



# CAN CONGRESS CREATE PROCEDURES FOR THE SUPREME COURT'S ORIGINAL JURISDICTION CASES?

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**I**N *KANSAS V. COLORADO*<sup>1</sup> the Supreme Court declined to “decide whether Kansas is correct in contending that Article III of the Constitution does not permit Congress to impose” procedural requirements on the Supreme Court when that Court is exercising its original jurisdiction. Kansas asserted that there was an answer to that question, and so did Colorado, though their suggestions were diametrically opposed. It is curious that such a fundamental Article III question remains unresolved 220 years after ratification and after the Supreme Court has decided more than 200 original jurisdiction cases.

Constitutional text strongly implies an answer to the question reserved in *Kansas v. Colorado*. Article III, § 2, speaks directly to the

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<sup>1</sup> 556 U.S. \_\_\_\_ (2009).

Supreme Court's original jurisdiction in the following familiar paragraph:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned [in the first paragraph of Section 2], 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.

Kansas argued that the inescapable implication of this text is that Congress may regulate and make exceptions to the Supreme Court's appellate jurisdiction but has no such power over the Court's original jurisdiction.

In *Kansas v. Colorado*, two Justices endorsed that reading of Article III. The Chief Justice, joined by Justice Souter (not a typical two-Justice combination on the current Court), wrote separately to emphasize that it is "our [the Court's] responsibility to determine matters related to our original jurisdiction," including the procedures to use in such cases. The Chief Justice supported that view with three short sentences explaining that (1) Article III subjects the Court's appellate jurisdiction to regulation by Congress, (2) Article III does not subject the Court's original jurisdiction to such regulation, and (3) the Framers "presumably" acted purposely in drafting the precise language of Article III.<sup>2</sup>

No Justice endorsed the view that Congress has equal authority to regulate the Court's appellate and original jurisdiction. That

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<sup>2</sup> See also David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 216 (1995) ("The explicit provision authorizing Congress to make exceptions to the appellate jurisdiction, moreover, casts considerable doubt on the alternative hypothesis that Congress may make exceptions from the original jurisdiction as well."); 22 J. Moore, *Moore's Federal Practice* 3d, § 402.02[2][b], at 402-24.3 (2002) ("the fact the drafters of Article III included a provision that gives Congress the authority to regulate the Court's appellate jurisdiction, coupled with their failure to include a comparable provision directed at its original jurisdiction, strongly suggests that Congress cannot regulate or modify the latter.").

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*“It is . . . our responsibility to determine matters related to our original jurisdiction, including the availability and amount of witness fees. For the reasons given by the Court, I agree that \$40 is a reasonable choice for the fees at issue here. But the choice is ours.”*

*John G. Roberts  
in Kansas v. Colorado (2009)*

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view may have supporters among the current Justices, but there is no way to know from *Kansas v. Colorado*. It was unnecessary for any supporters of such congressional authority to take up the banner of Congress in this case because the Court’s opinion so carefully and explicitly reserved the question. For the same reason, however, it was not necessary for the Chief Justice and Justice Souter to concur separately to carry the Supreme Court’s banner, and yet these two Justices – so jurisprudentially different in many respects – were sufficiently motivated that they staked the claim for the Court’s supreme role in determining procedures in its original cases.

Based on constitutional text alone, the Chief Justice seems to have by far the best of the argument. Indeed, the textual argument standing alone is quite powerful. But, of course, the text does not stand alone, and several other considerations potentially complicate the answer to the question. Most problematic for the Chief Justice’s position are the Court’s own decisions in original cases.

One very early Supreme Court decision from 1796 suggests that Congress may regulate the Court’s original jurisdiction, and an 1854 decision expressly declares that Congress may do so. In neither case, however, was the *Kansas v. Colorado* question actually at stake, so the critical language is quintessential dicta.

The first suggestion that Congress might have the authority to control procedures in original cases occurs in *Grayson v. Virginia*,<sup>3</sup> an original case involving a suit by the estate of William Grayson, one of Virginia's first two Senators in Congress, against the Commonwealth of Virginia. The published opinion addresses the question of how to serve a State as a party defendant to an original action in the Supreme Court. Apparently, the Court delayed a decision while considering whether it had the authority to create rules of service in such cases, or whether an Act of Congress was necessary. The Court concluded that it had the power to establish rules for serving process on the States, and it then adopted two such rules in the opinion.

In discussing its authority to make rules of procedure, the Court noted that it generally adopted practices “founded on the custom and usage of Courts of Admiralty and Equity, constituted on similar principles . . . .” The Court went on to declare that it is “also authorized to make such deviations as are necessary to adapt the rules of the Court to the peculiar circumstances of this country, *subject to the interposition, alteration, and controul, of the Legislature*” (emphasis added). This, of course, is at most suggestive and hardly definitive on the question of Congress's authority vis-à-vis the Court in original cases, for at least two reasons. First, the Court's language is dicta, and indeed the Court actually chose to make its own service rules in the acknowledged absence of any Act of Congress. Second, the *Grayson* opinion gives no consideration to Article III text or any other legal authority – it cites no cases and only drops a footnote to reference § 14 of the Judiciary Act of 1789<sup>4</sup> for the proposition that Congress has such authority. At most, *Grayson* is a

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<sup>3</sup> 3 U.S. (3 Dall.) 320 (1796).

<sup>4</sup> Section 14 authorized the courts of the United States to issue various writs, including, but not limited to, *scire facias* and *habeas corpus*. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 81-82. Section 17 gave federal courts the power “to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States.” *Id.* at 83.

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*potential* clue to what the Court *might* have said if asked the *Kansas v. Colorado* question in 1796.

The second case is considerably more powerful. In *Florida v. Georgia*,<sup>5</sup> an original case involving a boundary dispute between Florida and Georgia, the Attorney General of the United States, Caleb Cushing, sought to intervene in order to assert the interests of the United States. Both Florida and Georgia opposed the motion, arguing that no Act of Congress or rule of the Court permitted such intervention in an original case, and that such intervention would not have been permitted under English law.

Chief Justice Taney wrote for the Court in rejecting the States' arguments and granting the Attorney General's motion to intervene. He first observed that the "constitution confers on this court original jurisdiction" and "that a question of boundary between States is within the jurisdiction thus conferred." Noting that "the constitution prescribes no particular mode of proceeding, nor is there any act of congress upon the subject," he then discussed the procedures in original cases, referring to *Grayson*:

And at a very early period of the government a doubt arose whether the court could exercise its original jurisdiction without a previous act of congress regulating the process and mode of proceeding. But the court, upon much consideration, held, that *although congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases, as fully as in any other court, yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred, that it was a duty imposed upon the court; and in the absence of any legislation by congress, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given.*<sup>6</sup>

Although certainly suggestive and potentially powerful, neither *Grayson* nor *Florida v. Georgia* actually involved a dispute over con-

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<sup>5</sup> 58 U.S. 478 (1854).

<sup>6</sup> *Id.* at 491-92 (emphasis added).

gressional power to dictate procedures in original cases. Nor was the Court in either case confronted by a Congress that had enacted legislation purporting to do so. Instead, both opinions were responding to arguments that the Court *itself* was *disabled* from acting without congressional authorization. That is not the same question as whether Congress may dictate procedures for the Court to follow, though the two inquiries are obviously related.

The Court's answer to the issue raised in both *Grayson* and *Florida v. Georgia* was that its original jurisdiction is self-executing, and requires no Act of Congress to implement it,<sup>7</sup> an answer the Court consistently has given to that question up to the present day, as described more fully below. But that was not the question in *Kansas v. Colorado*, where Colorado's argument was that Congress had dictated by statute the fees to be allowed as "costs" for expert witnesses in federal courts and the Supreme Court was bound to follow that rule even in original cases.

Thus, the real question is whether the Court would actually adhere to the suggestions in *Grayson* and *Florida v. Georgia* if Congress expressly purported to regulate *procedures* in the Court's original cases.<sup>8</sup> Neither case actually presented a fact pattern requiring reso-

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<sup>7</sup> The proposition that the Court's original jurisdiction is self-executing goes back to at least *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 451, 463-64, 467, 479 (1793), in which four of the Justices endorsed it (Justices Blair, Wilson, and Cushing, and Chief Justice Jay, respectively). Many subsequent decisions reiterate the proposition, some discussed in this article. Nonetheless, "Congress has always enacted statutes that purport affirmatively to confer original jurisdiction on the Court." James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 558 n. 12 (1994).

<sup>8</sup> Two other aspects of Congress's potential power over original cases merit mention here, but this article does not explore them in detail. *First*, the Supreme Court long ago appears to have accepted the proposition that Congress has the authority to designate the Court's constitutionally mandated original jurisdiction as either "exclusive" (as it has in cases between two or more States, *see* 28 U.S.C. § 1251(a)) or "concurrent" (as it has in all other original cases, *see id.* § 1251(b)). *See Bors v. Preston*, 111 U.S. 252, 258-59 (1884). *Second*, the Court in the past has indicated strongly that Congress, because the Constitution empowers it to approve interstate compacts, Art. I, § 10, cl. 3, may legislate in order to *enforce and*

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lution of the question. Moreover, *Grayson* justified its aside only with a footnote citation to a section of the Judiciary Act of 1789 that is irrelevant to the *Kansas v. Colorado* question, and *Florida v. Georgia* relied solely on *Grayson*. In all fairness, although these cases provide some support for the proposition that Congress has the power to regulate procedures in the Supreme Court's original cases, they are at most *dicta* in the truest and most classical sense. Importantly, they are not the only precedential clues relevant to resolving the constitutional question.

At least three Supreme Court decisions seem to reject the suggestion that Congress has plenary authority to regulate the Court's original jurisdiction. Perhaps most importantly, only six years after *Florida v. Georgia*, Chief Justice Taney (recall that he was the author of the Court's opinion in *Florida v. Georgia*) strongly suggested that the Court alone creates the procedures in original cases, although again he did so in the context of refuting an argument that the Court's original jurisdiction is not self-executing and requires an Act of Congress in order to be exercised.

In *Kentucky v. Dennison*,<sup>9</sup> the Court was confronted with a case that clearly implicated the legality of slavery in the United States. But unlike his infamous opinion in *Dred Scott v. Sandford*,<sup>10</sup> Chief Justice Taney's opinion in *Dennison* reflected a careful avoidance of any dramatic showdown over the slavery issue. Ultimately the Court decided the case on a narrower statutory ground.

In *Dennison*, a Kentucky grand jury indicted "Willis Lago, free man of color, of the crime of assisting a slave to escape," alleging that Lago "did seduce and entice Charlotte, a slave, . . . to leave her owner and possessor, and did aid and assist said slave in an attempt to make her escape from her said owner and possessor, against the peace and dignity of the Commonwealth of Kentucky." Lago was in Ohio, and Kentucky brought an original mandamus action in the

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implement the Court's decisions in original cases between States. See *Virginia v. West Virginia*, 246 U.S. 565, 601-05 (1918).

<sup>9</sup> 65 U.S. (24 How.) 66 (1861). This case is a fascinating story in its own right, and one that deserves its own telling.

<sup>10</sup> 60 U.S. (19 How.) 393 (1856).

Supreme Court against William Dennison, Governor of Ohio, seeking the extradition of Lago to Kentucky, relying on Article IV, § 2, cl. 2,<sup>11</sup> as the constitutional basis for such an action. Governor Dennison, a well-known abolitionist, refused to deliver Lago to Kentucky.

Among other arguments, the Ohio Attorney General contended that the Supreme Court had no jurisdiction over Governor Dennison in an original action because Congress had not authorized such jurisdiction. The Supreme Court rejected that argument with relative ease, pointing to early original cases finding that the Court needs no Act of Congress in order to exercise its original jurisdiction,<sup>12</sup> and cases such as *Grayson* specifically holding that Governors are subject to the Court's original jurisdiction.<sup>13</sup> In rejecting Ohio's jurisdictional argument, Chief Justice Taney declared as follows:

It has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that *the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.*<sup>14</sup>

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<sup>11</sup> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the States from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

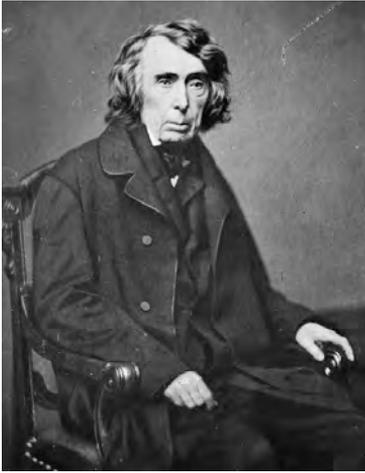
<sup>12</sup> 65 U.S. at 96 (citing *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); and *New Jersey v. New York*, 30 U.S. (5 Pet.) 283 (1831) (Marshall, C.J.)).

<sup>13</sup> 65 U.S. at 97. The Court cited *Grayson* and *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828) (Marshall, C.J.), and observed that in the first original case ever brought in the Supreme Court, *Georgia v. Brailsford*, the Governor of Georgia brought the suit on Georgia's behalf. 65 U.S. at 97-98.

<sup>14</sup> 65 U.S. at 98 (emphasis added). The Court rejected Ohio's argument that Article IV, § 2, cl. 2, did not apply because Ohio law did not define Lago's alleged conduct as a crime, observing that such a holding "would render the clause useless for any practical purpose." *Id.* at 102. Nonetheless, the Court declined to issue a mandamus against Governor Dennison because the 1793 Act of Congress on

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On the one hand, “congress had undoubtedly the right to prescribe the process and mode of proceeding in [original jurisdiction] cases.” But on the other hand, “the court may regulate and mould the process it uses [in original jurisdiction cases] in such manner as in its judgment will best promote the purposes of justice.”

Roger B. Taney  
in *Florida v. Georgia* (1854) and  
*Kentucky v. Dennison* (1861)

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Again, like *Grayson* and *Florida v. Georgia*, the *Dennison* case did not involve an Act of Congress which purported to dictate procedures in the Supreme Court’s original cases, so Chief Justice Taney’s comments can be viewed as dicta on that question. Nonetheless, in *Dennison* Chief Justice Taney emphasizes that the Court will “regulate and mould the process it uses” in original cases.

More recent original jurisdiction cases also suggest that the Court alone controls its procedures in such cases. That said, there is a difficulty in ascertaining just how far these cases go in answering the *Kansas v. Colorado* question: The cases are *very clear* on the proposition that the Court’s original jurisdiction is *self-executing* and requires no Act of Congress to be exercised, but *not so clear* whether

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which Kentucky relied, which declared that “it shall be the duty of the Executive authority of the State” to arrest and deliver fugitives to the claiming state, *id.* at 107, contained no authorization to the federal courts to use “coercive means to compel” the Governor to comply. *Id.* at 109-10. Thus, in what perhaps might be described as a *Marbury v. Madison*-like maneuver, Chief Justice Taney’s opinion managed to declare that Article IV required States to give up fugitive slaves and those aiding them to the States whose laws had been violated, but ultimately avoided ordering Governor Dennison to do so, an order that might well have been disobeyed, and could have led to a crisis for the Court.

the Court is also implying or suggesting that Congress is absolutely precluded (or perhaps “preempted”?) from enacting measures applicable in the Supreme Court’s original cases.

Thus, in *California v. Arizona*,<sup>15</sup> the Court declared that “[t]he original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation.” That quotation alone does not necessarily answer the question of Congress’s power to impose procedures, but the Court importantly went on to address a related question and suggest that the Chief Justice was correct in *Kansas v. Colorado*. Confronting a question whether Congress might withdraw or eliminate certain suits from the Court’s original jurisdiction, the Court seemed very skeptical, declaring that “Congress has broad powers over the jurisdiction of the federal courts and over the sovereign immunity of the United States, but it is extremely doubtful that they include the power to limit in this manner the original jurisdiction conferred upon this Court by the Constitution.”

Undoubtedly the best case in support of the Chief Justice’s position is *Texas v. New Mexico*.<sup>16</sup> In that case, the parties disputed whether New Mexico should have to pay postjudgment interest in the event the Special Master recommended that damages be awarded against New Mexico. Explaining the Court’s holding that the Special Master could award postjudgment interest, Justice White’s opinion for the Court emphasized that *the Court* sets the rules in original cases:

New Mexico submits that there is *no statutory authority* for this Court to allow postjudgment interest in any form and that we are therefore without power to do so in this original action. It relies on the statements in *Pierce v. United States*, 255 U.S. 398, 406 (1921), that postjudgment interest may not be awarded absent statutory authority. But *we are not bound by this rule in exercising our original jurisdiction.*

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<sup>15</sup> 440 U.S. 59, 65-66 (1979).

<sup>16</sup> 482 U.S. 124, 132 n. 8 (1987).

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A leading treatise on the federal courts recognizes that the statements in *Grayson* and *Florida v. Georgia* appear to conflict with the Court's more recent pronouncements. Though perhaps taking an agnostic position, or at least hedging, on the ultimate question (stating that "Power to control the procedure in original jurisdiction cases appears to be shared between Court and Congress"), the treatise authors nonetheless make clear that, "[i]f indeed the Constitution establishes original jurisdiction beyond congressional control, the Court must have final authority over the procedure to be used. Any other conclusion would subject the constitutional jurisdiction to drastic impairment or even defeat by unworkable procedures."<sup>17</sup>

It is understandable if a review of the relevant Supreme Court cases, very small in number for 220 years of original jurisdiction and pointing at times in different directions, caused the Chief Justice not to cite or rely upon them in *Kansas v. Colorado*. Yet, overall, even accepting that the cases are a bit mixed, and conceding that it may give some Justices pause that the oldest cases may suggest that Congress has the power to regulate procedures in original cases, the better overall reading of the limited precedents includes two conclusions: (1) the Court has never actually held, as opposed to suggested in dicta, that Congress has such authority; and (2) the Court's original cases since at least 1860 seem to support consistently the literal reading of Article III.

Three other points bolster the conclusion that the Constitution does not give Congress the power to regulate the procedures in the Court's original jurisdiction cases.

1. *Congressional Practice*. It is not clear that Congress has ever intentionally regulated or expressly declared an intent to regulate the procedures in the Court's original cases, but there is evidence that Congress has made efforts to avoid doing so. In § 17 of the Judiciary Act of 1789, Congress declared that the federal courts have the "power" to make their own rules, as mentioned above. That authorization seems essential for the lower federal courts, them-

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<sup>17</sup> See 17 Wright & Miller, *Federal Practice & Procedure* § 4054, at 235 (3d ed. 2007) (emphasis added).

selves creations of Congress, to exercise rulemaking power, but it is far from clear that the Supreme Court required such authorization, and indeed most of the original jurisdiction decisions discussed above suggest it did not.

Section 13 of the Judiciary Act purported to regulate the Court's original jurisdiction, but only to the extent of declaring that the Supreme Court had "exclusive" jurisdiction over certain categories of original cases, and concurrent jurisdiction over others.<sup>18</sup> *Marbury v. Madison* of course famously held that § 13 is unconstitutional to the extent it can be read to attempt to expand the Court's original jurisdiction in mandamus actions beyond what Article III authorizes,<sup>19</sup> but that holding, like the conclusion that the Court's original jurisdiction is self-executing, does not answer the question whether Congress has the power to dictate procedures in the Court's original cases.

In fact, Congress largely left the federal courts to make their own rules without congressional intervention until 1853, when apparently the situation with respect to costs and fees in the lower federal courts had gotten so bad that Congress acted to bring order and national uniformity to such matters. In that year, Congress passed "An Act to Regulate the Fees and Costs to be allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, and for other Purposes."<sup>20</sup> This statute imposed uniformity on the lower federal courts with respect to fees and costs, but as the title of the Act makes clear, Congress excluded the Supreme Court from the Act's purview, and presumably intentionally so. That view is supported by the literal title of the 1853 Act, the Act's stated purposes, and also by 28 U.S.C. § 1911, which declares that "the Supreme Court may fix the fees to be charged by its clerk."

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<sup>18</sup> 1 Stat. 73, 80-81. Over time the line between exclusive and concurrent original jurisdiction has changed somewhat, but the distinction remains in 28 U.S.C. § 1251, with the Court's exclusive original jurisdiction now limited solely to cases between two or more States.

<sup>19</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>20</sup> 10 Stat. 161 (1853).

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More recent statutory enactments suggest the same conclusion. Even the Rules Enabling Act, which authorizes the federal courts to adopt rules of procedure, evidence, and bankruptcy – all subject to congressional approval – specifically exempts from its scope any rule promulgated by the Supreme Court.<sup>21</sup> As a matter of practice, it does not appear that the Supreme Court has *ever* submitted any of *its own* rules to Congress for approval.

2. *Supreme Court Practice.* The Court's longstanding practice and tradition has been to determine the procedures in original jurisdiction cases largely on an *ad hoc* basis, without formalizing them or memorializing them in published rules of the Court. Thus, there was no Supreme Court rule on original jurisdiction until 1939,<sup>22</sup> when the Court published its first rule on "Original Actions."<sup>23</sup> Since 1939, there has been one and only one Supreme Court Rule for original cases. Indeed, current Rule 17 is not much longer and addresses only a few more issues than the original 1939 Rule. Specifically, Rule 17 directs that "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed," and it also states that "[i]n other respects, those Rules and the Federal Rules of Evidence *may be taken as guides.*"<sup>24</sup>

Nothing in the Court's own rules suggests (or ever has suggested) that in original cases the Court is bound to follow rules that are binding on the lower federal courts. Indeed, as one commentator recognized 50 years ago, in original cases the Court has "proceeded on an *ad hoc* basis, fashioning rules as specific questions arose and carefully reserving the right to deviate from those rules as cir-

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<sup>21</sup> See 28 U.S.C. § 2071 *et seq.*

<sup>22</sup> Beginning in 1884, original actions were mentioned in a Supreme Court rule titled "Printing Records," which simply indicated that "the clerk shall cause copies to be made . . . of the whole record in cases of original jurisdiction." See, *e.g.*, 108 U.S. 573, 579 (1884) (Rule 10.4). The Supreme Court's "rule(s)" in original jurisdiction cases will be explored in a forthcoming article in the *Green Bag* tentatively titled "The Supreme Court's Rules In Original Jurisdiction Cases: Why Are There No 'Reply Briefs'?"

<sup>23</sup> See Rule 5, published at 306 U.S. 685-86 (1939).

<sup>24</sup> Sup. Ct. R. 17.2 (emphasis added).

cumstances might require. This carefully preserved flexibility remains today a distinctive feature of the procedure in original actions.<sup>25</sup> The proposition that Congress has the power to regulate procedures in the Court's original cases necessarily suggests that Rule 17 is subject to amendment or abolition by an Act of Congress, notwithstanding that the Supreme Court is not subject to the Rules Enabling Act and has *never* submitted Rule 17 to Congress for approval.

3. *The Parade of Horribles*. The implications of concluding that Congress has the power to regulate and dictate procedures in the Supreme Court's original jurisdiction cases are likely to be extremely troubling to the Justices. If the Court were to accept the proposition, the Court logically would have to follow an Act of Congress regulating, for example, (1) the use, selection, credentials or fees of Special Masters (*query*: could Congress even prohibit the use of Special Masters?), (2) time limits or deadlines for original cases, (3) the use of jury trials in original cases, and (4) a host of requirements that Congress has imposed on the lower federal courts. In sum, Congress could eliminate by statute the discretion the Court long has exercised in original cases.

Such concerns may well explain the perhaps unexpected partnership between the Chief Justice and Justice Souter in defending the Court's original jurisdiction ramparts from congressional intrusion. Their agreement on the question whether Congress may regulate procedures in the Court's original cases likely arises from a shared sense of tradition and institutional dignity in a unique but important area of the Court's responsibilities. We know that their shared interest does not arise from a common vision of limited congressional authority or a robust view of federalism. Indeed, in general, the Chief Justice and Justice Souter have sharply contrasting

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<sup>25</sup> Note, *The Original Jurisdiction Of The United States Supreme Court*, 11 Stan. L. Rev. 665, 686 (1959). Examples of the Court discussing its discretion to award costs or requests for special master fees are found in *Missouri v. Illinois*, 202 U.S. 598, 599 (1906) (discussing costs to award), and *Louisiana v. Mississippi*, 466 U.S. 921, 923 (1984) (several Justices dissenting from orders regarding expenses sought by a special master).

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views on these matters. That they found one another allies on the Article III question raised in *Kansas v. Colorado* is best explained by a shared view of judicial power, and only further emphasizes the unique and special nature of the Court's original jurisdiction.

If the Court ever decides the question reserved in *Kansas v. Colorado*, I predict that the Court will answer the question as the Chief Justice and Justice Souter declared it should be answered. Of course, the Court may simply manage to avoid deciding the question for another 220 years.

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