments of any National Officers, and questions which involve the national peace and harmony.” <sup>94</sup>	“the jurisdiction is to extend to all <u>cases</u> affecting the National peace and harmony”

Shifting from Questions to Cases: Example Two

On June 19, 1787, the Convention voted to reject the New Jersey Plan and report out the resolutions offered by Governor Randolph on June 13.<sup>95</sup> As discussed

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<sup>93</sup> Farrand at 84-90.

<sup>94</sup> 1 *Records* at 223.

<sup>95</sup> 1 *Records* at 312-13.

above, on July 18 the Convention unanimously approved a resolution presented by James Madison to amend the June 13 resolution to read: “the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony.”<sup>96</sup>

As mentioned above, on July 27, 1787, the Convention adjourned until August 6, so that a Committee of Detail “might have time to arrange, and draw into method & form the several matters which had been agreed to by the Convention, as a Constitution for the United States.”<sup>97</sup> The Committee of Detail was comprised of five delegates: Governor Randolph, James Wilson, Oliver Ellsworth (a judge of the Connecticut Supreme Court), Nathaniel Gorham of Massachusetts (a former president of the Continental Congress), and John Rutledge (former Governor of South Carolina).<sup>98</sup>

No official journal of this committee’s proceedings exists; however, a number of documents apparently relating to the committee’s work have survived.<sup>99</sup> One such document was handwritten by Governor Randolph. Max Farrand, who prepared the authoritative compilation of the convention’s records,<sup>100</sup> provides this explanation for the Randolph document:

“[although] [l]ittle has been known about how the committee set about the preparation of its report ... it seems probable that one of the first steps taken was to have some one of their members prepare a preliminary sketch of a constitution as a working basis upon which the committee could proceed. ... In view of the part he had taken in presenting and at various time in expounding on the Virginia plan, Randolph was a very natural person to whom this duty should be assigned. ... [W]e have in Randolph’s handwriting what is evidently the first draft of a constitution based specifically on the resolutions the convention had adopted.”<sup>101</sup>

Randolph’s draft includes a section that begins “insert the II article” and in that section, below a heading entitled “The Judiciary,” appears Paragraph 7.<sup>102</sup> In drafting Paragraph 7 he apparently is working from the July 18 Resolution. The

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<sup>96</sup> *Id.* (emphasis added); see also 2 *Records* at 39. The official Journal did not record who made this second motion, which also passed unanimously, but Madison’s Notes indicate that it was his proposal, in response to “several criticisms having been made” on the definition of the jurisdiction of the national judiciary. James Madison, *The debates in the Federal Convention of 1787* 279 (2007) (*Madison’s Notes*).

<sup>97</sup> George Washington, *DIARY*, 2 *Records* 65. See also, *DIARY*, *id.* at 67.

<sup>98</sup> Farrand at 16-35, 122.

<sup>99</sup> 2 *Records* at 129.

<sup>100</sup> *The Records of the Federal Convention of 1787* (Max Farrand ed. 1966) (original copyright 1911).

<sup>101</sup> Farrand at 124-25.

<sup>102</sup> 2 *Records* at 144, 146.

first seven lines of his draft largely parallel the July 18 Resolution, with four changes: (1) the grant of jurisdiction is changed from “the national judiciary” to “the supreme tribunal”<sup>103</sup> (2) “impeachments of officers” is added after “cases arising under laws,” and 3) “such other questions” is changed to “such other cases,” and (4) “such other cases” is modified by the phrase “as the national legislature may assign.”<sup>104</sup>

July 18 Resolution	Randolph’s Draft from Committee of Detail
<p>“the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, <u>and to such other questions as involve the National peace and harmony.</u>”</p>	<p>“The jurisdiction of the supreme tribunal shall extend</p> <ol style="list-style-type: none"> <li>1 to all cases, arising under laws passed by the general (Legislature)</li> <li>2. to impeachments of officers, <u>and</u></li> <li>3. <u>to such other cases, as the national legislature may assign, as involving the national peace and harmony,</u> <ul style="list-style-type: none"> <li>in the collection of the revenue</li> <li>in disputes between citizens of different states</li> </ul> </li> </ol> <p>in disputes between a State &amp; a Citizen or Citizens of another State</p> <ul style="list-style-type: none"> <li>in disputes between different states; and</li> <li>in disputes, in which subjects or citizens of other countries are concerned (&amp; in Cases of Admiralty Jurisdn)</li> </ul> <p>But this supreme jurisdiction shall be appellate only, except in &lt;Cases of Impeachmt. &amp;(in)&gt; those instances, in which the legislature shall make it original. and the legislature shall organize it”<sup>105</sup></p>

Given that the task of the Committee of Detail was to implement the resolutions approved by the Convention, and that two resolutions introduced by Randolph himself extended federal jurisdiction to “questions involving national

<sup>103</sup> In the subsequent Paragraph 8, Randolph’s draft would leave to the discretion of Congress whether to extend the jurisdiction extended to the “supreme tribunal” to “inferior tribunals”: “The whole or a part of the jurisdiction aforesaid according to the discretion of the legislature may be assigned to the inferior tribunals, as original tribunals.” 2 *Records* 147.

<sup>104</sup> *Id.* (emphasis added).

<sup>105</sup> *Id.* (emphasis added) (pattern of indentation in original). .

peace and harmony”,<sup>106</sup> it seems unlikely that Randolph intended to make a substantive change in federal jurisdiction when he replaced “questions” in the July 18 Resolution with “cases” in his draft for the Committee of Detail. It seems far more likely that, like his fellow Committee of Detail member James Wilson,<sup>107</sup> Randolph considered he could construct a phrase beginning with either “cases” and “questions” to refer to the same concept of federal jurisdiction.

In Randolph’s draft, the pattern of indentation (reproduced in the table above) suggests that the phrases that follow “such other cases, as the national legislature may assign, as involving the national peace and harmony” – e.g. collection of revenue, disputes between citizens of different states – were considered by him to be examples of questions/cases that involve national peace and harmony.

Madison’s puzzling objection to “cases arising under the Constitution”

On August 6, 1787, the Convention reconvened to receive the Committee’s proposed draft of the Constitution. Article X of the Committee’s draft bears strong resemblance to the draft Randolph wrote for Committee; however, the phrase “involving the national peace and harmony” has disappeared as has the reference to “collection of revenue.”

Randolph’s Draft for Committee of Detail	Art X, Committee’s Draft Constitution
“The jurisdiction of the supreme tribunal shall extend 1 to all cases, arising under laws passed by the general Legislature 2. to impeachments of officers, and 3. to such other cases, as the national legislature may assign, as involving the national peace and harmony, in the collection of the revenue in disputes between citizens of different states in disputes between a State & a Citizen or Citizens of another State in disputes between different states; and	“The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects

<sup>106</sup> See notes \_\_\_ - \_\_\_, *supra*, and accompanying text (discussing Resolution 9 of the Virginia Plan introduced May 29, 1787) and note \_\_\_, *supra*, and accompanying text (discussing resolution introduced June 13, 1787)

<sup>107</sup> See notes \_\_\_ - \_\_\_, *supra*, and accompanying text (discussing Wilson speech to Convention on June 16, 1787).

<p>in disputes, in which subjects or citizens of other countries are concerned &amp; in Cases of Admiralty Jurisdn But this supreme jurisdiction shall be appellate only, except in Cases of Impeachmt. &amp; those instances, in which the legislature shall make it original. and the legislature shall organize it”<sup>108</sup></p>	<p>In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make.<sup>109</sup></p>
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On August 27 and August 28, 1787, the Convention took up discussion of the Committee’s proposed Article X and ten amendments were approved, indicated below by numbering and underlining:

Art X, Committee’s Draft Constitution	Art X as amended August 27 and 28
<p>“The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States;</p> <p>to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State,</p>	<p>“The (1) <u>Judicial power</u><sup>110</sup> shall extend to all cases (2) <u>both in law and equity</u><sup>111</sup> arising (3) <u>under this constitution the</u><sup>112</sup> laws passed by (4) <del>the Legislature of</del><sup>113</sup> the United States, (5) <u>and treaties made or which shall be made under their authority</u><sup>114</sup></p> <p>to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State,</p>

<sup>108</sup> 2 Records at 147 (emphasis added).

<sup>109</sup> 2 Records at 186-87. This text of the Committee’s report comes from Madison’s notes; however his numbering of the articles differs from extant copies of the original printed report. *Id.* at 177 n. 2. Madison numbered this section as Article XI; the printed original numbered it as Article X. *Id.* at 177 n.1, 186.

<sup>110</sup> *Id.* at 425.

<sup>111</sup> *Id.* at 425.

<sup>112</sup> *Id.* at 423.

<sup>113</sup> *Id.* at 423-24 (deleting the phrase “passed by the Legislature”)

<sup>114</sup> *Id.* at 424.

<p>between Citizens of different States,</p> <p>and between a State or the Citizens thereof and foreign States, citizens or subjects</p> <p>In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which</p> <p>a State shall be party, this jurisdiction shall be original.</p> <p>In all the other cases before mentioned, it shall be appellate,</p> <p>with such exceptions and under such regulations as the Legislature shall make.</p> <p>The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.</p>	<p>between Citizens of different States, (6) <u>between Citizens of the same State claiming lands under grants of different States</u><sup>115</sup></p> <p>and between a State or the Citizens thereof and foreign States, citizens or subjects</p> <p>In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which (7) <u>the United States or</u><sup>116</sup> a State shall be a party, <u>the supreme Court shall have original jurisdiction.</u></p> <p>In all the other cases before mentioned, the (8) <u>supreme Court shall have appellate jurisdiction</u><sup>117</sup> (9) <u>both as to law and fact</u><sup>118</sup></p> <p>with such exceptions and under such regulations as the Legislature shall make.<sup>119</sup></p> <p>(10) <del>The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.</del><sup>120</sup></p>
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<sup>115</sup> *Id.* at 425.

<sup>116</sup> *Id.* at 423.

<sup>117</sup> *Id.* at 437 (the only amendment adopted on August 28).

<sup>118</sup> 2 *Records* at 424.

<sup>119</sup> 2 *Records* at 186-87. This text of the Committee’s report comes from Madison’s notes; however his numbering of the articles differs from extant copies of the original printed report. *Id.* at 177 n. 2. Madison numbered this section as Article XI; the printed original numbered it as Article X. *Id.* at 177 n.1, 186.

<sup>120</sup> *Id.* at 425 (deleting last sentence of the Committee’s proposed Article X).

With these amendments, Article X of the Committee's draft now closely resembled Article III, Section 2 as it appears in the Constitution.<sup>121</sup>

James Madison recorded in his notes that he had expressed doubt on August 27 about one of the amendments, what we have numbered above as amendment (3):

“Doctr. Johnson [William Johnson, who held a Doctor of Laws degree] moved to insert the words ‘this Constitution and the’ before the word ‘laws’. Mr Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.”<sup>122</sup>

What might be inferred from these statements made by Madison on August 27? First, Madison apparently worried that “cases” could be interpreted as having such a broad meaning that adding the phrase “cases arising under the Constitution” might go “too far to extend the jurisdiction of the Court.” Second, Madison seemed to think that the phrase “cases arising under the Constitution,” unless “limited,” could be interpreted as extending to “cases not of a judiciary nature.”

The working draft before Johnson's amendment already contained the phrase “cases arising under laws.” Madison obviously did not think that phrase needed to be “limited” so it could not be interpreted as extending to “cases not of a judiciary nature” because he was the author and proponent of “cases arising laws.”<sup>123</sup> Why, then, did he apparently think that “cases” might become dangerously ambiguous if the text was amended as proposed by Johnson?

This puzzle can be resolved if both “cases arising under this Constitution” and “cases arising under the laws” were implicitly understood by Madison to be functioning as shell noun phrases.<sup>124</sup> If both are shell noun phrases, then “cases” can definitely have very different meaning in each phrase. To illustrate, if “questions” is substituted for “cases” (as the “and such other” provision and Wilson's speech suggest would be permissible), then it becomes more understandable that “questions arising under the constitution” could seem to be a

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<sup>121</sup> The only substantive differences from Article III are that “controversies to which the United States shall be a Party” has been added to what was approved on August 27 and 28 and jurisdiction over impeachments has been removed as discussed below, notes \_\_\_ - \_\_\_, and accompanying text.

<sup>122</sup> 2 *Records* at 430, *Madison's Notes* at 475.

<sup>123</sup> See notes \_\_\_ - \_\_\_, *supra*, and accompanying text (discussing Madison's resolution, introduced July 18, 1787).

<sup>124</sup> We know Madison was very adept at using shell noun phrases. See notes \_\_\_ - \_\_\_, *supra*, and accompanying text.

very different exercise of judicial power than “questions arising under the laws.” Madison’s assumption that “cases arising under the constitution” might not be “cases of a judiciary nature” makes more sense if “cases” is not tied to the Supreme Court’s interpretation of “injured plaintiff litigation,” but instead functions to introduce and characterize its shell content, “arising under the constitution.”

In the printed version of Madison’s notes, the following sentence follows the paragraph discussed above:

“The motion of Docr. Johnson was agreed to nem: con: [Latin abbreviation for “no-one contradicting”] it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature --- ”<sup>125</sup>

It is somewhat difficult to interpret this cryptic sentence. Does it mean the motion passed because Madison was the only delegate who thought the phrase created by Johnson’s amendment, “all cases arising under this constitution,” was dangerously ambiguous? Does it mean the motion passed because all the other delegates – unlike Madison – did understand the phrase to mean “cases of a Judiciary nature”? If these are the correct interpretations, could it be argued from this sentence that the Supreme Court is right to assume that the “all cases arising” phrases in Article III only include “injured plaintiff litigation”?

To pursue this line of argument one would have to assume that this cryptic sentence reliably reports words actually spoken by other delegates at the Convention rather than just Madison’s private speculation for why Johnson’s motion passed, despite what Madison reports that he said in opposition. To determine the reliability of this cryptic sentence, it is then further necessary to examine more closely when and how this sentence came to be written down.

The standard compilation of convention records follows the format of the print version of Madison’s notes and presents the cryptic sentence in the same way as the paragraph that begins “Docr. Johnson moved to insert the words ‘this Constitution and the’ before the word ‘laws’.”<sup>126</sup> However, the National Archives Founders Online<sup>127</sup> presents this cryptic sentence as a kind of footnote to the paragraph, with the annotation “JM added”:

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<sup>125</sup> *Madison’s Notes* at 475.

<sup>126</sup> 1 *Records* at 430.

<sup>127</sup> “Jurisdiction of the Supreme Court, [27 August] 1787,” *Founders Online*, National Archives, accessed April 11, 2019, <https://founders.archives.gov/documents/Madison/01-10-02-0108>. [Original source: *The Papers of James Madison*, vol. 10, 27 May 1787–3 March 1788, ed. Robert A. Rutland, Charles F. Hobson, William M. E. Rachal, and Frederika J. Teute. Chicago: The University of Chicago Press, 1977, pp. 157–158.]

The screenshot shows a digital document viewer interface. At the top, there are navigation buttons: "PERMALINK VIEW", "START NEW SEARCH", and "VIEW PREVIOUS SEARCHES". To the right is a portrait of James Madison and a handwritten signature. Below the navigation is a search bar with a magnifying glass icon and a folder icon. The main content area displays the title "JURISDICTION OF THE SUPREME COURT, [27 AUGUST] 1787" in large orange letters. Below the title is the section heading "Jurisdiction of the Supreme Court" and the date "[27 August 1787]". The text of the document is displayed in a serif font, with a paragraph starting "Johnson moved to extend the jurisdiction of the Supreme Court to cases arising under the Constitution." and another starting "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department."<sup>1</sup>

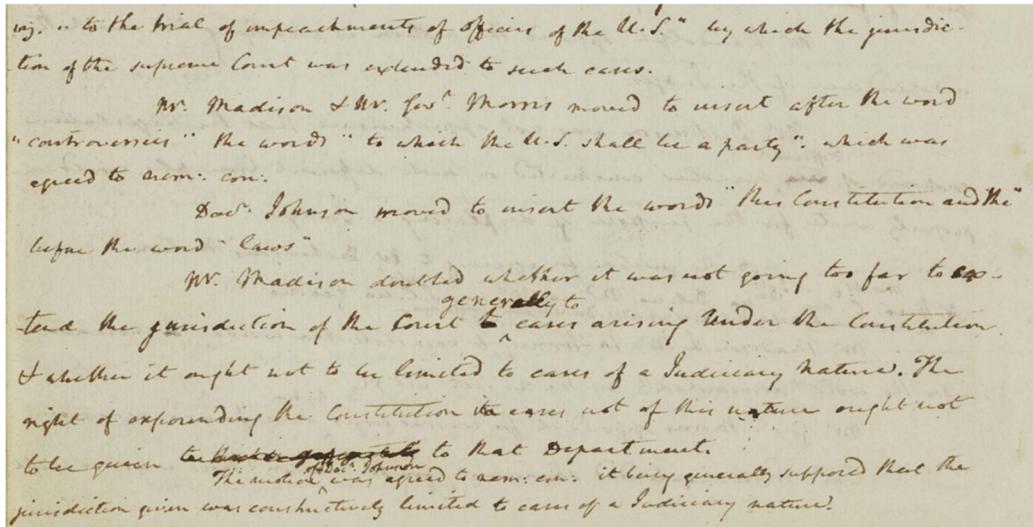
Below the text, there is a "Ms (DLC)" section with a footnote: "1. JM added that Johnson's motion 'was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature' (ibid.)."

At the bottom of the main content area, there is a "PERMALINK" section with the text "What's this?" and the URL "https://founders.archives.gov/documents/Madison/01-10-02-0108". A note follows: "Note: The annotations to this document, and any other modern editorial content, are copyright © University of Chicago Press. All rights reserved." Below the note is a "Back to top" link.

On the right side of the viewer, there is a sidebar titled "You Are Looking At". It contains the following information: "SOURCE PROJECT: Madison Papers", "TITLE: Jurisdiction of the Supreme Court, [27 August] 1787", "AUTHOR: Madison, James", and "DATE: 27 August 1787". Below this is a "Reference" section with the heading "CITE AS" and the following text: "Jurisdiction of the Supreme Court, [27 August] 1787," *Founders Online*, National Archives, accessed April 11, 2019, <https://founders.archives.gov/documents/Madison/01-10-02-0108>. [Original source: *The Papers of James Madison*, vol. 10, 27 May 1787–3 March 1788, ed. Robert A. Rutland, Charles F. Hobson, William M. E. Rachal, and Frederika J. Teute. Chicago: The University of Chicago Press, 1977, pp. 157–158.]

An image from the original manuscript of Madison’s notes in the Library of Congress, from which these printed passages was taken, appears below.<sup>128</sup>

<sup>128</sup> *The Constitutional Sources Project (ConSource)*, <https://www.consource.org/document/james-madisons-notes-of-the-constitutional-convention-1787-8-27/#>



In his preface to "Debates in the Constitution" Madison wrote:

"I assumed a seat in front of the presiding member, with the other members on my right & left hand. In this favorable position for hearing all that passed, I noted in terms legible & in abbreviations & marks intelligible to myself what was read from the Chair [presiding officer George Washington] or spoken by the members; and losing not a moment unnecessarily between the adjournment & reassembling of the Convention I was enabled to write out my daily notes during the session or within a few finishing days after its close."<sup>129</sup>

In his introduction to *The Records of the Federal Convention of 1787* Professor Farrand tells us:

"It is ... very helpful to know that it was Madison's invariable practice in his original notes to refer to himself as "M" or "Mr. M." In the revision of his manuscript he filled out his own name."<sup>130</sup>

This information would indicate the manuscript reproduced above, where "Mr. Madison" is written out in full, was not a page from Madison's actual contemporaneous notes taken at the Convention but was written down later, at the earliest "during the session or within a few finishing days after its close." However,

<sup>129</sup> Preface to Debates, *Madison's Notes* at 15

<sup>130</sup> 1 *Records* at xvii n.23.

Madison’s own correspondence confirms that he revised his notes after publication of the official Journal in 1819,<sup>131</sup> more than 30 years after the Convention.

The editors of the *Documentary History of the United States*, where Madison’s notes were first published, interpret the manuscript as reflecting the following revisions, shown below by inserting strikethrough for original text and brackets to show revision:

“Mr Madison doubted whether it was not going too far to extend the jurisdiction of the Court to [generally to] cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution to [in] cases not of this nature ought not to be given to them in general by to that Department.”<sup>132</sup>

These alterations may have been part of the revisions made after 1819 and it is possible that the sentence about Johnson’s motion being “agreed to nem: con,” which appears to be squeezed onto the bottom of the page, was also made at the later date.

Apart from the risk that Madison was interpreting events long after the fact rather than actually remembering what was said, the claim in his notes that it was “generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature” presents other problems. The phrase “cases of a judiciary nature” only appears three times, among the 336 million words of *COFEA*, and those three occurrences all come from Madison’s one paragraph objection to Johnson’s amendment on August 27:

The screenshot shows the BYU Law Corpus Linguistics interface for the Corpus of Founding Era American English (COFEA). The search query is "cases of a judiciary nature". The interface displays three concordance results:

DOCUMENT ID	CONTEXT
1 farrands.v2.section118.txt	posed that the jurisdiction given was constructively limited to cases of a Judiciary nature – On motion of Mr Rutledge, the w
2 farrands.v2.section118.txt	Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature . The right of expounding the Cons
3 fndrs.madison.01-10-02-0...	under the Constitution & whether it ought not to be limited to cases of a Judiciary Nature . The right of expounding the Cons

In fact the phrase “judiciary nature” only appears two other times in *COFEA*, both

<sup>131</sup> *Id.* at xvi.

<sup>132</sup> 3 *Documentary History* at 626.

times in documents written by James Madison, suggesting the phrase may have been idiosyncratic to him:

The screenshot shows the 'BYU LAW CORPUS LINGUISTICS BETA' interface. The search term 'judiciary nature' is entered in the search bar. Below the search bar, there are tabs for 'Concordances', 'Frequencies', 'Sections', and 'Collocates'. The 'Concordances' tab is selected, displaying a table with two columns: 'DOCUMENT ID' and 'CONTEXT'. The table contains five rows of search results, each showing a document ID and a snippet of text with the search term highlighted in blue.

DOCUMENT ID	CONTEXT
1 fndrs.madison.01-12-02-0...	...n additional delay, since it may require some special provision of a <b>Judiciary nature</b> for cases of seizure &c; until the
2 farrands.v2.section118.txt	...l that the jurisdiction given was constructively limited to cases of a <b>Judiciary nature</b> – On motion of Mr Rutledge, the
3 fndrs.madison.01-08-02-0...	...olishes the Quitrent. It was suggested that the latter point was of a <b>judiciary nature</b> , that it involved questions of fa
4 farrands.v2.section118.txt	...the Constitution, & whether it ought not to be limited to cases of a <b>Judiciary Nature</b> . The right of expounding the Cc
5 fndrs.madison.01-10-02-0...	...r the Constitution & whether it ought not to be limited to cases of a <b>Judiciary Nature</b> . The right of expounding the Cc

If “judiciary nature” was a term coined and only used by Madison, then it seems doubtful that the other delegates would have actually uttered words like “we approve Johnson’s motion because we suppose that the jurisdiction given is constructively limited to cases of a Judiciary nature.” Further, as discussed below, there is clear evidence contemporaneous with ratification that Madison’s primary colleague in developing the language that became Article III – Governor Randolph – continued to think that “all cases arising under the Constitution” was dangerously ambiguous, providing a powerful counterexample to the assumption that Madison’s doubts were overcome by general agreement that “cases arising under the Constitution” was “constructively limited to cases of a Judiciary nature.”

Finally, considering what weight to give this cryptic sentence brings to mind Justice Scalia’s definition of “original meaning”: “What was the most plausible meaning of the words of the Constitution to the society that adopted it – regardless of what the Framers might secretly have intended?”<sup>133</sup> The “general supposition” Madison reports attended the adoption of Johnson’s amendment – “that the jurisdiction given was constructively limited to cases of a Judiciary nature” – looks very much like “secret intent.” One of the first decisions made by the Convention was to keep all its proceedings secret<sup>134</sup> and Madison deliberately chose not to make

<sup>133</sup> *Original Meaning*, SCALIA SPEAKS 183 (Christopher J. Scalia & Edward Whelan eds. 2017) (emphasis added).

<sup>134</sup> Daniel Webster, *The Madison Papers*, 4 THE WORKS OF DANIEL WEBSTER 301-303 (1851) (Remarks made in the Senate of the United States on Feb 20, 1837, in relation to purchase of the Manuscript Papers of James Madison).

his notes public until after his death, decades after ratification.<sup>135</sup> As mentioned above, Madison himself advised that the intentions of those “who which prepared and proposed the Constitution” should only be given “respect” as “presumptive evidence of the general understanding at the time of the language used,” because “the only authoritative intentions were those of the people of the States, as expressed through the Conventions which ratified the Constitution.”

If the first reaction of someone as skilled in using the language of Constitution writing as James Madison was to hear “cases arising under the constitution” as giving the Supreme Court the “right to expounding the Constitution” for not only “cases of a judiciary nature” but also “cases not of this nature,” then it is hard to exclude the possibility that the members of the ratifying conventions would have heard the phrase the same way.

“Cases of Impeachment”

On September 8, 1787, as the Convention approached its final days, a Committee on Style was appointed “to revise the style of and arrange the articles which had been agreed to by the house.”<sup>136</sup> Both James Madison and Alexander Hamilton were members of this committee.<sup>137</sup> The committee transformed the jurisdictional provision as amended on August 27 and 28 into Article 3:

Art X as amended August 27 and 28	Article III, Sec. 2
The Judicial power shall extend to all cases both in law and equity arising under this constitution the laws passed by the Legislature of the United States, and treaties made or which shall be made under their authority to all cases affecting Ambassadors, other Public Ministers and Consuls; <u>to the trial of impeachments of Officers of the United States;</u> to all cases of Admiralty and maritime jurisdiction;	The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; --to all cases affecting ambassadors, other public ministers and consuls; --to all cases of admiralty and maritime jurisdiction; --to controversies to which the United

<sup>135</sup> *Id.*

<sup>136</sup> Farrand at 179.

<sup>137</sup> *Id.*

<p>to controversies between two or more States, (except such as shall regard Territory or Jurisdiction)  between a State and Citizens of another State,  between Citizens of different States,  between Citizens of the same State claiming lands under grants of different States  and between a State or the Citizens thereof and foreign States, citizens or subjects  <u>In cases of impeachment,</u>  cases affecting Ambassadors, other Public Ministers and Consuls, and those in which the United States or a State shall be a party, the supreme Court shall have original jurisdiction.  In all the other cases before mentioned, the supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Legislature shall make.</p>	<p>States shall be a party;  --to controversies between two or more states;  --between a state and citizens of another state;  --between citizens of different states;--  between citizens of the same state claiming lands under grants of different states,  and between a state, or the citizens thereof, and foreign states, citizens or subjects.  In all  cases affecting ambassadors, other public ministers and consuls, and those in which__the United States or a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.</p>
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As indicated by underscoring, the version reported out by the Committee on Style contained only two substantive changes to federal jurisdiction. Jurisdiction was explicitly extended “to controversies to which the United States shall be a party.”<sup>138</sup> The other change was to remove jurisdiction over impeachments of officers of the United States from the federal courts.<sup>139</sup>

Article X, section 4, of the Committee of Detail’s draft constitution had stated:

“The trial of all criminal offenses, (except in cases of Impeachment), shall be in the

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<sup>138</sup> Although technically a substantive change, this edit fell within the committee mandate to “revise style” because one of the amendments approved by the Convention on August 27 had added “cases to which the United States is a party” to the sentence creating the Supreme Court’s original jurisdiction.

<sup>139</sup> See also Art. I, sec. 6 (“The Senate shall have the sole Power try all Impeachments.”)

State where they shall be committed; and shall be by Jury.”<sup>140</sup>

Article X, section 2 had extended the jurisdiction of the “supreme tribunal” to “impeachments of officers.” However, even though the Committee on Style deleted this language and gave the Senate the sole power to try impeachments, the Committee on Style still retained all of this language from draft Article X, section 4, in reporting back to the Convention what is now Section 3 of Article III:

“The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.”<sup>141</sup>

How could “cases” in Article III have a stable, inherent meaning when it includes the use of “cases” in the phrase “cases of impeachment”? Not only is impeachment not “injured party litigation,” it is also not – in the words of James Madison – a “case of a judiciary nature.” The Constitution confers on the Senate “the sole Power to try all Impeachments.”<sup>142</sup>

Did the Committee on Style – staffed with such skillful and careful writers as James Madison, Alexander Hamilton, Dr. William Johnson,<sup>143</sup> and Gouverneur Morris<sup>144</sup> -- just forget to delete “cases of impeachment” from the language of Section 3 when the power to try impeachments was transferred from the judiciary to the Senate? Did the entire Convention also overlook such a mistake when approving the final language of the Constitution?

Interpreting *case* as being used as a shell noun in Article III would resolve such a puzzle also. “Cases” appears eight times in Article III, if cases” is assumed to be the implicit subject of the instances numbered below as (2) and (3):

“The judicial power shall extend

(1) to all cases, in law and equity, arising under this Constitution,

(2) [to all cases, in law and equity, arising under] the laws of the United States,

(3) And [to all cases, in law and equity, arising under] treaties made, or which shall be made, under their authority;

(4) --to all cases affecting ambassadors, other public ministers and consuls;

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<sup>140</sup> 2 *Records* at 187 (emphasis added).

<sup>141</sup> 2 *Records* at 601 (emphasis added).

<sup>142</sup> Art. I, sec. 6.

<sup>143</sup> See Farrand at 33-34 (Johnson was regarded as one of the most learned men in America).

<sup>144</sup> *Id.* at 21-22 (Morris was “probably the most brilliant member ... of the convention ... with a wonderful command of language”).

- (5) --to all cases of admiralty and maritime jurisdiction;  
 --to controversies to which the United States shall be a party;  
 --to controversies between two or more states;  
 --between a state and citizens of another state;  
 --between citizens of different states;  
 --between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
- (6) In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction.
- (7) In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.
- The trial of all crimes, (8) except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.”

“Cases” could be understood as starting off with a vague, abstract meaning each time it appears in Article III, a meaning which is only completed by the “shell content” that follows it, indicated above for each of the eight uses by underscoring. Under this shell noun interpretation, it would have been perfectly appropriate for the Committee on Style to continue to use the phrase “cases of impeachment” even after control of the impeachment process was moved from the judiciary to the Senate, because “cases” in this last usage in Article III did not have to have a meaning at all similar to “cases” when used earlier in the context of creating federal court jurisdiction.

#### Cases in law and equity

Even if “cases” in Article III by itself did not have a stable, inherent meaning approximating the Supreme Court’s interpretation (“injured plaintiff litigation”), is it possible that the meaning of the complete shell noun phrase, “all cases, in law and equity, arising under this Constitution” does mean only “injured plaintiff litigation” because in the final version of Article III the words “in law and equity” appear after “cases”?

The phrase “cases in law and equity” only appears thirty-nine times in *COFEA* and thirty-eight of these occurrences are direct quotes or paraphrases of

Article III. (The thirty-ninth occurrence is a court decision citing a book entitled “Modern Cases in Law and Equity.”)<sup>145</sup>

The phrase “law and equity” however does appear 397 times in *COFEA*; “law or equity” appears 412 times. The distinction between “law” and “equity” was salient and well-known in the Founding Era, especially to lawyers, as referring to two different types of courts in the English legal system: “courts of common law” and “courts of equity.” The leading legal treatise of the period, Blackstone’s *Commentaries on the Laws of England*, devotes hundreds of pages to describing the different functions and powers of the two types of courts.<sup>146</sup>

As briefly explained in the *Wex Legal Dictionary*:

“the term “equity” refers to a particular set of remedies and associated procedures ... These equitable doctrines and procedures are distinguished from “legal” ones. While legal remedies typically involve monetary damages, equitable relief typically refers to injunctions ... A court will typically award equitable remedies when a legal remedy is insufficient or inadequate. ... The distinction arose in England where there were separate courts of law and courts of equity.”<sup>147</sup>

The phrase “law and equity” appears to have first entered the Article III drafting process on August 27, 1787. According to Madison’s notes, as soon as the Convention “took up” consideration of the Committee of Detail’s draft Article X, Doctor William Johnson “moved to insert the words ‘both in law and equity’ after the words ‘U.S.’ the 1<sup>st</sup> line of sect I.” This appears to have been the first of the many amendments to draft Article X made that day<sup>148</sup> and its effect would have been as follows:

“The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States both in law and equity”

Madison’s notes indicate when Johnson made his motion at the outset of the discussion of federal jurisdiction, he “suggested that the judicial power ought to

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<sup>145</sup> A *COFEA* search for “cases” appearing within six words either side of “law and equity” results in fifty-six occurrences, but when results lacking a grammatical relationship between the terms are removed, what remains again are only quotes or paraphrases of Article III. Searching by changing the word order to “equity and law” produces no collocation within six words of “cases.”

<sup>146</sup> See “Of the Public Courts of Common Law and Equity,” William Blackstone, 2 *Commentaries on the Laws of England* 30-60 (Thomas J. Cooley, ed. 1873) and *id.* at 61-454.

<sup>147</sup> *Wex Legal Dictionary* (Cornell Legal Information Institute), <https://www.law.cornell.edu/wex/equity>

<sup>148</sup> See 2 *Records* at 422 (quoting the official Journal), *id.* at 428 (quoting Madison’s notes).

extend to equity as well as law.”<sup>149</sup> Madison reports that Mr. [George] Read [of Delaware] then “objected to vesting these powers in the same Court.”<sup>150</sup> Thus it appears that “both in law and equity” were understood to modify “jurisdiction of the Supreme Court” rather than “cases.”

Unlike most of the amendments on federal jurisdiction, which passed unanimously, adding “both in law and equity” was only supported by six state delegations, a bare majority at that point in the convention. Two states voted no and three states were recorded as absent or abstaining.<sup>151</sup> It appears this amendment was controversial because the delegates understood adding “both in law and equity” as expanding federal judicial power rather than narrowing it. As described below, this understanding was consistent with discussion of this provision at the Virginia Ratifying Convention.

After most other amendments had been accepted that day, the official Journal records another motion was approved, to add “both law and equity,” before the word arising:

“The Judicial power shall extend to all cases both in law and equity arising under this constitution the laws passed by the Legislature of the United States, and treaties made or which shall be made under their authority to all cases affecting Ambassadors, other Public Ministers and Consuls”

The Committee on Style removed the word “both,” and set off “in law and equity” with commas, giving us the version that appears in the Constitution:

“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction”

Would the members of the state ratifying conventions have considered “to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made” as extending judicial power more narrowly than if the phrase “in law and equity” was not part of the text?

If inclusion of the phrase “in law and equity” was understood as giving federal courts all the powers that existing courts possessed, that understanding would have been inconsistent with a limited “injured plaintiff litigation” meaning

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<sup>149</sup> *Id.* at 428 (emphasis added).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

for “cases in law and equity.” Robert Pushaw has assembled considerable historical evidence that during the Founding Era access to courts in both England and the American states was not predicated on showing particularized injury.

“In public law cases, a controversy was not required. A citizen who had suffered no individualized injury could challenge unlawful government action in a variety of ways ... ‘[R]elator’ actions authorized citizens with no personal stake in a matter of public interest to prosecute as private attorney generals.”<sup>152</sup>

To a 21<sup>st</sup> century lawyer or judge, inserting “in law and equity” into the phrase “all cases arising” makes it difficult to interchange “questions” for “cases”: “questions in law and equity arising under the Constitution ... laws ... treaties” may not sound well-formed. However, Professor Pushaw tells us that “by 1770 the power of English judges to give advisory opinions was well recognized ... and American courts [also] rendered advisory opinions.”<sup>153</sup> The Massachusetts Constitution of 1780 specifically required its supreme judicial court to answer questions from both the legislature and governor:

“Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court upon important questions of law, and upon solemn occasions.”<sup>154</sup>

As discussed in greater detail below, in apparent reliance on Article III’s extension of judicial power to “all cases in law and equity ... arising under Treaties,” at the direction of President George Washington, Secretary of State Thomas Jefferson submitted to the U.S. Supreme Court twenty-nine very specific but hypothetical questions about the interpretation of treaties between the United States and France. Jefferson gave President Washington a subsequent status report, saying two of the justices “had called on him” to ask whether the letter transmitting the questions “pressed for an answer.” Jefferson said in his report, that he told the justices “the cases would await their time.”

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<sup>152</sup> Pushaw at 480-81. See also Pfander at 92-94, James E. Pfander, *Standing, Litigable Interests, and Article III’s Case-or-Controversy Requirement*, 65 UCLA L. Rev. 170, 189-91 (2018).

<sup>153</sup> Pushaw at 481.

<sup>154</sup> Ch. III, Art. II. The New Hampshire Constitution of 1784 contained a similar provision. *N.H. Const.* of 1784, Part II: Judiciary Power. Professor Pushaw tells us that “by 1770 the power of English judges to give advisory opinions was well recognized ... and American courts [also] rendered advisory opinions.” Pushaw at 481.

### C. Virginia Governor Edmund Randolph's Opposition to Ratification

As mentioned above, Madison was not the only important convention delegate who thought “all cases arising under the constitution” was dangerously ambiguous. Despite having proposed the Virginia Plan and serving on the critical Committee of Detail that turned the Convention’s resolutions into the format we now see in the Constitution, Virginia Governor Edmund Randolph famously refused to sign the Constitution.

In a letter to the Speaker of the Virginia House of Delegates dated October 10, 1787, Randolph explained his position that the Constitution should be not ratified until, among other conditions, “all ambiguities of expression ... be precisely explained” including “limiting and defining the judicial power.”<sup>155</sup>

In a subsequent speech at the Virginia Ratifying Convention, which he chaired, Randolph made clear that his concerns about ambiguity mirrored what Madison said at the Convention about adding “arising under the constitution”:

there are defects in its construction, among which may be objected too great an extension of jurisdiction. ... It is ambiguous in some parts, and unnecessarily extensive in others. It extends to all cases in law and equity arising under the Constitution. What are these cases of law and equity? Do they not involve all rights, from an inchoate right to a complete right, arising from this Constitution? Notwithstanding the contempt gentlemen express for technical terms, I wish such were mentioned here. I would have thought it more safe; if it had been more clearly expressed. What do we mean by the words arising under the Constitution? What, do they relate to? I conceive this to be very ambiguous<sup>156</sup>

In this statement, Randolph, who later became the country’s first Attorney General, interpreted “all cases, in law and equity, arising under the Constitution” as extending the federal judicial power to “inchoate right[s].”<sup>157</sup> It is difficult to

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<sup>155</sup> Edmund Randolph, *A Letter of His Excellency, Edmund Randolph, Esq. on the Federal Constitution* (1787) (emphasis added), reproduced 3 *Records* at 143.

<sup>156</sup> 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 571-72 (Jonathan Elliot, ed. 1836) (emphasis added). See also the statement of William Grayson, immediately preceding Randolph’s speech to the Virginia ratifying convention: “My next objection to the federal judiciary is, that it is not expressed in a definite manner. The jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude. It is impossible for human nature to trace its extent: It is so vaguely and indefinitely expressed, that its latitude cannot be ascertained.” *Id.* at 565.

<sup>157</sup> *Id.* at 572.

find an interpretation more at odds with the Supreme Court's interpretation of "cases" as meaning "injured plaintiff litigation."

#### D. Questions for the Supreme Court on treaties between the U.S. and France<sup>158</sup>

One of the most challenging dilemmas of President Washington's second term was maintaining neutrality in the war between Great Britain and the revolutionary government of France.

On July 11, 1793 Secretary of State Thomas Jefferson transmitted to Washington detailed written notes of a contentious conversation with the French diplomat Edmond Genet. His notes included the following statements:

"he charged us with having violated the treaties between the two nations, & so went into the cases which had before been subjects of discussion ... says he, at least, Congress are bound to see that the treaties are observed. I told him No, there were very few cases indeed arising out of treaties which they could take notice of; that the President is to see that treaties are observed. and if he decides against the treaty to whom is a nation to appeal? I told him the constitution had made the President the last appeal. ... I told him ... we would have enquiries made into the facts, & would thank him for information on the subject, & that I would take care that the case should be laid before the President the day after his return"<sup>159</sup>

Jefferson repeatedly uses *case* in reference to the dispute over the treaties and, while apparently recognizing that there might be (very) few "cases arising out of treaties" that could be "noticed" by Congress, this case was to be "laid before" the President for his decision.

The very next day, on July 12, 1792, a "Cabinet Opinion on Foreign Vessels and Consulting the Supreme Court" was issued over the names of Thomas Jefferson, Alexander Hamilton (Secretary of the Treasury), and Henry Knox (Secretary of War).<sup>160</sup> The Opinion stated in part:

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<sup>158</sup> For an excellent background account of this dispute see Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any Dear John Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473 (1999).

<sup>159</sup> "Memorandum from Thomas Jefferson, 11 July 1793," *Founders Online*, National Archives, accessed April 11, 2019, <https://founders.archives.gov/documents/Washington/05-13-02-0137-0001>(emphasis added). [Original source: *The Papers of George Washington*, Presidential Series, vol. 13, *1 June–31 August 1793*, ed. Christine Sternberg Patrick. Charlottesville: University of Virginia Press, 2007, pp. 200–202.]

<sup>160</sup> Washington's cabinet had only four members. *Cabinet Members* (National Center for the Study of George Washington), <https://www.mountvernon.org/library/digitalhistory/digital->

“At a meeting of the heads of the departments at the President’s on summons from him, and on consideration of various representations from the Ministers Plenipotentiary of France & Great Britain on the subject of vessels arming & arriving in our ports, and of prizes it is their opinion that letters be written to the said Ministers informing them that the Executive of the U.S., desirous of having done what shall be strictly conformable to the treaties of the U.S. and the laws respecting the said cases has determined to refer the questions arising therein to persons learned in the laws ... That letters be addressed to the Judges of the Supreme court of the U.S. requesting their attendance at this place on Thursday the 18th instant to give their advice on certain matters of public concern which will be referred to them by the President.”<sup>161</sup>

Apparently what Jefferson described in his July 11 memo to Washington as “the case to be laid before the President” has now become “the cases” to be referred to the Supreme Court.

On July 18, 1793, Jefferson sent a letter to the Supreme Court justices enclosing 29 specific questions that could be said to be “arising under the treaties” between the United States and France.<sup>162</sup> In a number of the questions, *case* is used:

“3. Do they [the treaties] give to France, or her citizens, in the case supposed, a right to refit, or arm anew vessels, which before their coming within any port of the U.S. were armed for war, with or without commission?

5. Does the 22d article of the Treaty of commerce, in the case supposed, extend to vessels armed for war on account of the *government* of a power at war with France, or to merchant armed vessels belonging to the subjects or citizens of that power

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[encyclopedia/article/cabinet-members/](#) The member whose name did not appear on this Opinion was Attorney General Edmund Randolph.

<sup>161</sup> *Cabinet Opinion on Foreign Vessels and Consulting the Supreme Court*, 12 July 1793, (emphasis added), *Founders Online*, National Archives, accessed April 11, 2019, <https://founders.archives.gov/documents/Washington/05-13-02-0143>. [Original source: *The Papers of George Washington*, Presidential Series, vol. 13, *1 June–31 August 1793*, ed. Christine Sternberg Patrick. Charlottesville: University of Virginia Press, 2007, pp. 214–216.]

<sup>162</sup> “Enclosure Questions for the Supreme Court, 18 July 1793,” *Founders Online*, National Archives, accessed April 11, 2019, <https://founders.archives.gov/documents/Washington/05-13-02-0164-0002>. [Original source: *The Papers of George Washington*, Presidential Series, vol. 13, *1 June–31 August 1793*, ed. Christine Sternberg Patrick. Charlottesville: University of Virginia Press, 2007, pp. 243–247.] The complete set of 29 questions is posted in the online appendix.

(viz.) of the description of those which, by the English, are called Letters of marque ships, by the French ‘batiments armés en marchandize et en guerre’?

6. Do the treaties aforesaid prohibit the U.S. from permitting in the case supposed, the armed vessels belonging to a power at war with France, or to the citizens or subjects of such power to come within the ports of the U.S. there to remain as long as they may think fit, except in the case of their coming in with prizes made of the subjects or property of France?

7. Do they prohibit the U.S. from permitting in the case supposed vessels armed on account of the government of a power at war with France, or vessels armed for merchandize & war, with or without commission on account of the subjects or citizens of such power, or any vessels other than those commonly called privateers, to sell freely whatsoever they may bring into the ports of the U.S. & freely to purchase in & carry from the ports of the U.S. goods, merchandize & commodities, except as excepted in the last question?

8. Do they oblige the U.S. to permit France, in the case supposed, to sell in their ports the prizes which she or her citizens may have made of any power at war with her, the citizens or subjects of such power; or exempt from the payment of the usual duties, on ships & merchandize, the prizes so made, in the case of their being to be sold within the ports of the U.S.?

11. Do the laws of Neutrality, considered relatively to the treaties of the U.S. with foreign powers, or independantly of those treaties permit the U.S. in the case supposed, to allow to France, or her citizens the privilege of fitting out *originally*, in & from the ports of the U.S. vessels armed & commissioned for war, either on account of the government, or of private persons, or both?<sup>163</sup>

*Case* is used each time as a shell noun. The recurrent phrase “in the case supposed” is incomprehensible without its shell content, which is the entire first question posed by Jefferson:

“1. Do the treaties between the U.S. & France give to France or her citizens a *right*, when at war with a power with whom the U.S. are at peace, to fit out originally in & from the ports of the U.S., vessels armed for war, with or without commission?”

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<sup>163</sup> *Id.* (emphasis added)

The other two uses of *case* nicely illustrate the shell noun pattern “noun + of” discussed above.<sup>164</sup> In both instances *case* takes on meaning only when combined with its shell content, marked by underlining:

“6. ... except in the *case* of their coming in with prizes made of the subjects or property of France?”

“8. Do they oblige the U.S. to ... exempt from the payment of the usual duties, on ships & merchandize, the prizes so made, in the *case* of their being to be sold within the ports of the U.S?”

On July 19, 1793 Jefferson provided the following status report to Washington:

“Th: Jefferson with his respects to the President has the honor to inform him that Judges Jay & Wilson called on him just now and asked whether the letter of yesterday pressed for an answer. they were told the cases would await their time, & were asked when they thought an answer might be expected: they said they supposed in a day or two.”<sup>165</sup>

The interchangeability of “questions” with “cases” seen in the drafting history seems to reappear here. Jefferson has sent the Supreme Court what are “questions arising under [the] treaties” but describes what the Justices received as “cases.”

The submission of the twenty-nine questions to the Supreme Court did not result in a published decision; instead the following short letter was sent to President Washington signed by five<sup>166</sup> justices.

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<sup>164</sup> See notes \_\_ - \_\_\_, *supra*, and accompanying text.

<sup>165</sup> “To George Washington from Thomas Jefferson, 19 July 1793,” (emphasis added), Founders Online, National Archives, accessed April 11, 2019, <https://founders.archives.gov/documents/Washington/05-13-02-0168>.

[Original source: The Papers of George Washington, Presidential Series, vol. 13, 1 June–31 August 1793, ed. Christine Sternberg Patrick. Charlottesville: University of Virginia Press, 2007, p. 251.]

<sup>166</sup> The sixth justice, William Cushing, was not in attendance at the Court at the time. “To George Washington from Supreme Court Justices, 8 August 1793,” Founders Online, National Archives, accessed April 11, 2019, <https://founders.archives.gov/documents/Washington/05-13-02-0263>. [Original source: The Papers of George Washington, Presidential Series, vol. 13, 1 June–31 August 1793, ed. Christine Sternberg Patrick. Charlottesville: University of Virginia Press, 2007, pp. 392–393.]

“Philadelphia 8 Augt 1793

Sir

We have considered the previous Question stated in a Letter written to us by your Direction, by the Secretary of State, on the 18th of last month.

The Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been *purposely* as well as expressly limited to *executive* Departments.

we exceedingly regret every Event that may cause Embarrassment to your administration; but we derive Consolation from the Reflection, that your Judgment will discern what is Right, and that your usual Prudence, Decision and Firmness will surmount every obstacle to the Preservation of the Rights, Peace, and Dignity of the united States. We have the Honor to be, with perfect Respect, Sir, your most obedient and most h’ble servants”<sup>167</sup>

The Supreme Court has often expressed its interpretation of the meaning of “cases” in Article III in terms of a prohibition on issuing “mere” advisory opinions. For example in *United Public Workers of America v Mitchell*, the Court said:

“As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. [FN 19] For adjudication of constitutional issues ‘concrete legal issues, presented in actual cases, not abstractions’ are requisite.”<sup>168</sup>

Footnote 19 cites the August 8, 1793 letter from the justices to President Washington.<sup>169</sup>

Indeed the Justices’ letter to Washington is almost an automatic citation when the Court claims that Article III does not give federal courts the power to issue advisory opinions, as illustrated by this quote from *Flast v Cohen*: “The rule against advisory opinions was established as early as 1793.”<sup>170</sup>

However, despite the prevalent use of this 1793 letter to buttress a narrow interpretation of “cases” in Article III, the Justices in the 1793 letter say nothing

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<sup>166</sup> *United Public Workers of America v Mitchell*, 330 U.S. 75, 89 (1947)

<sup>167</sup> *Id.* (emphasis added).

<sup>168</sup> *United Public Workers of America v Mitchell*, 330 U.S. 75, 89 (1947) (emphasis added).

<sup>169</sup> *Id.* at 89 n.19.

<sup>170</sup> *Flast v Cohen*, 392 U.S. 83, 96 n.14 (1968) (citing August 8, 1793 letter from the justices to President Washington.)

about declining to answer the twenty-nine questions because they do not present a “case.” Instead the Justices refer generally to the principle of separation of powers, to the “impropriety” of deciding questions presented in an “extrajudicial” way, and to Article II, Section 2, as setting forth expressly a method for the president to “require” opinions from principal officers of his executive departments.

In contrast to the Justices’ silence, it seems apparent that George Washington -- who presided at the Constitutional Convention -- and his cabinet -- which included Alexander Hamilton, who signed the Cabinet Opinion and served on the Convention’s Committee on Style that finalized the Constitution – chose to handle the treaty dispute with France as if the federal judicial power under Article III did extend to deciding questions “arising under treaties.”

## CONCLUSION

One of the most glaring flaws of the Articles of Confederation was that the Articles supported only a very weak federal judiciary system.<sup>171</sup> When delegates gathered in Philadelphia to draft a new constitution, they started out with high aspirations for establishing courts empowered to “hear and determine ... questions which may involve the national peace and harmony.” The linguistic and historical analyses presented in this article support a conclusion that this aspiration did not disappear when “questions involving national peace and harmony” evolved into a series of shell noun phrases introduced by the word “cases” instead of “questions.”

We hope that this empirical research, presented with transparency that allows all readers to “check our work” for themselves, will prompt reevaluation of the Supreme Court’s assumption that the original meaning of “cases” in Article III had the restrictive meaning of “injured plaintiff litigation” – an interpretation that is inconsistent with evidence of how those who drafted and ratified the Constitution actually used language.

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<sup>171</sup> Max Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 Am. Pol. Sci. Rev. 532, 535-36 (1908) (listing the defects of the government under the Articles of the Confederation “from the writings of the members of the federal convention.”).