

## JURISDICTION-STRIPPING RECONSIDERED

*Richard H. Fallon, Jr.\**

INTRODUCTION.....	1044
I. <i>BOUMEDIENE</i> AND ITS METHODOLOGY: WHAT CONSTITUTIONAL THEORY HAS TO DO WITH JURISDICTION-STRIPPING.....	1053
A. <i>The Opinion</i> .....	1053
B. <i>Boumediene’s Potential Methodological     Significance</i> .....	1056
II. ALLOCATION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS.....	1063
A. <i>Withdrawal of Both Federal District Court and     Supreme Court Jurisdiction</i> .....	1065
1. <i>The Traditional View</i> .....	1065
2. <i>Professor Amar’s Neo-Federalist Rejoinder</i> .....	1069
3. <i>Deciding in the Face of Historical Uncertainty</i> .....	1072
4. <i>Supplementing Text-Based Originalism:         Congressional Motives Reconsidered</i> .....	1074
5. <i>Beyond Motive: Broader Limitations on the Total         Stripping of Federal Jurisdiction</i> .....	1083
B. <i>Withdrawal of Supreme Court Jurisdiction</i> .....	1087
1. <i>Background Principles</i> .....	1087
2. <i>Jurisdiction-Stripping and Supervisory Powers</i> .....	1089
C. <i>Stripping of District Court Jurisdiction</i> .....	1093
III. WITHDRAWAL OF ALL JUDICIAL JURISDICTION.....	1095
A. <i>Sources of Limits on Congressional Power</i> .....	1098
B. <i>Remedies and “the Battaglia Principle”</i> .....	1101
1. <i>Battaglia v. General Motors Corp.</i> .....	1102
2. <i>What Battaglia Forbids and Permits</i> .....	1102
C. <i>Constitutionally Necessary Remedies</i> .....	1104

---

\* Ralph S. Tyler, Jr. Professor of Law, Harvard Law School. I am grateful to Amanda Frost, Andrew Koppelman, John Manning, Caleb Nelson, Jim Pfander, Gil Seinfeld, Amanda Tyler, and to participants in a Constitutional Law Colloquium at Northwestern University Law School for extremely helpful comments on earlier drafts and to Steven Horowitz and Jonathan Schneller for excellent research assistance.

1. Nullification of Constitutionally Invalid Laws .....	1108
2. Habeas Corpus.....	1109
3. Post-Deprivation Monetary Remedies for Coercive Deprivations of Property and Liberty .....	1109
4. Injunctive or Similarly Effective Relief Against Ongoing Deprivations of Constitutional Rights That Would Not Be Adequately Compensable by Damages .....	1111
5. Remedies for Deprivations of “New Property” .....	1114
IV. STRIPPING OF JUDICIAL JURISDICTION TO REVIEW AGENCY ACTION .....	1115
A. <i>The Scope of the Inquiry</i> .....	1117
B. <i>Some Varieties of Jurisdiction-Stripping Issues</i> .....	1119
1. <i>Agency Actions Authorizing Criminal Punishments or Other Bodily Detentions</i> .....	1120
a. <i>Criminal Punishments</i> .....	1120
b. <i>Bodily Detentions</i> .....	1122
2. <i>Agency Action Determining Private Citizens’ Legally Enforceable Duties</i> .....	1122
a. <i>Adjudicative Determinations of One Private Party’s Civil Liability to Another Private Party</i> .....	1123
b. <i>Quasi-adjudicative Determinations of Duties Enforceable Under the Criminal Law</i> .....	1126
c. <i>Rulemaking as a Predicate for the Civil Liability of One Private Party to Another</i> .....	1127
3. <i>Agency Actions Coercively Enforcing the Law Against Private Citizens Without Resulting in Ongoing Physical Detentions</i> .....	1128
4. <i>Agency Decisions Involving the Distribution or Withholding of Material Benefits Such as Money, Education, or Employment</i> .....	1130
CONCLUSION.....	1133

#### INTRODUCTION

**P**ROPOSALS to “strip” jurisdiction from the federal courts raise fundamental questions about the power of Congress under the separation of powers and about the necessary role of the

federal courts in the constitutional scheme.<sup>1</sup> For better or for worse, many of the most mooted of those questions remain unanswered. Although the constitutional text, history, and precedent work in conjunction to resolve some issues, the Constitution's language leaves other questions debatable, and scholars have advanced remarkably varied claims about the original understanding of Congress's powers to define or curb federal jurisdiction. That debate exists about the historically understood meaning of constitutional provisions bearing on jurisdiction-stripping should provoke no surprise. As James Madison remarked in *The Federalist No. 37*, much of the Constitution emerged from the 1787 Convention and the subsequent ratification debates with uncertain implications.<sup>2</sup> Accordingly, Madison said, the meaning of some provisions would need to be "liquidated" through practice and precedent.<sup>3</sup> With respect to many questions about Congress's power to oust the federal courts of jurisdiction, however, practice and precedent speak inconclusively, if at all. Although jurisdiction-stripping bills are frequently introduced in Congress, they seldom pass.<sup>4</sup> Moreover, on the infrequent occasions when Congress has enacted laws that appear to attempt comprehensive jurisdiction withdrawals, the Supreme Court, more often than not, has strained to read them as effecting less than total preclusions in order to avoid the serious constitutional questions that otherwise would arise.<sup>5</sup> As a result, the Court has decided few cases squarely addressing the constitutionality of selective withdrawals of federal jurisdiction.

---

<sup>1</sup> See, e.g., Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499, 1500–01 (1990) [hereinafter Amar, *Two-Tiered Structure*] ("[T]he issues implicated by the jurisdiction-stripping debate go to the very heart of the role of the federal courts in our constitutional order.").

<sup>2</sup> *The Federalist No. 37*, at 197–98 (James Madison) (Clinton Rossiter ed., 1999); see also Henry Paul Monaghan, *Doing Originalism*, 104 Colum. L. Rev. 32, 38 n.37 (2004) ("Neither Madison nor anyone else believed that the document set out, once and for all, a clear set of rules.").

<sup>3</sup> *The Federalist No. 37* (James Madison), *supra* note 2, at 197.

<sup>4</sup> Proposals to strip the federal courts of jurisdiction have been introduced regularly since the early nineteenth century. See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 895–97 (1984).

<sup>5</sup> See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 299–300, 314 (2001); *Webster v. Doe*, 486 U.S. 592, 603 (1988).

The Military Commissions Act (“MCA”), adopted in 2006,<sup>6</sup> marked a deviation from the historical norm. The MCA purported to eliminate federal habeas corpus jurisdiction to review the detention of any alien who had “been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”<sup>7</sup> The Supreme Court reviewed the jurisdictional withdrawal and held it unconstitutional in *Boumediene v. Bush*.<sup>8</sup> In doing so, the Court ruled that the Suspension Clause<sup>9</sup> protects a right to habeas corpus at least as broad as that which existed in 1789.<sup>10</sup>

*Boumediene*’s holding that the Suspension Clause mandates habeas jurisdiction for detainees at the United States detention facility at the Guantanamo Bay Naval Base was important but narrow. The writ of habeas corpus protects only those who are unlawfully subjected to physical detention;<sup>11</sup> it does not avail those who seek access to a court to enforce other legal rights. Of further interest and potentially broader import is *Boumediene*’s interpretive methodology. Writing for the majority, Justice Anthony Kennedy began by inquiring into the original understanding of the Suspension Clause, but he shortly concluded that historical materials could not resolve the issue that the case presented. Insofar as the question was whether the guarantee of the writ extended to a non-citizen detained by the United States in territory that it controlled but over which it did not possess sovereignty, Justice Kennedy declared that the eighteenth-century precedents provided no clear answer.<sup>12</sup> But he did not stop with this assessment of eighteenth-century history. Instead, he suggested that the question before the

---

<sup>6</sup> Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

<sup>7</sup> 28 U.S.C. § 2241(e)(1) (2006).

<sup>8</sup> 128 S. Ct. 2229 (2008).

<sup>9</sup> U.S. Const. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

<sup>10</sup> *Boumediene*, 128 S. Ct. at 2248 (explaining that “‘at the absolute minimum’ the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified” (quoting *St. Cyr*, 533 U.S. at 301)).

<sup>11</sup> See Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and The Federal System* 1301–03 (6th ed. 2009) [hereinafter Fallon et al., *Hart & Wechsler*] (discussing the custody requirement).

<sup>12</sup> 128 S. Ct. at 2251.

Court was one that the Founding generation could not even possibly have foreseen, involving “the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age.”<sup>13</sup> Under these historically unforeseeable circumstances, Justice Kennedy concluded, the Court appropriately resolved the case based on principles immanent in several of its own precedents, all decided in the twentieth century, and functional considerations. He also held open “the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.”<sup>14</sup>

In many areas of constitutional law, *Boumediene*'s guarded recognition of the limitations of narrowly textual and rigidly originalist analysis would arouse no comment. In the context of a dispute about Congress's power to curb jurisdiction, however, it not only provoked a caustic dissent by Justice Scalia, but also diverged notably from the originalist and textualist style of reasoning that has characterized nearly all leading academic writings on congressional control of jurisdiction. Professor Henry Hart, who remains the most influential contributor to the discussion, rested principally on originalist grounds when he maintained that “it's been clear ever since September 17, 1787”—the date on which the Constitutional Convention finished its work—that the Constitution makes “[t]he state courts . . . the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.”<sup>15</sup> In the most important challenge to Hart's conclusion that few limits exist on Congress's power to strip federal court jurisdiction as long as state courts remain open, Akhil Amar has similarly relied almost entirely on Article III's text and original understanding to support his “neo-federalist” theory: although Congress could strip jurisdiction from *either* the Supreme Court or the lower federal courts, it cannot simultaneously withdraw the jurisdiction of both in important categories of cases, including those “arising under” the Constitution, laws, and treaties of the United States.<sup>16</sup>

---

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

<sup>14</sup> *Id.* at 2248.

<sup>15</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362, 1401 (1953).

<sup>16</sup> The relevant articles include Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *B.U. L. Rev.* 205, 271–72

Following *Boumediene*, the time seems ripe for a general reconsideration of Congress's power to withdraw jurisdiction from the federal courts as a means of shielding questions about the legality of official conduct from judicial review. At the core of my perspective lie two closely related organizing ideas. First, any modern assessment of Congress's power to control and limit federal jurisdiction should "decenter" originalist analysis under Article III for at least some purposes<sup>17</sup> and rely openly on such considerations as consistency with judicial precedent and functional desirability. In many areas of constitutional law, the prevailing doctrines diverge enormously from widely held expectations in 1789 or even in 1868, following the ratification of the Thirteenth and Fourteenth Amendments,<sup>18</sup> and reflect adaptations to accommodate developments, interests, and practical imperatives that the Founding generation—as in *Boumediene*—could not have anticipated. Free speech and equal protection furnish leading examples.<sup>19</sup> Indeed, non-originalist decisions and doctrines are by no means unknown in the domain of congressional power to allocate judicial jurisdiction and to exclude some cases and issues from the Article III courts. Prior to *Boumediene*, the most prominent example came from cases acknowledging congressional power to assign adjudicative responsibilities to administrative agencies that also perform rulemaking and prosecutorial functions and to limit judicial review of agency rulings.<sup>20</sup> The Supreme Court has seldom, if ever, tried to justify Congress's withdrawal of "private rights" cases—involving

---

(1985) [hereinafter Amar, Neo-Federalist View]; Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 487 (1989); Akhil Reed Amar, Reports of My Death Are Greatly Exaggerated: A Reply, 138 U. Pa. L. Rev. 1651, 1673 (1990); Akhil Reed Amar, Taking Article III Seriously: A Reply to Professor Freedman, 85 Nw. U. L. Rev. 442, 445 (1991); Amar, Two-Tiered Structure, *supra* note 1, at 1502–05.

<sup>17</sup> See Louise Weinberg, The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts," 78 Tex. L. Rev. 1405, 1422–24 (2000) (arguing that the Due Process Clause imposes more salient limits on Congress's power to curtail federal jurisdiction than does Article III).

<sup>18</sup> See, e.g., Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 727–39 (1988).

<sup>19</sup> Michael J. Perry, Interpretivism, Freedom of Expression, and Equal Protection, 42 Ohio St. L.J. 261, 287 (1981).

<sup>20</sup> See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 858 (1986); *Crowell v. Benson*, 285 U.S. 22, 65 (1932).

the liability of one private party to another—from the courts, and their assignment instead to administrative agencies, by direct appeal to original understandings of how the Constitution’s language would be applied.<sup>21</sup>

In calling for a decentering of originalist analysis in assessments of congressional power to strip the jurisdiction of the federal courts, I do not mean to dismiss original understandings as irrelevant to constitutional adjudication. In previous work, I have defended a multi-factor interpretive theory that takes account of relevant constitutional text, evidence of its original intent or understanding, constitutional structure, precedent, and value arguments involving normative attractiveness and functional workability.<sup>22</sup> Far better than originalism, a multi-factored approach reflects the implicit, tacit norms of our constitutional practice, within which judges and Justices routinely employ multiple categories or modalities of constitutional argument.<sup>23</sup> It is also a striking feature of our actual practice that participants in constitutional argument typically employ interpretive techniques that avoid open conflict among the considerations that they acknowledge as relevant:<sup>24</sup> they familiarly adjust their provisional assessment of the strongest arguments within one category in light of their judgments with respect to others.<sup>25</sup> As a result, it is normally possible for judges and Justices to find interpretations of the constitutional text, the Framers’ intent or original understanding, structurally identifiable norms, and judicial precedent that bring all of the categories of argument into a relationship of “constructivist coherence” or reflective equilibrium in which all support the same result.<sup>26</sup> Within this process, evidence concerning the historically expected applications of constitutional language is always relevant, but judges and Jus-

---

<sup>21</sup> See, e.g., *Crowell*, 285 U.S. at 50–51 (distinguishing “public” from “private” rights and characterizing withdrawal of judicial jurisdiction in private rights cases as presenting unresolved constitutional issues).

<sup>22</sup> See Richard H. Fallon, Jr., *Implementing the Constitution* 134–35 (2001) [hereinafter Fallon, *Implementing*]; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1252–68 (1987) [hereinafter Fallon, *Constructivist Coherence*].

<sup>23</sup> See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 6–8 (1982) (identifying modalities of constitutional argument).

<sup>24</sup> See Fallon, *Constructivist Coherence*, *supra* note 22, at 1238–39.

<sup>25</sup> See *id.* at 1240–43.

<sup>26</sup> See *id.*

tices can also, in some cases, appeal to a provision's more abstract purposes or emphasize the uncertainty of the relevant evidence in reaching a result that accords well with judicial precedent and functional or policy concerns<sup>27</sup>—as the Court did in *Boumediene*.<sup>28</sup>

The second substantial idea driving this Article involves the relationship between Congress's power to strip jurisdiction under provisions such as Article III, the Suspension Clause, and the Due Process Clause, on the one hand, and non-jurisdictional doctrines defining substantive constitutional rights, on the other hand. With respect to this relationship, my argument—which follows Henry Hart on this point<sup>29</sup>—holds that when substantive constitutional rights exist, the Constitution requires that some court have jurisdiction to provide sufficient remedies to prevent those rights from becoming practical nullities.<sup>30</sup> If this argument is accepted, then the emergence of once unrecognized substantive rights—including some that would be impossible to defend by exclusive reference to the original understanding—can generate rights to judicial remedies that in turn establish limits on Congress's power to strip judicial jurisdiction.

An example of the need to synthesize understandings of Congress's power to control jurisdiction with non-originalist developments in substantive constitutional law comes from statutes precluding judicial review of administrative action. Conventional wisdom holds that the original understanding of Article III and the Due Process Clause required no judicial review of government decisions involving “public rights” or “privileges” such as claims of entitlement to benefits or gratuities.<sup>31</sup> Based on this assumption,

---

<sup>27</sup> See *id.* at 1198–99; Monaghan, *supra* note 2, at 32, 38.

<sup>28</sup> Especially when constitutional interpretation proceeds in this way, the search for the Constitution's meaning will sometimes yield only relatively vague conclusions. In such cases, a further aspect of the judicial function involves the crafting of doctrinal tests to implement the Constitution's meaning. See Fallon, *Implementing*, *supra* note 22, at 41–42. Familiar examples include tests that inquire whether legislation has a rational basis, is necessary to promote a compelling government interest, or reflects a forbidden purpose. See *id.* at 77–79.

<sup>29</sup> See Hart, *supra* note 15, at 1372.

<sup>30</sup> See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 *Harv. L. Rev.* 2029, 2038–39 (2007).

<sup>31</sup> See *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (explaining that “there are matters, involving public rights, which may be presented in such form that



the Supreme Court once affirmed that Congress can establish non-Article III tribunals to adjudicate “public rights” disputes and preclude judicial review of administrative decisions.<sup>32</sup> Today, however, that conclusion seems sufficiently discordant with developments in substantive constitutional law to provoke a reconsideration of whether evidence of the Founding generation’s specific expectations should be regarded as controlling. Although the Constitution may not have been originally understood to require judicial review of benefits disputes, neither would the Constitution, as understood in the late eighteenth and early nineteenth centuries, have prohibited the government from discriminating against women and racial minorities by providing benefits—which would then have been denominated as privileges or gratuities—exclusively to white males. With a non-originalist understanding of the of the Fifth Amendment’s Due Process Clause having prevailed since *Bolling v. Sharpe*,<sup>33</sup> limitations on Congress’s power to preclude judicial jurisdiction to enforce equal protection rights (among others) should be regarded as having expanded commensurately with the rights themselves.

In taking a fresh, post-*Boumediene* look at the constitutional issues posed by jurisdiction-stripping, Part I begins by closely examining *Boumediene* itself, and especially its animating methodological assumptions. *Boumediene*, I argue, also furnishes a possible template for inquiries into the permissibility of jurisdiction-stripping under other constitutional provisions, including Article

---

the judicial power is capable of acting on them, . . . but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper”). For a history of the public rights doctrine, see Gordon G. Young, Public Rights and the Federal Judicial Power: From *Murray’s Lessee* Through *Crowell* to *Schor*, 35 Buff. L. Rev. 765, 772–89 (1986). The notion that benefits disputes involve public rights and do not necessarily require judicial review appears to be rooted partly in the concept of sovereign immunity. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982); *Murray’s Lessee*, 59 U.S. (18 How.) at 284; cf. Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 583–84 (2007) (asserting that benefits disputes were historically understood to involve “privileges” rather than “rights”). Whatever the underlying explanation, claims against the United States for money have long been understood to involve public rights. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (characterizing claims to veterans’ benefits as involving public rights); *Bakelite*, 279 U.S. at 452.

<sup>32</sup> See *Bakelite*, 279 U.S. at 452; *Murray’s Lessee*, 59 U.S. (18 How.) at 284; see also *Crowell*, 285 U.S. at 50–51.

<sup>33</sup> 347 U.S. 497, 500 (1954).

III—one that is generally consistent with the multi-factored, constructivist coherence approach outlined above.

Part II examines the issues that would arise from congressional enactment of legislation stripping jurisdiction from the federal courts, but permitting adjudication of constitutional issues in the state courts, in cases that do not implicate the Suspension Clause. In light of developments in other areas of constitutional law, Part II argues that a central focus of inquiry should involve Congress's motive or purpose in withdrawing jurisdiction. More particularly, legislation should be deemed unconstitutional if its evident purpose is to invite state court defiance of past authoritative Supreme Court decisions.

Part III considers the constitutionality of proposals that would strip jurisdiction from federal courts and state courts alike (in cases outside *Boumediene's* holding concerning the Suspension Clause) and thereby leave the victims of constitutional violations with no judicial forum in which to assert their claims. The resulting constitutional issues are vastly more complex than is often recognized because a gap frequently exists between constitutional rights and constitutionally mandated remedies. Simultaneous stripping of state and federal jurisdiction would violate the Constitution when it precludes the award of constitutionally necessary remedies, but not when it bars jurisdiction in cases not involving constitutionally necessary remedies (such as remedies against the government that fall within the ambit of sovereign immunity).<sup>34</sup> Identifying which remedies are constitutionally necessary is an immensely daunting task, for reasons that Part III explains. The inquiry must be sensitive to—even if it is not always directly entailed by—evolving, non-originalist, substantive constitutional doctrine.

Part IV addresses questions that arise when Congress assigns adjudicative responsibilities to legislative courts and administrative agencies and strips the Article III courts of jurisdiction to review those tribunals' decisions. In probing the boundaries of congressional power to preclude review of legislative courts' and agencies' decisions by the Article III courts, Part IV highlights an analogy to

---

<sup>34</sup> See generally Fallon et al., *Hart & Wechsler*, supra note 11, at 305–14 (exploring the pertinence of substantive constitutional rights, rights to remedies, and immunity doctrines to Congress's power to control jurisdiction).

*Boumediene*, in which the Supreme Court did not question Congress's employment of non-Article III tribunals to identify "enemy combatants" subject to federal detention in the War on Terror, but held that the Constitution nevertheless requires an oversight role for the Article III judiciary. Part V provides a brief conclusion.

I. *BOUMEDIENE* AND ITS METHODOLOGY: WHAT CONSTITUTIONAL THEORY HAS TO DO WITH JURISDICTION-STRIPPING

*Boumediene v. Bush*<sup>35</sup> is the first decision since *United States v. Klein*,<sup>36</sup> in 1871, to hold unequivocally that a statute framed as a withdrawal of jurisdiction from the federal courts violates the Constitution.<sup>37</sup> Because *Boumediene*'s ruling rested wholly on the Suspension Clause, it has no necessary bearing on jurisdiction-stripping proposals outside the scope of that provision. Nevertheless, the decision was very much about jurisdiction-stripping—namely, the removal of the federal courts' habeas corpus jurisdiction in cases involving non-citizen detainees in the War on Terror. Moreover, the Court's opinion illuminates issues of constitutional theory and methodology that participants in debates about Congress's powers to curb judicial jurisdiction have too often ignored. If extended to other cases, the Court's interpretive methodology—which is at least loosely consistent with the multi-factored, constructivist coherence approach described in the Introduction—would also result in an overdue decentering of the kind of Article III originalism that has dominated discussions of jurisdiction-stripping.

A. *The Opinion*

*Boumediene* arose from Congress's enactment of the Military Commissions Act, which purported to strip the federal courts of habeas jurisdiction to review the detentions of non-citizens who had been determined by the United States to be enemy combatants or were being held pending such a determination.<sup>38</sup> The more spe-

---

<sup>35</sup> 128 S. Ct. 2229 (2008).

<sup>36</sup> 80 U.S. (13 Wall.) 128 (1872).

<sup>37</sup> See Daniel J. Meltzer, Habeas Corpus, Suspension, and Guantánamo: The *Boumediene* Decision, 2008 Sup. Ct. Rev. 1, 1.

<sup>38</sup> Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

cific question concerned whether the MCA violated rights guaranteed to non-citizens held at Guantanamo Bay, Cuba by the Suspension Clause, which provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>39</sup> The Government defended the MCA on the ground that the Suspension Clause conferred no rights on non-citizens outside the sovereign territory of the United States.<sup>40</sup> But the Supreme Court, in a 5-4 decision, rejected the Government’s position and held the MCA’s jurisdiction-stripping provision unconstitutional.<sup>41</sup>

In a methodologically fascinating opinion, Justice Kennedy began by affirming the Court’s observation in prior cases that “‘at the absolute minimum’ the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified.”<sup>42</sup> In addition, he wrote, “[t]he Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.”<sup>43</sup>

Having reasoned that the Suspension Clause protects a habeas jurisdiction at least as broad as in 1789, Justice Kennedy proceeded to examine Founding-era authorities. In his view, these authorities gave no clear guidance concerning whether the writ would then have been available to non-citizens at a place such as Guantanamo Bay, which is not a part of the United States but is subject to complete U.S. control:

In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the

---

<sup>39</sup> U.S. Const. art. I, § 9, cl. 2.

<sup>40</sup> See, e.g., *Boumediene*, 128 S. Ct. at 2251 (“Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.”).

<sup>41</sup> Justice Kennedy’s majority opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Chief Justice Roberts and Justices Scalia, Thomas, and Alito all joined the two dissenting opinions, one authored by the Chief Justice and the other by Justice Scalia.

<sup>42</sup> *Boumediene*, 128 S. Ct. at 2248 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

<sup>43</sup> *Id.*

one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.<sup>44</sup>

Writing in dissent, Justice Scalia insisted that the Court's analysis should have stopped with this conclusion. He argued that if the original understanding of the Suspension Clause did not clearly bar a congressional withdrawal of habeas corpus jurisdiction, then the Court had no adequate foundation for holding that the Suspension Clause applied.<sup>45</sup>

Justice Kennedy disagreed. Although insisting that analysis must begin with Founding-era authorities, he suggested that those authorities not only did not, but could not, resolve the issue before the Court. Among the reasons that the historical precedents were not precisely on point, he wrote, was that they had not reckoned, as the Court must, with "the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age."<sup>46</sup>

"Declin[ing] to infer too much, one way or the other, from the lack of historical evidence on point,"<sup>47</sup> Justice Kennedy next reviewed both Suspension Clause and non-Suspension Clause cases addressing "the Constitution's extraterritorial application."<sup>48</sup> From those cases he extracted the principle that constitutional guarantees sometimes extend outside the United States and that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."<sup>49</sup> To implement that principle in cases involving claims of a right of access to the writ of habeas corpus, he prescribed a balancing test that requires weighing six considerations: (1) the citizenship of the detainee, (2) the status of the detainee under applicable legal norms, including the laws of war, (3) "the adequacy of the process through which that status determination was made," (4) the nature of the site where a detainee was initially apprehended, (5) the nature of the site where a detainee is

---

<sup>44</sup> Id.

<sup>45</sup> Id. at 2297 (Scalia, J., dissenting) ("If [the issue is ambiguous], the Court has no basis to strike down the Military Commissions Act, and must leave undisturbed the considered judgment of the coequal branches.").

<sup>46</sup> Id. at 2251 (majority opinion).

<sup>47</sup> Id.

<sup>48</sup> Id. at 2253.

<sup>49</sup> Id. at 2258.

held, and (6) “the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”<sup>50</sup> Although this open-ended formula would appear to leave unresolved whether the right to the writ extends to non-citizens in other locations outside the United States, the majority held unequivocally that the Suspension Clause “has full effect [and thus guarantees the availability of habeas corpus] at Guantanamo Bay.”<sup>51</sup> In embracing a multi-factored analysis, and thus rejecting any categorical exclusion of a judicial role in reviewing detentions of aliens outside the United States, Justice Kennedy cited a weighty separation-of-powers interest in maintaining a regime in which the judicial branch, rather than Congress or the President, gets to “say ‘what the law is.’”<sup>52</sup>

Having determined that the *Boumediene* petitioners had a right of access to a federal court possessing habeas jurisdiction, Justice Kennedy’s opinion for the Court declined to rule on whether the administrative procedures employed by the government to make determinations of enemy combatant status satisfied the Due Process Clause.<sup>53</sup> Nor did it seek to ascertain what substantive rights to freedom from detention the petitioners could assert, whether under the Constitution or any other source of law. The Court framed and treated the central question before it as involving the permissibility of the stripping of habeas corpus jurisdiction and found unconstitutional only a single jurisdiction-stripping provision of the MCA.<sup>54</sup>

### B. *Boumediene’s Potential Methodological Significance*

Because the Court’s ruling in *Boumediene* relied wholly on the Suspension Clause, its pertinence to jurisdiction-stripping cases

---

<sup>50</sup> Id. at 2259. These considerations are all subsumed within what Justice Kennedy characterized as:

[A]t least three factors . . . relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.

Id.

<sup>51</sup> Id. at 2262.

<sup>52</sup> Id. at 2259 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>53</sup> Id. at 2270.

<sup>54</sup> Id. at 2275 (“The only law we identify as unconstitutional is MCA § 7.”).

that do not implicate that provision remains uncertain. Nevertheless, by employing a multi-factored interpretive approach that reads constitutional language in light of precedent, the separation of powers, and functional concerns, *Boumediene* furnishes a possible model for a broader reframing of jurisdiction-stripping debates. It does so along at least four dimensions.

*First*, *Boumediene* illustrates that questions about Congress's power to strip judicial jurisdiction may depend on background, hotly contested issues of constitutional theory. Although Justice Kennedy's majority opinion described the original understanding as the appropriate starting point for the Court's inquiry into the constitutionality of the MCA, he also suggested, over the dissenting protest of Justice Scalia, that Founding-era understandings and expectations may not control how the Constitution applies to circumstances that the Founding generation could not have anticipated.<sup>55</sup> Justice Kennedy also reserved the possibility, which Justice Scalia again thought foreclosed, that the necessary role of the federal courts in habeas cases might have expanded over time.<sup>56</sup>

For readers not steeped in federal court literature, the proposition that jurisdiction-stripping debates involve issues of constitutional theory may seem so self-evident as to merit no notice. Nevertheless, scholarship abounds asserting claims about the natural linguistic meaning or original understanding of Article III, as if those claims, if historically accurate, would necessarily decide current controversies.<sup>57</sup> In this context, *Boumediene* serves as either a reminder or a wake-up call. Purported new findings about the original understanding of Article III—which have emerged with astonishing frequency—necessarily depend for their significance on issues of constitutional theory.

*Second*, and relatedly, the *Boumediene* majority implicitly rejected the methodological position—sometimes labeled “exclusive originalism”—that courts in principle could, and in practice should,

---

<sup>55</sup> See *id.* at 2251.

<sup>56</sup> *Id.* at 2248. The Court had previously reserved the same question. See *INS v. St. Cyr*, 533 U.S. 289, 300–01 (2001).

<sup>57</sup> See, e.g., John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203, 204 (1997) (defining congressional power over jurisdiction by “[f]ocusing on the language of the Constitution, and ignoring as much as possible the gloss that has developed”).

resolve every constitutional dispute based on the best evidence of the original understanding,<sup>58</sup> typically as evidenced by prevailing expectations concerning how constitutional language would be applied.<sup>59</sup> As the analysis in subsequent parts of this Article will make clear, I believe exclusive originalism to be deeply mistaken and therefore applaud the *Boumediene* majority's rejection of it. With the literature on originalism being vast already, this is not the place to offer a systematic critique of exclusive originalism—which is only one among the proliferating strands of originalist thought.<sup>60</sup> Many objections will emerge in criticism of particular positions asserted in jurisdiction-stripping debates. Nevertheless, it may be useful for me to introduce in summary form some of the difficulties with exclusive originalism that subsequent arguments will amplify:

\* Often there appears to have been no consensus concerning what constitutional language meant or how it applied to eighteenth- or nineteenth-century problems,<sup>61</sup> much less how it applies to twentieth- and twenty-first-century issues.

\* In the absence of actual historical agreement, efforts to establish “the original public meaning”<sup>62</sup> that a reasonable (and reasonably informed) observer<sup>63</sup> would have ascribed to a provision—

---

<sup>58</sup> See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. Rev. 1, 10 (2009) (so labeling the thesis that “whatever may be put forth as the proper focus of interpretive inquiry (framers’ intent, ratifiers’ understanding, or public meaning), that object would be the sole interpretive target or touchstone”).

<sup>59</sup> See John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 Const. Comment. 371, 378–79 (2007) (maintaining that “some of the best evidence of [originally understood] meaning would be the expected applications, especially when widely held”).

<sup>60</sup> Useful surveys include Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239 (2009); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 Ohio St. L.J. 1085 (1989); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. Rev. 923, 926–40 (2009); Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub Pol’y 599 (2004).

<sup>61</sup> For discussion of examples, see *infra* notes 115–32 and 227–231 and accompanying text.

<sup>62</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 Yale L.J. 541, 553 (1994); Gary Lawson, *Proving the Law*, 86 Nw. U. L. Rev. 859, 875 (1992).

<sup>63</sup> See Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 398 (2002) (explaining that objective public meaning originalism requires “a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision”); McGinnis & Rappaport, *supra* note 59, at 374 (maintaining that “the



in light of dictionary definitions of words, for example—frequently depend on imputations of value-based assumptions and attitudes that are normatively charged and therefore require normative defenses. Doctrinaire insistence that courts should eschew assessments of normative desirability either invites decisions based on unacknowledged premises or risks disastrous results in high-stakes cases.

\* In cases of reasonable doubt about or division within prevailing historical expectations about how constitutional language would be applied, it would be undesirable to the point of foolhardiness for courts not to take the practical implications of alternative possible resolutions into account.<sup>64</sup>

\* Precedent and settled expectations sometimes provide more than ample reason for rejecting constitutional arguments founded on exclusively originalist premises.<sup>65</sup>

\* In a body of law that is not exclusively originalist—as contemporary constitutional law is not—it would frequently be dysfunctional for courts to decide previously unresolved issues on exclusively originalist grounds when such decisions would be normatively and practically out of joint with surrounding precedent.<sup>66</sup>

Having stated my objections to exclusive originalism so summarily, I want to reiterate that nothing I have said implies that the original understanding is irrelevant to constitutional adjudication.<sup>67</sup> I should also emphasize that, as noted above, exclusive originalism is not the only form of originalism.<sup>68</sup> Some originalists acknowledge that the original understanding may not be sufficiently determinate to resolve all important issues.<sup>69</sup> Some also agree that precedent

---

focus of originalism should be on how a reasonable person at the time of the Constitution's adoption would have understood its words and thought they should be interpreted" even in the case of provisions that "may have seemed ambiguous").

<sup>64</sup> See Fallon & Meltzer, *supra* note 30, at 2080.

<sup>65</sup> See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. Rev. 1107, 1147–48 (2008).

<sup>66</sup> See Larry Kramer, *Two (More) Problems with Originalism*, 31 Harv. J.L. & Pub. Pol'y 907, 915 (2008); Adrian Vermeule, *The Supreme Court, 2008 Term, Foreword: System Effects and the Constitution*, 123 Harv. L. Rev. 4, 54–58 (2009).

<sup>67</sup> See *supra* notes 22–27 and accompanying text.

<sup>68</sup> See Solum, *supra* note 60, at 926–40 (identifying varieties).

<sup>69</sup> Among the possible routes to this conclusion, some originalists believe that the original understanding determines constitutional meaning, but that courts must per-

can sometimes justify departures from the original understanding.<sup>70</sup> With the line that divides non-exclusive originalists from non-originalists sometimes being a fine one, my criticisms of exclusively originalist stances with regard to jurisdiction-stripping issues do not necessarily apply to all forms of originalism. It is *Boumediene's* rejection of *exclusive* originalism that deserves emphasis in appraising the case's potential methodological significance.

*Third, Boumediene*, which turned wholly on the Suspension Clause, pushed Article III from its frequent, if not characteristic, center-stage location in disputes about jurisdiction-stripping. Although it might appear unremarkable that the Court's assessment of a claim under the Suspension Clause would focus on that provision to the exclusion of Article III, Article III's irrelevance was not obvious. On one familiar interpretation, the so-called Madisonian Compromise at the Constitutional Convention,<sup>71</sup> which made the establishment of lower federal courts optional rather than mandatory,<sup>72</sup> rules out arguments that the Suspension Clause requires

---

form a further role of "construction" to furnish tests or standards to be applied in adjudication when the semantic meaning of the constitutional text is vague, ambiguous, or indeterminate. See, e.g., Randy E. Barnett, *Restoring the Lost Constitution* 121–25 (2004); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 5 (1999).

<sup>70</sup> See, e.g., Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 138–40 (1997); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 Va. L. Rev. 1437, 1441 (2007); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. Pa. J. Const. L. 155, 159 (2006).

<sup>71</sup> See, e.g., Fallon et al., *Hart & Wechsler*, supra note 11, at 8; Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39, 42.

<sup>72</sup> Although the delegates at the Constitutional Convention agreed from the outset that their Constitution should provide for one Supreme Court, see Fallon et al., *Hart & Wechsler*, supra note 11, at 7, their debates about lower federal courts exhibited a remarkable volatility. After initially adopting language that would have made the establishment of lower federal courts mandatory, the Convention subsequently reversed itself and voted tentatively to preclude the establishment of any national tribunals other than the Supreme Court. See 1 *The Records of the Federal Convention of 1787*, at 125 (Max Farrand ed., 1911). Madison then made the compromise proposal that resulted in the current language of Article III, Section 1, which provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1 (emphasis added).

federal habeas corpus jurisdiction.<sup>73</sup> On this view, the Suspension Clause only bars Congress from abolishing such habeas jurisdiction as state courts might otherwise possess.<sup>74</sup> But the *Boumediene* Court exhibited an utter obliviousness to the notion—which Henry Hart trumpeted as reflecting the original understanding of Article III—that state rather than federal courts might function as the ultimate guarantors of constitutional liberties.<sup>75</sup>

*Fourth*, *Boumediene* rested its invalidation of a jurisdiction-stripping statute partly on the premise, which Justice Kennedy traced to *Marbury v. Madison*<sup>76</sup> and described as fundamental to the separation of powers, that it is the necessary and proper function of the Judicial Branch to “say [authoritatively] ‘what the law is.’”<sup>77</sup> On a narrower interpretation, *Marbury*’s famous dictum would imply only that in cases properly within the jurisdiction of a federal court, the court can pronounce and apply all relevant law. Over the past fifty years, however, the Supreme Court has repeatedly asserted, albeit in dicta, that the Constitution mandates authoritative judicial resolution—and, in particular, determination by the Court itself—of constitutional questions more generally.<sup>78</sup>

---

<sup>73</sup> See William F. Duker, *A Constitutional History of Habeas Corpus* 126–80 (1980); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1509–10 (1987) (adopting Duker’s reading); Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 *Minn. L. Rev.* 265, 308–21 (2007) (same).

<sup>74</sup> See sources cited *supra* note 73.

<sup>75</sup> Hart, *supra* note 15, at 1401. The implication of Hart’s view would have been that the Military Commissions Act was unconstitutional only insofar as it divested the state courts of their habeas corpus jurisdiction over petitions such as *Boumediene*’s. A partial embarrassment to Hart’s view is the Supreme Court’s decision in *Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1872), discussed *infra* at notes 192–93 and accompanying text. But just as the *Boumediene* Court did not discuss Hart’s well-known view, neither did it refer to *Tarble’s Case*.

<sup>76</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>77</sup> *Boumediene*, 128 S. Ct. at 2259 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

<sup>78</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (“No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”); *Baker v. Carr*, 369 U.S. 186, 211 (1962) (describing the Supreme Court as the “ultimate interpreter of the Constitution”); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”).

Before *Boumediene*, when the Supreme Court emphasized that it is the province of the judicial branch to say what the law is, it most often did so in cases that were manifestly within its jurisdiction and in which the question involved appropriate interpretive deference.<sup>79</sup> In *Boumediene*, by contrast, the Court treated the judicial branch's function of saying what the law is as a ground for holding that the Constitution mandates federal jurisdiction.<sup>80</sup>

For reasons that Part II will discuss, I am ambivalent about arguments that the Supreme Court's increasingly accepted status as the ultimate expositor of the Constitution<sup>81</sup>—which may diverge dramatically from prevalent understandings at the Founding<sup>82</sup>—helps to justify non-originalist limitations on Congress's power to curb the Court's appellate jurisdiction. After *Boumediene*, however, it is an open question whether, and if so, how, analysis of jurisdiction-stripping statutes would and should be affected by the idea that the separation of powers and the rule of law require au-

---

<sup>79</sup> See, e.g., *Morrison*, 529 U.S. at 616–17 n.7; *United States v. Nixon*, 418 U.S. 683, 704 (1974).

<sup>80</sup> See Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 *Const. Comment.* 377, 378 (2009) (asserting that *Boumediene* “should be understood as a case about the Court’s vision of separation of powers . . . in which federal courts serve to keep the political branches within the bounds of the Constitution and . . . the political branches cannot evade judicial review by manipulating jurisdiction”); Stephen I. Vladek, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 *Notre Dame L. Rev.* 2107, 2110 (2009) (“Reading *Boumediene*, one is left with the distinct impression that for Justice Kennedy, at least, the writ of habeas corpus is in part a means to an end—a structural mechanism protecting individual liberty by preserving the ability of the courts to check the political branches.”). *Boumediene’s* apparent separation-of-powers theory is not a complete innovation. The Court has cited similar concerns, see, e.g., *Baker*, 369 U.S. at 211, as supporting its near evisceration of the political question doctrine, which once acknowledged that the political branches, not the courts, should resolve a variety of legal and constitutional questions. See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 *Colum. L. Rev.* 237, 240 (2002).

<sup>81</sup> See, e.g., Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 227–28 (2004) (explaining the Court’s accession to that status as a modern development).

<sup>82</sup> See, e.g., *id.* at 98–99, 109 (describing a view common in the 1790s that judicial review should be employed “only where the unconstitutionality of a law was clear beyond doubt” and judicial interpretations were not necessarily binding on other branches).

thoritative exposition of the Constitution by the federal judiciary as a whole or the Supreme Court in particular.<sup>83</sup>

## II. ALLOCATION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS

Outside the context of habeas corpus, the most discussed jurisdiction-stripping proposals would bar the federal courts from resolving specific constitutional claims, usually involving politically hot-button issues, and thereby channel the litigation of those claims exclusively into state courts.<sup>84</sup> Familiar examples come from bills introduced in Congress, but not so far enacted into law, that would bar both the federal district courts and the Supreme Court from entertaining challenges to abortion restrictions,<sup>85</sup> school prayer,<sup>86</sup> and governmentally sponsored recitations of the Pledge of Allegiance.<sup>87</sup>

There appear to be two reasons why the sponsors of jurisdiction-stripping bills have most often proposed to exclude constitutional claims from federal, but not state, courts. First, the proponents have assumed that legislation stripping all courts' jurisdiction would violate the Constitution even if barring federal jurisdiction would not. I shall discuss the constitutionality of legislation stripping the jurisdiction of state, as well as federal, courts in Part III. Second, proponents of jurisdiction-stripping legislation have, quite obviously, assumed that state courts are more likely than federal courts to uphold the constitutionality of abortion restrictions and such practices as school prayer and recitations of the Pledge of Allegiance.<sup>88</sup>

---

<sup>83</sup> For the argument that it would and should have significant influence, see Vladek, *supra* note 80, at 2146–50.

<sup>84</sup> See Gunther, *supra* note 4, at 895–96 (summarizing thirty jurisdiction-stripping bills introduced in 1981 and 1982).

<sup>85</sup> See, e.g., S. 158, 97th Cong. (1981).

<sup>86</sup> See, e.g., H.R. 4756, 97th Cong. (1981) (proposing to strip federal courts of jurisdiction over cases “arising from any statute . . . of any state . . . that permits or facilitates voluntary prayer in any public school or public building”).

<sup>87</sup> See, e.g., H.R. 2389, 109th Cong. § 2 (2006) (proposing to strip federal courts of jurisdiction over constitutional challenges to the Pledge of Allegiance).

<sup>88</sup> See, e.g., Eugene Gressman & Erik K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 *Geo. Wash. L. Rev.* 495, 502–06 (1983).

The conventional wisdom with respect to the constitutionality of jurisdiction-stripping holds that Congress (1) has the authority under Article III, Section 1 to withdraw the jurisdiction of the lower federal courts to entertain defined sets of issues,<sup>89</sup> (2) can similarly create issue-based exceptions to the Supreme Court's original jurisdiction under Article III, Section 2,<sup>90</sup> and, therefore, (3) could, if it chose, simultaneously strip both the lower federal courts and the Supreme Court of jurisdiction to entertain selected claims.<sup>91</sup> In assessing this multi-part position, it would be impossible wholly to avoid the carefully sequenced analysis—asking first whether Congress could strip district court jurisdiction, then whether it could eliminate Supreme Court jurisdiction—that commentators have conventionally performed.<sup>92</sup> Where multiple constitutional provisions bear on a question, each requires separate discussion. Nevertheless, I want to begin with as holistic an analysis as possible, focused on whether it would be constitutionally permissible for Congress to withdraw both district court and Supreme Court jurisdiction over the same set of contentious, politically salient claims. In my view, a jurisdictional withdrawal of this kind would be unconstitutional. If I can successfully make the case for this conclusion, the core elements of that case will lend nuance to subsequent discussions of whether, and if so when, it might be unconstitutional for Congress to withdraw just Supreme Court jurisdiction, while leaving the lower federal courts open, or to eliminate federal district court jurisdiction, while continuing to permit appeals of state court judgments to the Supreme Court.

---

<sup>89</sup> Article III, Section 1 gives Congress the power but not the obligation to create lower federal courts. See *supra* note 72 and accompanying text.

<sup>90</sup> Article III, Section 2 provides that the Supreme Court's appellate jurisdiction shall be subject to "such Exceptions . . . as the Congress shall make."

<sup>91</sup> Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1569 (1990); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw. U. L. Rev. 191, 195, 234–35 (2007).

<sup>92</sup> See, e.g., Fallon et al., *Hart & Wechsler*, *supra* note 11, at 287 (differentiating and separately analyzing jurisdiction-stripping issues).

*A. Withdrawal of Both Federal District Court and Supreme Court Jurisdiction*

Because my aim is a reconsideration of arguments that have dominated ongoing debates, I shall begin by sketching the traditional view of Congress's power to strip federal court jurisdiction and appraising a well-known challenge. The traditional framing, I shall then argue, overlooks pertinent developments in other areas of constitutional law that call for a parsing of Congress's purposes in curbing federal jurisdiction.

*1. The Traditional View*

The traditional view begins by affirming Congress's authority to withdraw lower federal court jurisdiction under Article III, Section 1, which says that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and *in such inferior Courts as the Congress may from time to time ordain and establish.*"<sup>93</sup> The italicized language embodies the "Madisonian Compromise"<sup>94</sup> that gave Congress the option, but not the obligation, to create lower federal courts. From this grant of congressional discretion, the conclusion follows almost ineluctably that Congress can establish lower courts but give them less than the full jurisdiction that the Constitution would permit. Congress did so in the 1789 Judiciary Act and has continued to do ever since, sometimes with express judicial approval.<sup>95</sup>

---

<sup>93</sup> U.S. Const. art. III, § 1 (emphasis added).

<sup>94</sup> See supra notes 71–72 and accompanying text.

<sup>95</sup> Although the First Judiciary Act accepted the invitation of the Madisonian Compromise to establish a system of lower federal courts, it vested the lower federal courts with far less than all of the jurisdiction that Article III would have permitted them to have. See William R. Casto, *The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction*, 26 B.C. L. Rev. 1101, 1110 (1985). In perhaps its most striking omission, the 1789 Act made no provision for general federal question jurisdiction. See, e.g., Fallon et al., *Hart & Wechsler*, supra note 11, at 22; William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control Over Federal Jurisdiction*, 7 Const. Comment. 89, 93 (1990). Absent some more specialized grant of jurisdiction, cases presenting federal questions had to be litigated in state court, subject to Supreme Court review. (The Supreme Court's jurisdiction over state court decisions of federal questions was limited to those cases in which the state court had denied a claim of federal right. See Act of Sept. 24, 1789, § 25, 1 Stat. 73, 85–87.) Apart from a brief interlude under a short-lived statute enacted in 1801 and repealed in 1802, see Fallon et al., *Hart & Wechsler*, supra note 11,

Prominent support for the traditional view comes from *Sheldon v. Sill*,<sup>96</sup> which Professor Hart, in the first edition of *The Federal Courts and the Federal System*, made the leading case on congressional power to restrict the jurisdiction of lower federal courts.<sup>97</sup> A provision of the 1789 Judiciary Act vested the lower federal courts with diversity jurisdiction, but excepted cases in which one party transferred a “chose in action” to another, out-of-state party.<sup>98</sup> In upholding this limitation, *Sheldon* pronounced that a statute restricting the jurisdiction of the lower federal courts “cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.”<sup>99</sup>

---

at 744, it was not until 1875 that Congress conferred a general authorization for the lower courts to entertain “suits of a civil nature” arising under the Constitution, laws, and treaties of the United States, and even then it attached a \$500 amount-in-controversy requirement. See Act of Mar. 3, 1875, § 1, 18 Stat. 470. Even today, “federal questions” generally cannot be litigated in the lower federal courts unless a federal question appears on the face of the plaintiff’s well-pleaded complaint. See, e.g., *Franchise Tax Bd. of Cal. v. Constr. Laborers’ Vacation Trust*, 463 U.S. 1, 9–10 (1983) (describing the well-pleaded complaint rule).

Since 1789, the jurisdictional statutes have always vested the lower federal courts with diversity jurisdiction, but that grant has consistently been subject to an amount-in-controversy requirement. In 1789, the amount-in-controversy requirement was \$500. Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78–79. Today, it is \$75,000. 28 U.S.C. § 1332(a) (2006). In addition, the early case of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), construed the 1789 Act as requiring “complete diversity” when there are multiple parties on one or both sides of a case, even though Article III does not mandate this limitation. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967).

<sup>96</sup> 49 U.S. (8 How.) 441 (1850).

<sup>97</sup> See Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 288 (1st ed. 1953).

<sup>98</sup> See Act of Sept. 24, 1789, § 11, 1 Stat. 73, 79.

<sup>99</sup> *Sheldon*, 49 U.S. (8 How.) at 449. The other case on which Hart relied most heavily to establish Congress’s power to exclude cases from the lower federal courts was *Lauf v. Shinner*, 303 U.S. 323 (1938). See Hart, *supra* note 15, at 1363 (relying on *Sheldon* and *Lauf*). In applying a provision of the Norris-LaGuardia Act, ch. 90, H.R. Res. 5315, 72nd Cong., 47 Stat. 70 (1932) (codified as amended and repealed in part at 29 U.S.C. §§ 101–115 (2006)), that barred lower federal courts from enforcing so-called “yellow dog” contracts and from issuing injunctions in labor disputes, the Court said summarily in *Lauf* that “[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.” 303 U.S. at 330.



As even defenders of the orthodox position readily acknowledge, this dictum speaks too broadly.<sup>100</sup> *Boumediene* falsifies it. Moreover, surely Congress could not define the jurisdiction of the district courts to exclude cases brought by Catholics, women, or African-Americans.<sup>101</sup> Those exclusions would violate either the First Amendment's Free Exercise Clause or the equal protection component of the Fifth Amendment's Due Process Clause.<sup>102</sup> But these non-Article III limits on Congress's power over jurisdiction—which commentators often describe as “external” restraints<sup>103</sup>—would have no application to jurisdiction-stripping legislation that deprived the lower federal courts of jurisdiction to entertain challenges to the Pledge of Allegiance or school prayer. Such proposed legislation would not employ a “suspect classification.” And assertions that it would burden the exercise of a fundamental right are question-begging.<sup>104</sup> It cannot simply be assumed that a plaintiff who wishes to assert a claim under the Establishment Clause, for example, necessarily has the fundamental right that she claims. Nor does the requirement that a party litigate in state rather than federal court in the first instance unconstitutionally burden the right to litigate.<sup>105</sup> The Supremacy Clause binds state courts to enforce federal rights, anything in state law to the contrary notwithstanding.<sup>106</sup> Criminal defendants who wish to challenge the constitutionality of the statutes under which they are prosecuted in state courts generally have no right to present their

---

<sup>100</sup> See, e.g., Paul M. Bator, Congressional Power Over the Jurisdiction of the Federal Courts, 27 *Vill. L. Rev.* 1030, 1034 (1982); Gunther, *supra* note 4, at 916.

<sup>101</sup> See, e.g., Gunther, *supra* note 4, at 916; Lawrence Gene Sager, The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts, 95 *Harv. L. Rev.* 17, 26 (1981); Laurence H. Tribe, Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts, 16 *Harv. C.R.-C.L. L. Rev.* 129, 132 (1981).

<sup>102</sup> Cf. Amanda L. Tyler, The Story of *Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts, in *Federal Courts Stories* 87, 112 (Vicki Jackson & Judith Resnik eds., 2010) (ascribing this result to the principle, apparently rooted in Article III, “that Congress may not employ the courts in a way that forces them to become active participants in violating the Constitution”).

<sup>103</sup> See Fallon et al., *Hart & Wechsler*, *supra* note 11, at 292; Gunther, *supra* note 4, at 916–22.

<sup>104</sup> See Gunther, *supra* note 4, at 917–18.

<sup>105</sup> But cf. Tribe, *supra* note 101, at 141–49 (arguing that selective jurisdictional withdrawals impermissibly burden constitutional rights).

<sup>106</sup> See U.S. Const. art. VI, cl. 2.

claims in a federal district court instead,<sup>107</sup> nor do civil defendants who wish to assert federal constitutional defenses against state law actions.<sup>108</sup>

Having satisfied themselves that Article I, Section 1 would permit a withdrawal of district court jurisdiction over cases raising a particular constitutional issue, defenders of the orthodox view then argue that Congress could validly strip the Supreme Court of appellate jurisdiction under the Exceptions Clause of Article III, Section 2, which makes the Court's otherwise self-executing appellate jurisdiction subject to "such Exceptions . . . as the Congress shall make."<sup>109</sup> The Exceptions Clause makes it undeniable that Congress can create at least some exceptions to the Court's appellate jurisdiction. Under the first Judiciary Act, the Supreme Court had no appellate jurisdiction over federal criminal cases<sup>110</sup> and cases in which state courts upheld constitutional claims.<sup>111</sup>

On the orthodox view, no additional constitutional difficulty would arise if Congress combined a withdrawal of district court jurisdiction that would be permissible under Article I, Section 1, with a withdrawal of Supreme Court jurisdiction that Article I, Section 2 would authorize. Nor does Congress's motive for simultaneously stripping district court and Supreme Court jurisdiction over the same set of cases matter in the traditional analysis. According to adherents of the orthodox view, the Constitution's structure and history rule out motive-based objections to jurisdiction-stripping proposals.<sup>112</sup> *Ex parte McCardle*<sup>113</sup> provides the strongest precedential support for this argument. *McCardle* arose in the aftermath of the Civil War when Congress, fearing that the Court would use the

---

<sup>107</sup> There is no statutory provision for removal in most such cases, and the doctrine of *Younger v. Harris*, 401 U.S. 37, 45–49 (1971), bars federal injunctions against pending state criminal prosecutions. See generally Fallon et al., Hart & Wechsler, supra note 11, at 1083–128 (discussing *Younger* abstention doctrine).

<sup>108</sup> See Fallon et al., Hart & Wechsler, supra note 11, at 776–78 (discussing implications of the rule that makes federal jurisdiction depend on the contents of the plaintiff's well-pleaded complaint).

<sup>109</sup> U.S. Const. art. III, § 2, cl. 2.

<sup>110</sup> See *United States v. More*, 7 U.S. (3 Cranch) 159, 172–74 (1805) (holding that Congress's failure to provide for appellate jurisdiction over federal criminal matters in the 1789 Judiciary Act barred such jurisdiction).

<sup>111</sup> See Act of Sept. 24, 1789, § 25, 1 Stat. 73, 85.

<sup>112</sup> See, e.g., Bator, supra note 100, at 1036–37; Gunther, supra note 4, at 919–20.

<sup>113</sup> 74 U.S. (7 Wall.) 506, 514 (1869).

case to hold Reconstruction unconstitutional, repealed the statute on which the Court's jurisdiction depended. After hearing argument on the constitutionality of the repealing act, the Court unanimously upheld it. In response to the argument that the repealer statute was invalid because enacted for the purpose of precluding the Court from invalidating military Reconstruction, the Justices said flatly that "[w]e are not at liberty to inquire into the motives of the legislature."<sup>114</sup>

## 2. Professor Amar's Neo-Federalist Rejoinder

Although the view that Congress could simultaneously withdraw both lower federal court and Supreme Court jurisdiction over specified issues retains the status of orthodoxy, it now provokes lively debate as a result of path-breaking scholarship by Larry Sager and Akhil Amar.<sup>115</sup> Amar's work, in particular, has spurred a broad and continuing discussion among Federal Courts scholars, largely because it engages traditionalists on common methodological ground: Amar roots his arguments almost entirely in the language, history, and structure of Article III.<sup>116</sup>

Building on earlier arguments by Justice Joseph Story,<sup>117</sup> Amar rests his case partly on Article III, Section 1, which says that the judicial power "shall be vested," and even more on Article III, Section 2, Clause 1, which makes selective use of the word "all" in describing the reach of federal jurisdiction.<sup>118</sup> With respect to the first three of the nine jurisdictional categories that Article III, Section 2 lists, it states that the judicial power "shall extend" to "all cases."

---

<sup>114</sup> Id.

<sup>115</sup> See, e.g., Amar, Neo-Federalist View, *supra* note 16; Sager, *supra* note 101.

<sup>116</sup> See sources cited *supra* note 16.

<sup>117</sup> See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 327–31 (1816).

<sup>118</sup> Article III, Section 2, Clause 1 provides:

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.

U.S. Const. art. III, § 2, cl. 1.

With respect to the remaining six categories, it drops the word “all,” and says simply that the judicial power shall extend to denominated “controversies.” According to Amar, this selective use of the word “all” reflects a division of the categories of federal jurisdiction into two tiers: a first tier, comprising three categories in which the Constitution mandates federal jurisdiction, and a second tier, consisting of the six remaining categories, in which Congress has the option to vest federal jurisdiction or not.<sup>119</sup> Even with respect to first-tier cases, Amar maintains, there need not be original federal jurisdiction; the Madisonian Compromise gives Congress the option not to create lower federal courts.<sup>120</sup> Nor need the Supreme Court necessarily have appellate jurisdiction; the Exceptions Clause indicates otherwise.<sup>121</sup> But, Amar maintains, the plain language of Article III mandates the vesting of jurisdiction over all cases arising under the Constitution in either a lower federal court, in the Supreme Court, or in both.<sup>122</sup>

Amar buttresses his reading of Article III with other evidence concerning the original understanding. He notes that earlier drafts of the Judiciary Article at the Constitutional Convention consistently contemplated federal jurisdiction of all cases arising under the Constitution while omitting the “all” in describing other categories of federal judicial power.<sup>123</sup> Despite some gaps, the 1789 Judiciary Act was reasonably consistent with his two-tier thesis, he says.<sup>124</sup>

In further support of his textualist-originalist case, Amar adduces arguments based on the Constitution’s structure. In particular, he argues that his interpretation of Article III would ensure that cases of the greatest national consequence are decided, as they should be, by national judges who have been appointed by the President and confirmed by the Senate, and whose independence is

---

<sup>119</sup> See Amar, *Neo-Federalist View*, supra note 16, at 240–46.

<sup>120</sup> *Id.* at 255.

<sup>121</sup> *Id.* (“Congress may make exceptions to the Supreme Court’s appellate jurisdiction in the mandatory categories, but only if it creates other Article III tribunals with the power to hear all the excepted cases.”).

<sup>122</sup> *Id.* at 255–59.

<sup>123</sup> *Id.* at 242–45.

<sup>124</sup> *Id.* at 259–65.

secured by Article III's guarantees of life tenure and non-reduction in salary.<sup>125</sup>

As often happens with brilliant scholarship, Amar's work provoked searching criticism. In an article in the *University of Pennsylvania Law Review*, my colleague Daniel Meltzer responded to Amar's arguments nearly point-by-point.<sup>126</sup> Meltzer notes that the records of the Constitutional Convention include no references to Article III's having a two-tiered structure. He also offers an alternative explanation for Article III's referring to "all Cases" in some instances, as distinguished from "Controversies" in others. According to Meltzer, historical evidence suggests that the Founding generation understood the word "cases" to embrace both civil and criminal actions, whereas the word "controversies" referred only to civil disputes.<sup>127</sup> The Framers may thus have meant the word "all" preceding "cases" to signal the inclusion of both civil and criminal actions. Meltzer emphasizes that the 1789 Judiciary Act did not fit Amar's two-tier thesis perfectly.<sup>128</sup> Perhaps most importantly, Section 25 permitted Supreme Court review of state courts' decisions of federal questions only when the state courts had rejected a claim of federal right.<sup>129</sup> Finally, in response to Amar's structural arguments, Meltzer doubts that all of the cases in Amar's first tier are likely to prove more consequential than those in the second, which includes controversies between states and those to which the United States is a party.<sup>130</sup> Echoing Charles Black, he also suggests that rigid insistence by federal judges that they have a constitutionally necessary role might detract from the national judiciary's democratic legitimacy.<sup>131</sup>

---

<sup>125</sup> See Amar, *Two-Tiered Structure*, *supra* note 1, at 1511–13.

<sup>126</sup> Meltzer, *supra* note 91. For a comparably searching and comprehensive critique of Amar's arguments, see Harrison, *supra* note 57.

<sup>127</sup> Meltzer, *supra* note 91, at 1575 (citing William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 *U. Chi. L. Rev.* 131, 133 (1990)).

<sup>128</sup> *Id.* at 1585–99.

<sup>129</sup> *Id.* at 1585–93 (discussing Section 25 of the First Judiciary Act).

<sup>130</sup> *Id.* at 1582–85.

<sup>131</sup> *Id.* at 1621–22.

### 3. *Deciding in the Face of Historical Uncertainty*

Based on the evidence that Amar and Meltzer adduce, I could not confidently answer the question whether Article III originally was or would have been understood to require the vesting of jurisdiction of “all cases” arising under the Constitution and laws of the United States in *some* federal court. If forced to make a probabilistic assessment, I would adjudge Meltzer’s negative arguments slightly more persuasive than Amar’s affirmative ones,<sup>132</sup> but my level of confidence falls far short of total. Among my reasons for hesitation is that it seems entirely plausible that different members of the Founding generation would have offered different conclusions about the meaning or implications of Article III if they had thought about Amar’s two-tier thesis at all. Some originalists would say, of course, that the right question is what a reasonable and properly informed member of the Founding generation most likely would have thought in light of the dictionary meaning of words, pertinent rules of grammar, and so forth.<sup>133</sup> But efforts to specify what exactly a hypothetical observer would have known—and what his values might have been and how they might have affected his interpretive judgment<sup>134</sup>—generate more dizziness than confidence. For anyone with a similar response to the purely historical and textual arguments, the issue thus becomes whether historical and linguistic analysis that focuses narrowly on Article III’s historically expected applications should mark the end of constitutional inquiry into whether, today, Congress could permissibly strip both the district courts and the Supreme Court of jurisdiction to decide controversial issues.

Each of three reasons independently makes me think not. All are suggested by, or at least are consistent with, the Supreme Court’s analysis in *Boumediene*.

---

<sup>132</sup> Strongly corroborative of that judgment is William A. Fletcher, *Congressional Power Over the Jurisdiction of Federal Courts: The Meaning of the Word “All” in Article III*, 59 *Duke L.J.* 929, 952 (2010), which concludes that the historical significance of the word “all” in reference to particular jurisdictional categories in Article III was to authorize Congress to vest exclusive jurisdiction in the federal courts if it so chose, not to mandate that some federal court must have jurisdiction of every case within those categories.

<sup>133</sup> See, e.g., McGinnis & Rappaport, *supra* note 59, at 378–79.

<sup>134</sup> See generally Ronald Dworkin, *Law’s Empire* 52–55 (1986) (discussing the partial dependence of interpretive judgments on normative values).

First, even if Amar's neo-federalist argument were rejected on textualist-originalist grounds, its rejection would be at most relevant to, and not dispositive of, modern debates about jurisdiction-stripping. The modern question is whether it would be constitutionally permissible for Congress to withdraw all federal court jurisdiction, after it had vested, over controversial claims of constitutional right, based on Congress's anticipated disagreement with how the federal courts would decide those claims. This is a different question from that framed by Professor Amar and Justice Story, who ask whether Article III compels Congress to confer federal court jurisdiction in the first instance. The closest analogy in early American history took shape in 1802 when Thomas Jefferson's Democratic-Republicans repealed the grant of federal "arising under" jurisdiction that a lame-duck Federalist Congress had recently conferred.<sup>135</sup> In that era, nearly every question about Congress's appropriate role in defining and delimiting judicial power provoked partisan division about the Constitution's meaning.<sup>136</sup>

Second, when plausible historical and textual arguments support contrary conclusions, courts characteristically do, and should, take account of other considerations, including practical workability and normative attractiveness.<sup>137</sup> This, admittedly, is a controversial claim, especially in its normative dimension, and I shall not repeat here arguments that I have made in support of it elsewhere.<sup>138</sup> Nevertheless, in a case of historical doubt, *Boumediene* turned to precedent-based and functional analysis. In my view, constitutional decisionmaking should follow the same course in jurisdiction-stripping cases not involving the Suspension Clause.

---

<sup>135</sup> See Fallon et al., Hart & Wechsler, supra note 11, at 744.

<sup>136</sup> See Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* 147–244 (2005) (describing controversies surrounding the scope of judicial power in the aftermath of the 1800 presidential election).

<sup>137</sup> See Fallon, *Constructivist Coherence*, supra note 22, at 1237–51.

<sup>138</sup> Prominent among the reasons is that exclusive originalism does not "state a workable ideal for a polity with an aged constitution and a robust tradition of judicial review that has produced a large body of nonoriginalist precedents." Fallon, *Implementing*, supra note 22, at 24. For statements of more affirmative reasons for taking practical workability and normative attractiveness into account, see id. at 45–55; Fallon, *Constructivist Coherence*, supra note 22, at 1262–80.

Third, I see no reason to accept the premise that judicial reasoning about Congress's power to curb federal jurisdiction should necessarily be exclusively originalist even insofar as a clear, pertinent original understanding—defined by historically expected applications—might be identifiable. As I have noted already, in many areas of constitutional law, Justices, judges, and commentators treat information about the original understanding as relevant to, but not necessarily controlling of, constitutional interpretation.<sup>139</sup> Over the course of constitutional history, federal courts have earned recognition as stalwart and sometimes necessary guarantors of constitutional rights,<sup>140</sup> and the Supreme Court has assumed the role of the “ultimate expositor of the constitutional text.”<sup>141</sup> Under these circumstances, it should be treated as an open question whether practice and precedent might have established that the federal courts have a broader necessary role in the constitutional scheme today than they were understood to have in 1789. Even if not specifically anticipated by the Founding generation, such a role might well be consistent with the historical intent and understanding that the federal judicial branch would play an important checking and balancing role within the constitutional scheme.<sup>142</sup>

#### *4. Supplementing Text-Based Originalism: Congressional Motives Reconsidered*

In considering the possible supplementation of originalist analysis, I think it important to emphasize the evident purpose of bills

---

<sup>139</sup> Fallon, *Implementing*, supra note 22, at 45–55; Fallon, *Constructivist Coherence*, supra note 22, at 1213.

<sup>140</sup> See Burt Neuborne, *The Myth of Parity*, 90 *Harv. L. Rev.* 1105, 1115–18 (1977). For a review of the literature on the question of state court “parity” or lack thereof with federal courts, see Fallon et al., *Hart & Wechsler*, supra note 11, at 278–83.

<sup>141</sup> *United States v. Morrison*, 529 U.S. 598, 616–17 n.7 (2000).

<sup>142</sup> See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850 (1986) (“Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts ‘to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating’ constitutional courts . . . and thereby preventing ‘the encroachment or aggrandizement of one branch at the expense of the other.’” (quoting *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting))); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion) (“The Federal Judiciary was . . . designed by the Framers to . . . maintain the checks and balances of the constitutional structure . . .”); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam).



that would remove all federal jurisdiction over cases presenting particular constitutional issues. Such proposals aim to license or invite state courts to reach decisions different from those that federal courts would reach, typically (though admittedly not always) by failing to accord Supreme Court precedents the authority that the federal courts would grant them. The sponsors of such bills frequently trumpet this ambition.<sup>143</sup> Moreover, any law so narrowly carving an exception to both the Supreme Court's and the lower federal courts' jurisdiction could seldom have any other rationally plausible explanation. Whatever difficulties judicial inquiry into congressional motives may pose in some other contexts, legislation that simultaneously stripped both Supreme Court and lower federal court jurisdiction over a narrowly defined set of constitutional questions for which Supreme Court precedents clearly prescribed a controlling test would constitute an easy case. Jurisdiction-stripping legislation such as this would thus present the question whether it should be deemed necessary and proper for Congress to use its power to control federal jurisdiction for the purpose of encouraging state courts to ignore, reject, or defy pertinent precedents.

In addressing this question, I proceed from the premise that, following an attempted stripping of federal jurisdiction, the Supreme Court's precedents would remain binding on state courts as a matter of law. The Supreme Court has held repeatedly that the lower courts must adhere to its precedents, even when judges believe that the Court erred or would now reverse itself.<sup>144</sup> Treating the Court's pronouncements as authoritative, most commentators have assumed that Congress could not excuse state courts from their obligation of obedience.<sup>145</sup>

---

<sup>143</sup> See Gressman & Gressman, *supra* note 88, at 502–03, 505.

<sup>144</sup> See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (*per curiam*). But cf. Frederic M. Bloom, *State Courts Unbound*, 93 *Cornell L. Rev.* 501, 502–06 (2008) (arguing that state courts not infrequently contradict Supreme Court precedent and that the Supreme Court sometimes condones such action).

<sup>145</sup> See, e.g., Paul M. Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 *Harv. J.L. & Pub. Pol'y* 31, 33 (1984); Steven G. Calabresi & Gary Lawson, *Equity & Hierarchy: Reflections on the Harris Execution*, 102 *Yale L.J.* 255, 276 n.106 (1992); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan.*

Several originalist scholars have recently challenged this view. Professor John Harrison has argued that the plain text and original understanding of Article III neither require nor forbid doctrines of precedential authority.<sup>146</sup> According to Harrison, current rules occupy the status of “general” or common law that Congress could change.<sup>147</sup> Professor Michael Paulsen has advanced the further argument that Congress could repeal doctrines of stare decisis on a selective basis and, thus, excuse the lower courts from any obligation to adhere to Supreme Court decisions involving school prayer or abortion.<sup>148</sup>

Although these arguments deserve serious attention, I find them unpersuasive for reasons that I have stated at length in earlier writing.<sup>149</sup> To minimize repetition, I shall restate my views here only summarily. If questions about the constitutional authority of Supreme Court precedents depended solely on the text and original understanding of Article III, the historical record is less clear than Professors Harrison and Paulsen suggest.<sup>150</sup> A respectable case can be made that Article III’s grant of “the judicial power” presup-

---

L. Rev. 817, 869 (1994) (arguing that “Supreme Court precedents should continue to bind lower courts” even if Congress enacted jurisdiction-stripping legislation); Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. Rev. 651, 672–73 (1995); Martin H. Redish, Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination, 27 Vill. L. Rev. 900, 925–26 (1982); Herbert Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1006 (1965). But see Amar, Neo-Federalist View, *supra* note 16, at 258–59 n.170; Leonard Ratner, Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction, 27 Vill. L. Rev. 929, 937 (1982); Charles E. Rice, Congress and the Supreme Court’s Jurisdiction, 27 Vill. L. Rev. 959, 985 (1982).

<sup>146</sup> See John Harrison, The Power of Congress Over the Rules of Precedent, 50 Duke L.J. 503, 513–30 (2000).

<sup>147</sup> *Id.* at 505.

<sup>148</sup> See Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?, 109 Yale L.J. 1535, 1596–97 (2000) (suggesting that a congressional abrogation of stare decisis limited to abortion cases might be constitutionally acceptable).

<sup>149</sup> See Fallon, *supra* note 65; Richard H. Fallon, Jr., Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition, in *The Rule of Recognition and the U.S. Constitution* 47, 59–60 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) [hereinafter Fallon, Precedent-Based Adjudication]; Richard H. Fallon, Jr., Stare Decisis and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570 (2001) [hereinafter Fallon, Stare Decisis].

<sup>150</sup> See Fallon, Stare Decisis, *supra* note 149, at 578–82.

poses that Supreme Court precedents will bind lower courts and, to some extent, the Court itself.<sup>151</sup>

But more is involved than the original understanding. The foundations of law lie in practices of acceptance.<sup>152</sup> The Constitution is law in the United States today, while the Articles of Confederation (and the dictates of the British Parliament) are not, because the Constitution is accepted as law.<sup>153</sup> And because the Constitution requires interpretation, what it means today is a function, not just of the original understanding, but also of currently accepted interpretive norms.<sup>154</sup> Under interpretive practices that have prevailed throughout constitutional history, all of the Justices of the Supreme Court, including those currently sitting, have accepted that prior Court decisions can authorize or even bind them in some cases to reach decisions contrary to what they would otherwise have interpreted the Constitution to require.<sup>155</sup> If the Court's precedents can sometimes lawfully prevail over what the Constitution would otherwise demand, it must be because practice and precedent have settled that Supreme Court decisions become part of the fabric of constitutional law.<sup>156</sup> In other words, practice and precedent have settled that Supreme Court precedent is a constituent element of constitutional meaning—just as the original understanding is an element of constitutional meaning.<sup>157</sup> This being so, Congress could not validly direct lower courts to ascertain the Constitution's meaning without regard to Supreme Court precedent any more than it could direct either the Supreme Court or lower courts to determine

---

<sup>151</sup> See *id.* at 579.

<sup>152</sup> See Fallon, *supra* note 65, at 1128.

<sup>153</sup> See *id.*

<sup>154</sup> For expressions of the contrary, outlier view that precedent can never lawfully displace the Constitution's originally understood meaning, see, e.g., Randy E. Barnett, *Trumping Precedent With Original Meaning: Not as Radical as It Sounds*, 22 *Const. Comment.* 257 (2005), Gary Lawson, *The Constitutional Case Against Precedent*, 17 *Harv. J.L. & Pub. Pol'y* 23 (1994), and Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 *Const. Comment.* 289 (2005). The arguments of Fallon, *Precedent-Based Adjudication*, *supra* note 149, at 50–55, and Fallon, *supra* note 65, aim to show that the view that the Constitution's originally understood meaning is always constitutionally authoritative rests on untenable jurisprudential assumptions.

<sup>155</sup> See Fallon, *supra* note 65, at 1130 n.84.

<sup>156</sup> See Fallon, *Precedent-Based Adjudication*, *supra* note 149.

<sup>157</sup> See Fallon, *Constructivist Coherence*, *supra* note 22, at 1202–04, 1260–62 (treating precedent as a constituent element of constitutional meaning).

the Constitution's meaning without reference to the original understanding.<sup>158</sup>

If this analysis is correct, it puts into stark relief the question whether congressional motives bear on the validity of jurisdiction-stripping legislation. The question is whether the Constitution should be interpreted to permit Congress to invite or encourage state court judges—almost ninety percent of whom must stand for election<sup>159</sup>—to defy their constitutional obligations to enforce Supreme Court precedents. In so framing the issue, I do not mean to suggest that the Court's constitutional interpretations are always correct. But whether Congress should be entitled to strip jurisdiction as a means of promoting official and lower court disobedience of the Court's decisions is another matter.

In maintaining that Congress's purposes for stripping federal jurisdiction are constitutionally irrelevant, adherents to the orthodox view rest their conclusions on the imagined original understanding of Article III<sup>160</sup> and, especially, the Supreme Court's 1869 decision in *Ex parte McCordle*.<sup>161</sup> But *McCordle* would be an easily distinguishable precedent for a Supreme Court that wanted to distinguish it. As the Court pointedly noted in its decision, the repealer statute left open an alternative avenue by which the petitioner could seek appellate review.<sup>162</sup> The Court's jurisdiction to entertain challenges to military reconstruction was not completely eliminated. In addition, the jurisdiction of the lower federal courts remained untouched.

Moreover, only a few years after *McCordle*, the Court cited Congress's purposes as relevant to its invalidation of a statute purport-

---

<sup>158</sup> See Fallon, *Stare Decisis*, supra note 149, at 591–92.

<sup>159</sup> Jed H. Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1061, 1063 (2010). “Recent studies demonstrate that elected judges face more political pressure and reach legal results more in keeping with local public opinion than appointed judges do.” *Id.* at 1064.

<sup>160</sup> See, e.g., Bator, supra note 100, at 1030–31, 1036–37.

<sup>161</sup> 74 U.S. (7 Wall.) 506 (1869).

<sup>162</sup> See *id.* at 515 (“Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from the Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.”). The Court subsequently exercised jurisdiction under the previously existing statute in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

ing to eliminate its appellate jurisdiction in *United States v. Klein*.<sup>163</sup> *Klein* arose under an act of Congress authorizing noncombatant Southern property owners to recover for property seized by the federal government during the Civil War upon proof of their non-combatant status.<sup>164</sup> In ruling in favor of *Klein*, the Court of Claims relied on a prior Supreme Court decision holding that a presidential pardon established an applicant's status as a loyal citizen during the Civil War.<sup>165</sup> By the time the case reached the Supreme Court, however, Congress had passed a statute prescribing that the Court of Claims and the Supreme Court must dismiss for want of jurisdiction any case in which a claimant relied on a presidential pardon as proof of loyalty.<sup>166</sup>

In a confusing opinion that included several strands,<sup>167</sup> the Court asserted as one of its grounds for decision that jurisdiction-stripping legislation that is enacted "as a means to an end" that is itself constitutionally impermissible "is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."<sup>168</sup> Although *Klein's* tangled

---

<sup>163</sup> 80 U.S. (13 Wall.) 128, 145 (1872).

<sup>164</sup> See Act of Mar. 3, 1863, § 3, ch. 120, 12 Stat. 820 (providing for compensation for property seized "on proof to the satisfaction of [the Court of Claims] . . . that [the property owner] has never given any aid or comfort to the present rebellion").

<sup>165</sup> *Klein*, 80 U.S. (13 Wall.) at 132–33; *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542–43 (1870).

<sup>166</sup> See Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

<sup>167</sup> The first strand suggested that the challenged statute, although framed as a limitation on judicial jurisdiction, was in fact more substantive than jurisdictional. See *Klein*, 80 U.S. (13 Wall.) at 146 ("The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction."). Congress, the Court said, lacked power to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* But this assertion flatly contradicts both prior and subsequent cases that clearly recognize Congress's power to enact statutes prescribing rules of decision applicable to pending cases. See, e.g., *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("[I]f subsequent to the judgment and before the decision of the appellate court, [an otherwise valid] law intervenes and positively changes the rule which governs, the law must be obeyed . . .").

A second strand asserted a clear and unexceptionable basis for the decision: the Court found that the challenged congressional statute was unconstitutional because it impaired the effect of a presidential pardon, as established by one of the Court's precedents, and thus "infring[ed] the constitutional power of the Executive." *Klein*, 80 U.S. (13 Wall.) at 147.

<sup>168</sup> *Klein*, 80 U.S. (13 Wall.) at 145–46.

reasoning raises as many questions as it answers,<sup>169</sup> it is surely relevant to the issues posed when Congress attempts to strip the federal courts of jurisdiction “as a means to [the] end” of stopping them from issuing particular rulings on the merits—especially if the rulings that Congress seeks to avert are ones that, like the ruling in *Klein*, the Supreme Court would regard as compelled by its precedents.<sup>170</sup> Any good doctrinalist would want to inquire how *McCardle* and *Klein* fit together and whether they can be reconciled.

In a recent article, Professor Caleb Nelson argues that—the apparently contrary statement in *McCardle* notwithstanding<sup>171</sup>—the nineteenth-century Supreme Court regarded congressional motive as pertinent to the validity of legislation in a variety of doctrinal contexts,<sup>172</sup> including that of jurisdiction-stripping under Article III. In support of that thesis, he cites *Klein*.<sup>173</sup> Under nineteenth-century jurisprudential understandings, Nelson maintains, the decisive difference between *McCardle* and *Klein* was that in the latter case Congress’s illicit motive was evident on the face of the statute, whereas in the former the identification of an illicit purpose—namely, that of frustrating the enforcement of constitutional guarantees—would have required reference to other evidence.<sup>174</sup>

Regardless of whether Professor Nelson is correct that the Supreme Court has long recognized congressional purpose as relevant to the validity of jurisdiction-stripping under Article III, it is certainly not categorically true today that the validity of legislation cannot depend on the motivations of the legislature. Motive or purpose tests feature prominently in contemporary constitutional law, including in cases under the Free Exercise Clause, the Free Speech Clause, and the Equal Protection Clause.<sup>175</sup> The reason is

---

<sup>169</sup> For provocative analyses, see Martin H. Redish & Christopher R. Pudelski, Legislative Deception, Separation of Powers, and Democratic Process: Harnessing the Political Theory of *United States v. Klein*, 100 Nw. U. L. Rev. 437 (2006); Lawrence G. Sager, *Klein*’s First Principle: A Proposed Solution, 86 Geo. L.J. 2525 (1998); Tyler, *supra* note 102.

<sup>170</sup> *Klein*, 80 U.S. (13 Wall.) at 145.

<sup>171</sup> See *supra* note 114 and accompanying text.

<sup>172</sup> See Caleb Nelson, Judicial Review of Legislative Purpose, 83 N.Y.U. L. Rev. 1784, 1790–91 & nn.17–22 (2008).

<sup>173</sup> *Id.* at 1790–91.

<sup>174</sup> *Id.*

<sup>175</sup> See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532–33 (1993) (Free Exercise Clause); *Washington v. Davis*, 426 U.S. 229, 240–41

not hard to locate. When important constitutional values are at stake, and it is difficult for the Supreme Court to agree on an alternative test of constitutional validity to protect those values, purpose tests provide a minimal protection against abuses of governmental power.<sup>176</sup> They stop legislatures from achieving indirectly aims that the Constitution would forbid the government to pursue directly.

To be sure, the Supreme Court has not held that courts should subject legislation to motive tests in all possible contexts.<sup>177</sup> The Court eschews motive-based inquiries when determining whether legislation comes within Congress's power to regulate interstate commerce.<sup>178</sup> More generally, the Court appears to treat motive as more frequently relevant in cases involving the Constitution's rights-guaranteeing than its structural provisions.<sup>179</sup> Defenders of the orthodox view that congressional motive is irrelevant to the constitutionality of congressional preclusions of federal jurisdiction might therefore argue that *Klein* was ambiguous or confused and that *McCardle*'s purported disavowal of motive-based inquiries should remain authoritative in matters of jurisdiction-stripping. But this intractable insistence that a single sentence in *McCardle* definitively resolves a question that that case did not present—namely, whether Congress could strip all jurisdiction to entertain constitutional challenges from both the Supreme Court and the lower federal courts—requires a normative justification that defenders of the orthodox view have not provided. There is nothing inherent in a legislative power over jurisdiction to preclude inquiries into legislative motivation,<sup>180</sup> as the Supreme Court recognized in its 2009 decision in

---

(1976) (equal protection component of the Due Process Clause). See generally Fallon, *Implementing*, supra note 22, at 89–95 (discussing purpose tests in constitutional law).

<sup>176</sup> See Fallon, *Implementing*, supra note 22, at 93–95.

<sup>177</sup> See, e.g., Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. Rev. 1, 35 (2007) (criticizing the Supreme Court for its “fractured pattern of consideration of purpose”).

<sup>178</sup> See, e.g., *United States v. Darby*, 312 U.S. 100, 115 (1941) (“The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Court places no restriction . . .”).

<sup>179</sup> According to Massey, supra note 177, at 23–24, it is “partly, but not universally, true” that “courts would think governmental purpose less relevant to the judiciary’s role in policing federalism limits on federal power and more relevant to questions of the scope of constitutional individual liberties.”

<sup>180</sup> See, e.g., Sager, supra note 101, at 74–77; Tribe, supra note 101, at 151.

*Haywood v. Drown*.<sup>181</sup> Ordinarily, a state legislature can limit state court jurisdiction in any way that it chooses, as long as it does not discriminate against federal claims. Nevertheless, *Haywood* invalidated a New York statute depriving state courts of jurisdiction to entertain damages claims against state correction officers under either state law or 42 U.S.C. § 1983, which creates a cause of action against state officials who violate federal rights. A state, the Court found, cannot validly strip its courts of jurisdiction over federal claims when its purpose is to “shut the courthouse door to federal claims that it considers at odds with its local policy.”<sup>182</sup>

Indeed, the Supreme Court’s 1986 decision in *Commodity Futures Trading Commission v. Schor* mandates a limited inquiry into congressional purposes in assessments of the permissibility of jurisdictional legislation under Article III.<sup>183</sup> At issue in *Schor* was whether Congress violated Article III when it authorized a federal administrative agency not only to adjudicate disputes under the federal Commodity Futures Trading Act, but also to exercise pendent jurisdiction over a state law counterclaim. In addressing that question, Justice O’Connor’s opinion for the Court began its constitutional analysis by eschewing “conclusory reference to the language of Article III”<sup>184</sup> and by affirming that the outcome should turn on the purposes of the Judiciary Article, one of which is to establish the federal courts as “an inseparable element of the constitutional system of checks and balances.”<sup>185</sup> In determining whether agency adjudication unacceptably diminished the judicial role, the Court found that an important consideration involved “the concerns that drove Congress” to assign cases to an agency instead of an Article III court.<sup>186</sup> Article III, the Court held, bars Congress from legislating “for the purpose of emasculating’ constitutional courts . . . and thereby preventing ‘the encroachment or aggrandizement of one branch at the expense of the other.’”<sup>187</sup>

---

<sup>181</sup> 129 S. Ct. 2108, 2116 (2009).

<sup>182</sup> *Id.* at 2117.

<sup>183</sup> 478 U.S. 833, 851 (1986).

<sup>184</sup> *Id.* at 847.

<sup>185</sup> See *id.* at 850 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982)).

<sup>186</sup> *Id.* at 851.

<sup>187</sup> *Id.* at 850 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976); *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 644 (1949)).



In my judgment, the functional interest in ensuring a checking and balancing role for the federal judiciary that underlies the analytical framework developed in *Schor* would align with recent precedents in other areas of modern doctrine to support a motive-based inquiry if Congress should ever enact legislation totally excluding a class of constitutional cases defined by subject matter from the Article III courts. Because it is almost always reprehensible for government officials—including judges—to engage in law-breaking, Congress’s power over jurisdiction should not be interpreted as a license to encourage lawbreaking by either state or federal officials or by state court judges.<sup>188</sup> Legislation barring both Supreme Court and lower federal court jurisdiction over challenges to anti-abortion legislation or school prayer should, accordingly, be held invalid based on its constitutionally forbidden purpose of encouraging defiance of applicable Supreme Court precedent.

#### *5. Beyond Motive: Broader Limitations on the Total Stripping of Federal Jurisdiction*

Not every imaginable jurisdiction-limiting statute would have the purpose of encouraging lower court defiance of Supreme Court precedents. Consider a statute withdrawing federal court jurisdiction of cases presenting constitutional challenges to the Pledge of Allegiance. The Supreme Court has never ruled definitively on whether government-sponsored recitations of the Pledge, which refers to “one nation, under God,” violate the Establishment Clause.<sup>189</sup> Legislation stripping federal jurisdiction over Pledge of

---

<sup>188</sup> In recent years, many thoughtful commentators—whose otherwise diverse positions are often linked under the rubric of “popular constitutionalism”—have argued for one or another kind of public role in, or influence on, constitutional interpretation. See Helen Norton, *Reshaping Federal Jurisdiction: Congress’s Latest Challenge to Judicial Review*, 41 *Wake Forest L. Rev.* 1003, 1014–18 (2006) (linking defenses of jurisdiction-stripping legislation to the “popular constitutionalism” movement). Although I am reasonably sympathetic to some versions of popular constitutionalism, for Congress to invite state judicial defiance of Supreme Court authority seems a crude and possibly self-defeating way of promoting ultimate, authoritative settlements of constitutional issues that reflect the values of what Dean Kramer has called “the People themselves.” See generally Kramer, *supra* note 81.

<sup>189</sup> The question was presented but avoided in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 5 (2004). The Court held that Newdow, who was a non-custodial parent suing on his daughter’s behalf, lacked prudential standing to bring suit in federal court. *Id.* at 17–18.

Allegiance cases could thus not invite defiance of any clearly on-point precedents. That Congress might invite the state courts to defy the implications of Court rulings is a theoretical possibility, but the Court's Establishment Clause cases seem too much a jumble for that rationale to apply.

Nevertheless, a strong case can be made under modern constitutional doctrine that a statute stripping all federal court jurisdiction over cases such as this would violate Article I, Section III, and the constitutional separation of powers. That case begins with historical practice and judicial precedent. Whatever the original understanding, over time *Marbury v. Madison*<sup>190</sup> has come to stand for the proposition that the federal judicial branch is the ultimate expositor of constitutional meaning in properly justiciable cases that do not present "political questions."<sup>191</sup> Writing in 1953, Henry Hart appeared to regard state courts as being constitutionally permissible substitutes for the federal courts in nearly all cases.<sup>192</sup> But in decisions since then the Supreme Court has said repeatedly, albeit in dictum, that the Constitution assigns ultimate law-declaring responsibility in justiciable cases to the federal courts and to itself.<sup>193</sup>

Also pertinent is *Tarble's Case*,<sup>194</sup> a nineteenth-century precedent much reviled by Federal Courts scholars,<sup>195</sup> which holds that state courts lack constitutional authority to issue writs of habeas corpus to federal officers. Lower courts have read *Tarble's Case* as establishing that state courts cannot issue injunctions against federal officials either.<sup>196</sup> If these cases are taken at face value, a statute

---

<sup>190</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>191</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 616–17 n.7 (2000); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

<sup>192</sup> Hart, *supra* note 15, at 1363–64. Although Hart affirmed that state courts might sometimes be the ultimate guarantors, he appeared to believe that there were limits—which he did not pause to specify—to Congress's power to strip Supreme Court jurisdiction. See Hart, *supra* note 15, at 1363–65 (“[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”).

<sup>193</sup> See, e.g., *Morrison*, 529 U.S. at 616–17 n.7; *Cooper*, 358 U.S. at 18.

<sup>194</sup> 80 U.S. (13 Wall.) 397 (1872).

<sup>195</sup> See, e.g., Amar, *supra* note 73, at 1509–10; Collins, *supra* note 71, at 101–02; Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 Colum. Hum. Rts. L. Rev. 555, 596 (2002); see also Fallon et al., Hart & Wechsler, *supra* note 11, at 402–06.

<sup>196</sup> See Fallon et al., Hart & Wechsler, *supra* note 11, at 407; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 89 (1975).

stripping the jurisdiction of both the lower federal courts and the Supreme Court could potentially bar all judicial declaration and enforcement of some constitutional rights against the federal government—a result that many, if not most, commentators would think incompatible with the constitutional plan.<sup>197</sup>

Arguments based on *Tarble's Case* have cut no ice with adherents of the orthodox view of congressional power to control federal jurisdiction. They have dismissed *Tarble's Case* as wrongly decided, or at least as wrongly reasoned, based on confident assumptions that the original constitutional understanding gave Congress plenary control over federal jurisdiction and at least sometimes mandated the availability of judicial remedies against federal officials who violated constitutional norms.<sup>198</sup> As noted above, however, the first of these assumptions is now hotly disputed, with Professor Amar having presented a powerful historical challenge. Although my earlier discussion expressed skepticism about whether the evidence adduced so far persuasively establishes Amar's thesis with respect to the original understanding,<sup>199</sup> the issue now under discussion is not purely historical. It is whether Congress should be adjudged to have the authority to strip all federal courts of jurisdiction over controverted issues in light of (1) some evidence tending to suggest, albeit not definitively establishing, that the Constitution was originally understood to require that some federal court must have jurisdiction to resolve constitutional issues,<sup>200</sup> (2) uncertainties about the force and implications of *Tarble's Case*,<sup>201</sup> and (3) other legally pertinent considerations, including subsequent judicial precedent suggesting that the Constitution makes the federal courts the ultimate expositors of constitutional law.<sup>202</sup>

---

<sup>197</sup> See, e.g., Amar, *supra* note 73, at 1509; see also Daniel J. Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537, 2565 (1998).

<sup>198</sup> See, e.g., Meltzer, *supra* note 197, at 2567 n.160 (observing that “the difficulties with . . . an interpretation [of *Tarble's Case* as holding that the Constitution forbids state courts to grant relief against federal officials even in the absence of federal court jurisdiction] are well known . . . as is the possibility of interpreting the decision as a sub-constitutional one, resting on the existence (and implied exclusivity) of federal court habeas jurisdiction”).

<sup>199</sup> See *supra* Subsection II.A.3.

<sup>200</sup> See *supra* Subsection II.A.2.

<sup>201</sup> See *supra* notes 194–97 and accompanying text.

<sup>202</sup> See *supra* notes 76–83 and accompanying text.

If all of these considerations inform legal analysis, reasonable people will undoubtedly differ in their constitutional judgments. On the one hand, a commitment to having claims of constitutional right subject to ultimate determination by life-tenured judges who are free from political pressure counts among the glories of our constitutional tradition.<sup>203</sup> On the other hand, there is something vaguely disquieting about the federal judiciary's relying on precedent created by federal judges to establish federal judges' irreducible place in the constitutional scheme. I take seriously Charles Black's remark that Congress's power to withdraw the Supreme Court's appellate jurisdiction is "the rock on which rests the legitimacy of the judicial work in a democracy"<sup>204</sup>—though I would also emphasize that the withdrawal of *both* Supreme Court and lower federal court jurisdiction raises different issues from a withdrawal of Supreme Court jurisdiction alone.

For my own part, I incline toward the view that a statute withdrawing both Supreme Court and lower federal court jurisdiction over Pledge of Allegiance cases—animated by a congressional belief that the state courts would be less likely than federal courts to uphold claims of constitutional right that Congress disfavors—would violate the Constitution as appropriately interpreted in light of precedent and functional considerations, as well as less than wholly conclusive evidence concerning the original understanding. If Congress should attempt to exclude both the Supreme Court and the lower federal courts from any role in adjudicating a constitutional issue, concerns that Congress had trenched impermissibly on the role of the federal judicial branch under the separation of powers should rise to their zenith. It is true, of course, that separation-of-powers concerns would be at stake on the other side if Congress viewed itself as checking a runaway federal judiciary. As I shall explain below, however, Congress has means of checking and balancing that fall short of totally precluding any role for either the Supreme Court or the lower federal courts in constitutional cases in

---

<sup>203</sup> See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 *Harv. L. Rev.* 915, 941 (1988) (observing that the Constitution "set[s] a higher fairness standard for the courts of the national government than it imposes on state courts").

<sup>204</sup> Charles L. Black, Jr., *The Presidency and Congress*, 32 *Wash. & Lee L. Rev.* 841, 846 (1975).

which jurisdiction-stripping legislation unmistakably reflects hostility to claims of constitutional right.

### *B. Withdrawal of Supreme Court Jurisdiction*

Let us now suppose that Congress purports to strip the Supreme Court of jurisdiction to hear a class of cases presenting constitutional claims, such as challenges to the Pledge of Allegiance, but continues to permit such claims to go forward in state and lower federal courts. Would a jurisdiction-stripping statute such as this violate the Constitution?

#### *1. Background Principles*

At least on the surface, the statute would appear to come within the plain text of the Exceptions Clause.<sup>205</sup> It could also claim support in historical practice. Among other examples, the first Judiciary Act deprived the Supreme Court of appellate jurisdiction over most criminal cases decided by the lower federal courts.<sup>206</sup> The theory developed by Professor Amar and Justice Story would also indicate that the imagined statute passes constitutional muster.

A statute stripping the Supreme Court of jurisdiction in Pledge of Allegiance cases, but retaining jurisdiction in the lower federal courts, would not discriminate based on a suspect classification or burden any fundamental right. Historical practice and the Exceptions Clause refute any suggestion that there is a fundamental constitutional right to litigate every case involving a constitutional claim in the Supreme Court.<sup>207</sup>

Nor, so long as those claiming rights had access to the lower federal courts, would a statute restricting the Supreme Court's jurisdiction necessarily betray an unmistakable purpose of inviting defiance of the Court's precedents. The lower federal courts are not only legally obliged to follow Supreme Court precedents (as are state courts), but also have guarantees of life tenure and non-

---

<sup>205</sup> U.S. Const. art. III, § 2, cl. 2.

<sup>206</sup> See Fallon et al., Hart & Wechsler, supra note 11, at 276–77.

<sup>207</sup> See id. (“From 1789 to 1914, the Supreme Court had jurisdiction to review state court decisions of federal questions only if the state court had denied a claim of federal right.”).

reduction in salary to fortify them in discharging their duties conscientiously.<sup>208</sup>

It is a further question whether it should be deemed constitutionally impermissible for Congress to exclude federal cases from the Supreme Court's appellate jurisdiction for the purpose of shielding lower federal courts' decisions from anticipated reversals: does the Supreme Court's "supreme" status imply that Congress may not preclude the Court from playing a law-shaping role with respect to particular, otherwise justiciable constitutional issues? The previous section argued that Congress could not validly exclude the federal judicial branch as a whole from performing this function. If my argument on this point was persuasive, it might appear that the most plausible linguistic peg on which to hang that conclusion might be Article III's provision that there shall be "one supreme Court"<sup>209</sup>—that although Congress can make exceptions to the Court's appellate jurisdiction based on a variety of non-suspect considerations, it cannot categorically exclude cases based on their constitutional subject matter.

But too many legally pertinent considerations weigh against this argument. It fits uneasily with historical practice, including that under the First Judiciary Act. Under the 1789 Judiciary Act, the Supreme Court had no appellate jurisdiction to review state court decisions of federal questions that upheld claims of federal rights, nor did it have appellate jurisdiction over lower federal court decisions in criminal cases.<sup>210</sup> Modern cases affirming the role of the Supreme Court and the federal judiciary as the ultimate constitutional expositors<sup>211</sup> are all distinguishable, for none has involved a situation in which Congress purported to strip the Supreme Court's jurisdiction while leaving the lower federal courts available to assure fairness to litigants and promote separation-of-powers values. Moreover, worries about judicial legitimacy would have special potency if the Supreme Court were to rule, largely on the basis of its own prior dicta and without further support from history and practice, that Congress has no power whatsoever under the Exceptions Clause to curb the Court's self-defined law-shaping role. Over the

---

<sup>208</sup> U.S. Const. art. III, § 1, cl. 2.

<sup>209</sup> U.S. Const. art. III, § 1, cl. 1.

<sup>210</sup> See Fallon et al., Hart & Wechsler, *supra* note 11, at 276–77.

<sup>211</sup> See *supra* notes 78–79.

course of constitutional history, the Supreme Court has acquired a larger importance than anyone in the Founding generation could possibly have imagined. The normative justification for the Court's ascent to its current status must therefore depend heavily on the continuing acceptance by the American people of the legitimacy of the Court's role.<sup>212</sup> One need not go so far as Professor Black in characterizing Congress's power to withdraw the Supreme Court's appellate jurisdiction as "the rock on which rests the legitimacy of the judicial work in a democracy"<sup>213</sup> in order to agree that the Court ought to hesitate before asserting that the role it has assumed as the ultimate authority on "what the law is" lies too far beyond congressional control. For the most part, statutes stripping Supreme Court appellate jurisdiction should pass constitutional muster if they preserve ultimate authority in the lower federal courts to declare and enforce federal law, and thus preserve a checking and balancing function for the Article III judiciary as a whole.

## *2. Jurisdiction-Stripping and Supervisory Powers*

Although the Exceptions Clause should permit Congress to enact statutes selectively stripping Supreme Court appellate jurisdiction in cases initially litigated in the lower federal courts, I have framed my conclusion in cautious terms. As Henry Hart argued, Article III contemplates that the Supreme Court has an "essential role" in the constitutional scheme.<sup>214</sup> Congressional motivations aside, some imaginable jurisdictional withdrawals might go too far in precluding the Court from playing that role. To take an extreme example, Congress would almost self-evidently violate Article III if it attempted to take away the Court's appellate jurisdiction in all cases in which the lower federal courts have resolved constitutional issues.<sup>215</sup> Hart further argued, persuasively in my view, that the

---

<sup>212</sup> The term "legitimacy" has moral as well as legal and sociological dimensions. See generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *Harv. L. Rev.* 1787 (2005) (distinguishing legal, moral, and sociological senses of legitimacy).

<sup>213</sup> Black, *supra* note 204, at 846.

<sup>214</sup> Hart, *supra* note 15, at 1365.

<sup>215</sup> In an effort to give content to Hart's vaguely formulated standard, Leonard Ratner argued that Congress must not preclude the Supreme Court from assuring the supremacy and uniformity of federal law. See Ratner, *supra* note 145, at 957. But fed-

question of “how far is too far?” would need to be answered on a case-by-case basis, without the aid of any sharply determinate test.<sup>216</sup>

Professor Pfander accepts that Congress has significant authority to strip the Supreme Court of jurisdiction to conduct de novo review of lower federal courts’ decisions, but argues that the Court’s “supreme” status requires that it be able to exercise at least minimal oversight, even when Congress has precluded it from conducting ordinary appellate review.<sup>217</sup> According to Pfander, the history of the Exceptions Clause shows that it reflected three assumptions. First, de novo review in the Supreme Court, available as-of-right, would be the norm.<sup>218</sup> Second, because mandatory appeals to a tribunal in the seat of government might prove unduly burdensome in some cases, Congress should have the power to create exceptions to that norm.<sup>219</sup> Third, even in the absence of appeal to the Supreme Court as-of-right, the Court’s status vis-à-vis “inferior” federal tribunals implied that the Court must possess jurisdiction to

---

eral supremacy is not much threatened in cases in which the lower federal courts retain their jurisdiction, even if the Supreme Court does not, and the conjunction of constitutional text—in the form of the Exceptions Clause—and history makes it hard to argue that the Supreme Court must have appellate jurisdiction to exercise de novo review of all lower court decisions of federal law. Among other pertinent evidence, the First Judiciary Act gave the Supreme Court no appellate jurisdiction in federal criminal cases. See *supra* note 210.

Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 *Colum. L. Rev.* 1002, 1005, 1038 (2007), argue that the original public understanding of Article III would have required the Supreme Court to have either original or appellate jurisdiction of all cases arising under the Constitution, laws, and treaties of the United States. According to the authors, the Exceptions Clause was originally understood to permit exceptions to the Court’s appellate jurisdiction only in cases in which Congress gave the Court original jurisdiction instead. *Id.* But *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803), decisively rejected the authors’ view that Congress could permissibly add cases to the Court’s original jurisdiction. In my view, it would be preposterous for the Court to overrule *Marbury* on this point, which has been settled for over two hundred years, on the basis of a disputable claim about the original understanding of Article III that would also entail the unconstitutionality of provisions of the 1789 Judiciary Act excepting cases from the Supreme Court’s appellate jurisdiction.

<sup>216</sup> See Hart, *supra* note 15, at 1364–66.

<sup>217</sup> James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 *Tex. L. Rev.* 1433, 1435 (2000).

<sup>218</sup> *Id.* at 1459–60 (equating “appellate” jurisdiction with “as-of-right” jurisdiction).

<sup>219</sup> *Id.* at 1459–65.



supervise the lower courts through “discretionary writs, such as mandamus, habeas corpus, and prohibition.”<sup>220</sup> Behind this third assumption lies a further, deeper assumption that Supreme Court supervision via the discretionary writs would be more deferential than normal appellate review.

The Supreme Court appeared to take seriously the possibility that Article III might require it to have the capacity for at least minimal supervisory oversight, even following the stripping of its appellate jurisdiction via the writ of certiorari, in *Felker v. Turpin*.<sup>221</sup> *Felker* arose under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which bars inmates from filing second or “successive” habeas petitions unless authorized to do so by a court of appeals.<sup>222</sup> The AEDPA further provides that decisions of the courts of appeals in their gatekeeping role “shall not be appealable and shall not be the subject of a petition for . . . a writ of certiorari.”<sup>223</sup> Writing for a unanimous Court, Chief Justice William Rehnquist held that the preclusion of certiorari review of the courts of appeals’ gatekeeping decisions did not violate Article III.<sup>224</sup> In doing so, however, the Chief Justice went out of his way to determine that the AEDPA did not eliminate the Court’s authority to entertain original petitions for habeas corpus.<sup>225</sup> Additionally, in a concurring opinion, Justice Souter, joined by Justices Stevens and Breyer, pointedly reserved the constitutional question that would arise under Article III if the courts of appeals “adopted divergent interpretations of the gatekeeper standard” and “statutory avenues other than certiorari for reviewing a gatekeeping determination were closed.”<sup>226</sup>

As the *Felker* opinions suggest, whether Article III requires a residuum of Supreme Court supervisory jurisdiction, even in cases in which Congress has invoked its power to create an exception to the

---

<sup>220</sup> *Id.* at 1441–42.

<sup>221</sup> 518 U.S. 651 (1996).

<sup>222</sup> Pub. L. No. 104-132, 110 Stat. 1217 (codified as 28 U.S.C. § 2244(b)(3)(A) (2006)).

<sup>223</sup> *Id.* (codified as § 2244(b)(3)(E)).

<sup>224</sup> *Felker*, 518 U.S. at 662.

<sup>225</sup> The availability of habeas corpus review, Rehnquist said, “obviate[d]” the argument that AEDPA’s jurisdictional withdrawal violated Article III. *Felker*, 518 U.S. at 661.

<sup>226</sup> *Id.* at 667 (Souter, J., concurring).

Court's appellate jurisdiction, is not only an open question, but also a difficult one. Although I introduced that question by calling attention to Professor Pfander's account of the original understanding of Article III, I hesitate either to endorse his historical conclusions or to reject them. Scholars who have studied the originally understood significance of the Constitution's designation of one federal court as "supreme" and of others as "inferior" have reached radically different judgments. In contrast with Professor Pfander, Professor Engdahl argues that Article III's reference to a "supreme" court did not imply any decisional hierarchy at all.<sup>227</sup> According to Engdahl, the Supreme Court's historically understood supremacy inheres solely in the geographic sweep of its jurisdiction.<sup>228</sup> Professor Amar concurs with Engdahl that Article III requires no role for the Supreme Court when Congress vests the judicial power of the United States in a lower federal court.<sup>229</sup> Professors Calabresi and Lawson align more nearly with Professor Pfander. According to them, "the objective meaning of the Constitution" in 1788 would have forbidden Congress to undermine the Supreme Court's hierarchical superiority to any "inferior" federal courts.<sup>230</sup> Calabresi and Lawson go further than Pfander, however, in maintaining that the Court must have either original or appellate jurisdiction—not mere supervisory power—in "*all* cases . . . that raise federal issues."<sup>231</sup> Having read the leading articles closely but not having undertaken original research, I can only question whether there even was a clear, widely shared original understanding of whether the Supreme Court's supremacy and the lower courts' inferior status entailed that the former must possess supervisory authority over the latter. I am equally unconvinced that a clear answer would emerge if the question were reframed as one about how a hypothetical, reasonable, objective observer would have understood the import of Article III's language in 1789.

With the language of Article III not unambiguously resolving whether Congress has the authority to strip the Supreme Court of

---

<sup>227</sup> David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 *Ind. L.J.* 457, 466–68 (1991).

<sup>228</sup> *Id.* at 475.

<sup>229</sup> Amar, *Neo-Federalist View*, *supra* note 16, at 221 n.60.

<sup>230</sup> Calabresi & Lawson, *supra* note 215, at 1005, 1038–39.

<sup>231</sup> *Id.* at 1005.

its supervisory jurisdiction via historically discretionary writs, and with no precedent or historical material speaking clearly to the issue, considerations of practical desirability and doctrinal coherence should loom large. In light of those considerations, I would endorse the view that the Supreme Court must have some capacity to examine lower courts' judgments of legal and constitutional issues, even if Congress can validly withdraw the Court's power to conduct a de novo review in every case. Although absolute uniformity of federal law is a misguided ideal,<sup>232</sup> gross interpretive disparities remain undesirable. And with the lower courts normally being legally bound by past Supreme Court decisions—a state of affairs that jurisdiction-stripping legislation could not alter<sup>233</sup>—the Court is the tribunal best situated to enforce the minimal obligations of fidelity to precedent. The Court is also the only institution with the constitutional authority to relax such obligations with respect to precedents that no longer cohere with the surrounding body of contemporary constitutional law.

### *C. Stripping of District Court Jurisdiction*

As Sections II.A and II.B implied, there should be no doubt that Congress has very broad power to limit the jurisdiction of the lower federal courts, as long as the Supreme Court retains appellate jurisdiction over constitutional claims initially litigated in state court. Robert Clinton has advanced an originalist argument that would apparently require Congress to vest the lower federal courts with, and then prevent any subsequent stripping of, all of the possible jurisdiction that Article III authorizes, including diversity jurisdiction.<sup>234</sup> But his argument rests on questionable historical foundations, and, in any event, practice running back to the First Judiciary Act thoroughly rejects it.<sup>235</sup>

Professor Theodore Eisenberg has also argued, on quasi-originalist grounds, that most modern proposals to strip the lower federal courts of jurisdiction in cases presenting federal, and espe-

---

<sup>232</sup> See Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567 (2008).

<sup>233</sup> See supra note 145 and accompanying text.

<sup>234</sup> See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 776 (1984).

<sup>235</sup> See Fallon et al., *Hart & Wechsler*, supra note 11, at 290–91.

cially constitutional, questions should be deemed constitutionally invalid, even in cases remaining within the Supreme Court's appellate jurisdiction.<sup>236</sup> Eisenberg erects his argument on the premise that the Founding generation expected Supreme Court review of state court decisions normally to occur as-of-right.<sup>237</sup> With vast docket increases having made appellate review by the Supreme Court a rarity, Eisenberg argues that the Founders' goal of ensuring ready access to the national judiciary by those claiming federal rights supports recognition of a judicially enforceable prohibition against most contemporary proposals to strip the lower federal courts' jurisdiction.<sup>238</sup>

Although appeals for a "translation" of original understandings to realize original constitutional purposes are sometimes persuasive,<sup>239</sup> Eisenberg's argument comes up short. Too many long-entrenched statutes and settled legal doctrines tolerate the exclusion of cases presenting constitutional issues from the lower federal courts' jurisdiction. Examples include the exclusion of constitutional issues arising in the context of state criminal prosecutions<sup>240</sup> and of civil "federal question" cases in which the federal question first arises by way of defense.<sup>241</sup> There is also a significant smattering of long-accepted statutes and doctrines predicated on the assumption that states have special interests in adjudicating certain classes of cases in the first instance, possibly based on the assumption that state judges possess relevant specialized expertise.<sup>242</sup>

---

<sup>236</sup> See Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 501 (1974).

<sup>237</sup> Id. at 507–10.

<sup>238</sup> Id. at 510–13.

<sup>239</sup> See generally Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165 (1993).

<sup>240</sup> Subject only to rare exceptions, the statutory scheme generally makes no provision for removal, and the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 43–54 (1971), bars suits to enjoin pending state criminal prosecutions. See Fallon et al., Hart & Wechsler, supra note 11, at 1083–128 (discussing *Younger* and related doctrines of equitable restraint).

<sup>241</sup> See Fallon et al., Hart & Wechsler, supra note 11, at 777.

<sup>242</sup> Examples include the Tax Injunction Act, 28 U.S.C. § 1341 (2006), which limits federal courts' authority to issue injunctions in disputes about state taxes; the Johnson Act, 28 U.S.C. § 1342 (2006), which similarly limits injunctions of state public utility rate orders; and the abstention doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–18 (1943), which holds that federal courts as a matter of sound equitable discretion should abstain from interfering with decisions of state administrative agencies involv-

Eisenberg is of course aware of settled practices that embarrass his thesis, and he distinguishes them mostly on motive-based grounds.<sup>243</sup> Congress, he argues, should not be able to exclude cases from the lower federal courts' jurisdiction based on anticipated disagreements with how the lower federal courts would likely resolve those cases.<sup>244</sup> Consistent with the analysis advanced above, I agree that Congress would act with a constitutionally impermissible motive if it stripped the lower federal courts of jurisdiction in cases presenting controversial constitutional issues as a means of inviting state courts' defiance of Supreme Court precedents. Stated abstractly, however, this seems to be both an unlikely congressional motivation for, and an unlikely result of, jurisdiction-stripping legislation that left Supreme Court review of state court judgments intact. I would thus conclude that legislation stripping district court jurisdiction but retaining the Supreme Court's appellate jurisdiction to review state court judgments should be invalidated on purpose-based grounds only in cases of especially clear congressional intent to frustrate the enforcement of established federal rights.

### III. WITHDRAWAL OF ALL JUDICIAL JURISDICTION

So far I have considered constitutional issues that would arise if Congress attempted to strip jurisdiction from federal courts, while leaving state court jurisdiction intact. Now suppose that Congress were to use its power over jurisdiction to create a situation in which no court, federal or state, could adjudicate a class of cases presenting constitutional issues. Congress might contrive to achieve this effect in either of two ways. First, citing authorities holding that state courts cannot issue injunctions against federal officers,<sup>245</sup> Congress might purport to strip the federal courts of jurisdiction of suits in which plaintiffs seek injunctions against some

---

ing matters of special importance or sensitivity to the states. On the notoriously elusive contours and rationale of the *Burford* doctrine, see Fallon et al., Hart & Wechsler, *supra* note 11, at 1075–79.

<sup>243</sup> See Eisenberg, *supra* note 236, at 514–18.

<sup>244</sup> *Id.* at 518–30.

<sup>245</sup> See *supra* note 196 and accompanying text.

subcategory of federal officials' alleged constitutional violations.<sup>246</sup> Alternatively, Congress might directly deprive the state courts of jurisdiction at the same time that it eliminated federal jurisdiction over the same class of cases. In a variety of contexts, Congress possesses undoubted power to divest state courts of jurisdiction as a necessary and proper means of achieving legitimate federal purposes. Well-known examples include provisions for exclusive federal jurisdiction over some categories of cases<sup>247</sup> and statutes authorizing removal to federal court of cases initially filed in state court.<sup>248</sup>

As noted above, most jurisdiction-stripping proposals would leave state court jurisdiction unimpaired. Although the sponsors apparently assume that any preclusion of jurisdiction by all courts must lie wholly beyond the pale of arguable constitutional permissibility, the reality is more complex. Before going further, it may therefore help for me to provide some examples of the diverse range of cases in which Congress might attempt to preclude any court whatsoever from entertaining otherwise justiciable constitutional claims.

*Case 1:* After Supreme Court interpretations of a federal labor law include underground travel in mining sites as part of workers' compensable work time, and thereby expose employers to huge retroactive liabilities, Congress enacts the Portal-to-Portal Act.<sup>249</sup> In Sections 2(a) and 2(b), the Portal-to-Portal Act wipes out employers' liability under the court decisions to which Congress responded.<sup>250</sup> In Section 2(d), it strips both state and federal courts of jurisdiction "to enforce liability"<sup>251</sup> in the cases covered by Sections 2(a) and 2(b).<sup>252</sup>

---

<sup>246</sup> But cf. Fallon et al., Hart & Wechsler, supra note 11, at 405 (suggesting that *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), which provides the lynchpin for the argument that state courts cannot compel certain official actions by federal officers, could be read as holding only that the affirmative conferral of federal court jurisdiction impliedly barred state court jurisdiction).

<sup>247</sup> See Fallon et al., Hart & Wechsler, supra note 11, at 390–91.

<sup>248</sup> See id. at 396–97.

<sup>249</sup> 29 U.S.C. §§ 251–62 (2006).

<sup>250</sup> 29 U.S.C. § 252(a), (b) (2006).

<sup>251</sup> 29 U.S.C. § 252(d) (2006).

<sup>252</sup> This case is closely modeled on *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948).

*Case 2:* Congress provides by statute that no court shall have jurisdiction of any suit for injunctive or any other anticipatory relief against the collection of any federal tax. The statute does not displace preexisting authorization for suits for refunds.<sup>253</sup>

*Case 3:* Congress enacts and the President signs a bill providing that assessments of tax liability by the Internal Revenue Service (“IRS”) are final and binding, that the IRS may summarily collect any tax assessments through the seizure of assets if necessary, and that no court shall have jurisdiction to entertain any action in which is brought in question the constitutional validity of such assessments or their collection, or the statutes, rules, regulations, or practices on which assessments are based.<sup>254</sup>

*Case 4:* A federal statute authorizes the executive branch to detain suspected enemy combatants within the United States and at Guantanamo Bay, Cuba. It provides that military commissions shall conduct proceedings to make binding determinations of enemy combatant status and further provides that the decisions of those tribunals are final. To enforce the provision for finality, the statute directs that no federal or state court shall have jurisdiction to inquire into the lawfulness of the detention of any person subject to or pending a military commission’s determination of enemy combatant status.<sup>255</sup>

*Case 5:* Congress enacts a law forbidding both federal and state courts to exercise jurisdiction over any suit calling into question the constitutionality of practices of prayer in the public schools of any state.

*Case 6:* Congress bars both state and federal courts from exercising jurisdiction of any suit calling into question the validity of any federal statute, rule, regulation, practice, or act on the ground that it abridges rights to be free from race-based discrimination.

*Case 7:* A federal statute provides that decisions of the Social Security Administration to award or withhold any benefit are final and not judicially reviewable and that no court shall have jurisdic-

---

<sup>253</sup> This case is based on the holdings of *Phillips v. Commissioner*, 283 U.S. 589 (1931), and *Snyder v. Marks*, 109 U.S. 189 (1883).

<sup>254</sup> This case is based on *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845).

<sup>255</sup> This case is based on *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

tion of any suit questioning any such decision or the law, rules, regulations, or practices on which any such decision is based.<sup>256</sup>

Cases 1 and 2 are both modeled on Supreme Court decisions that *upheld* jurisdiction-stripping legislation—albeit with a significant caveat in Case 1, which I shall address shortly. Case 3 is also based on a Supreme Court precedent that sustained a federal statute against constitutional challenge, though the actual case may, or may not, be distinguishable. By contrast, Case 4 is essentially *Boumediene v. Bush*, in which the Court found a jurisdiction-stripping statute unconstitutional. Cases 5 through 7 are hypothetical. As I shall explain, the imaginary legislation involved in Cases 5 through 7 should be deemed unconstitutional, although I cannot point to any directly on-point authority supporting this conclusion.

#### A. Sources of Limits on Congressional Power

As my preliminary survey of real and hypothetical cases may suggest, assessing Congress's power to create situations in which no court has jurisdiction to rule on constitutional claims requires probing matters of daunting complexity. Analysis appropriately begins with potential sources of congressional power to divest state courts, as well as federal courts, of jurisdiction. The most clearly constitutional divestitures of state court jurisdiction involve cases in which Congress wishes either to (a) establish exclusive federal jurisdiction in order to promote interests in the accurate and uniform determination of federal issues<sup>257</sup> or (b) prevent state court interference with federal functions.<sup>258</sup> Case 2, in which Congress bars both state and federal courts from enjoining the collection of federal taxes, and thereby forces taxpayers to litigate the constitutionality of tax assessments only after paying them, furnishes a doctrinally

---

<sup>256</sup> Cf. *United States v. Erika, Inc.*, 456 U.S. 201, 211 n.14 (1982) (declining to entertain a constitutional challenge to the preclusion of all review of certain claims under the Medicare statute on the ground that they had not been raised properly under applicable Supreme Court rules).

<sup>257</sup> See Fallon et al., *Hart & Wechsler*, supra note 11, at 392 (“Arguments in favor of exclusive federal jurisdiction frequently invoke the desirability of uniform interpretation of federal law.”).

<sup>258</sup> See *id.* at 397 (“Congress has provided since 1815 for the removal of state actions or prosecutions against federal officials likely to encounter sectional or state hostility.”).



supported example of a divestiture of state court jurisdiction that serves legitimate federal interests.<sup>259</sup>

By contrast, if Congress tried simultaneously to withdraw federal and state jurisdiction to entertain challenges to the constitutionality of state laws or actions, such as prayer in state public schools in Case 5, its authority to strip state court jurisdiction would be difficult to justify under any constitutional conferral of congressional power. Precluding a state court from enforcing the Constitution against state officials, in the absence of provision for federal court enforcement, would not be in service of any Article I power, nor would it be necessary and proper to the exercise of any federal governmental function.

Many of the considerations that could potentially bar Congress from stripping the jurisdiction of the lower federal courts—as discussed in Section II.A above—would also prohibit Congress from precluding both federal and state court jurisdiction. To take an unquestionable example, Congress could not forbid all courts to exercise jurisdiction of suits brought by African-Americans or by women. An attempt to do so would violate the equal protection component of the Fifth Amendment's Due Process Clause. Similarly, if Part II was correct that Congress's motive should matter to the validity of jurisdiction-stripping legislation, then any elimination of all courts' jurisdiction for the purpose of inviting non-judicial officials to violate constitutional norms should fail as a prohibited means to a forbidden end.<sup>260</sup> In my judgment, the hypothetical statutes imagined in Cases 5 and 6 would be invalid under this analysis.

Although multiple factors thus figure in the constitutional analysis of congressional power simultaneously to divest federal and state jurisdiction, a consideration of recurring, frequently controlling significance involves Congress's power to prescribe or forbid the award of particular remedies, such as injunctions in Case 2. The

---

<sup>259</sup> See *Phillips v. Commissioner*, 283 U.S. 589, 595–97 (1931); *Snyder v. Marks*, 109 U.S. 189, 193–94 (1883).

<sup>260</sup> As Part II also emphasized, however, the identification of prohibited motives can be tricky. I thus assume that Congress might preclude some remedies, such as injunctions against tax collection in Case 2, not because it wants to invite unconstitutional conduct by non-judicial officials, but to further important government interests such as those in the efficient administration of important government policies.

Constitution makes express provision for just two remedies: habeas corpus in some cases of bodily detention and just compensation in takings cases.<sup>261</sup> Otherwise, the Founding generation relied on, but did not expressly mandate, a rich tapestry of common law and equitable remedies to enforce constitutional norms.<sup>262</sup> Against this background, the conventional wisdom holds that “Congress necessarily has a wide choice in the selection of remedies, and . . . a complaint about [the withdrawal of any particular remedy] can rarely be of constitutional dimension.”<sup>263</sup>

The recurring significance of Congress’s power over remedies in gauging Congress’s power over jurisdiction arises from a conjunction of two considerations. First, jurisdiction to decide constitutional cases would prove meaningless without judicial power to award remedies.<sup>264</sup> Accordingly, where Congress has the power to forbid all remedies, it will typically also have the authority to withhold jurisdiction to adjudicate claims on the merits. Conversely, in cases in which the Constitution mandates the availability of a remedy—as, for example, the Suspension Clause guaranteed access to the writ of habeas corpus in *Boumediene*—then Congress cannot validly withdraw all judicial jurisdiction to award relief that the Constitution requires.

Second, and more subtly, the form in which constitutional disputes present themselves for judicial resolution is much more often a function of convention or of statutory law than of constitutional mandate. For example, a dispute about the constitutional validity of a tax assessment—as contemplated in Cases 2 and 3—could potentially come before a court in a suit for a pre-enforcement injunction, in a post-collection action against the United States (if it waived its sovereign immunity), in a post-collection action for damages against government officials who coercively extracted payment, or as a defense against a criminal prosecution for non-payment. By withholding one or another remedy, such as injunc-

---

<sup>261</sup> See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1779 n.244 (1991).

<sup>262</sup> See *id.* at 1779.

<sup>263</sup> Hart, *supra* note 15, at 1366.

<sup>264</sup> Indeed, for a federal court to pronounce on constitutional issues in a context in which it was evident from the outset that it could not order a remedy would violate the Article III prohibition against advisory opinions. See generally Fallon et al., Hart & Wechsler, *supra* note 11, at 52–58 (discussing advisory opinions).

tions in Case 2, Congress may not so much preclude the courts from entertaining constitutional issues—such as the issue of a tax’s validity—as shape the form in which a dispute becomes judicially cognizable. In other words, Congress’s power over remedies is often a power to determine when and how a constitutional dispute becomes ripe for judicial resolution.<sup>265</sup> The most problematic questions concerning congressional power thus tend to arise when Congress attempts to preclude the courts from adjudicating a constitutional dispute in any form whatsoever, thereby eliminating judicial power to “say ‘what the law is’”<sup>266</sup> and leaving the victims of constitutional violations with no remedies whatsoever.

### *B. Remedies and “the Battaglia Principle”*

Although factors unrelated to remedies sometimes bar Congress from precluding all courts from exercising jurisdiction over constitutional claims, the linkage between power over remedies and power over jurisdiction is sufficiently illuminating that it may be useful to explain how a remedy-based analysis is both consistent with and helps to make sense of *Battaglia v. General Motors Corp.*,<sup>267</sup> the Second Circuit decision on which Case 1 is based.<sup>268</sup> Although the *Battaglia* court did not explicitly frame its analysis in remedy-based terms, other familiar interpretations would generate untenable conclusions. By contrast, a focus on the relationship between power over remedies and power to strip jurisdiction is at least consonant with the Second Circuit’s opinion and illuminates why the case was rightly decided. A remedy-based analysis will also

---

<sup>265</sup> See Fallon, *supra* note 203, at 962 (noting broad congressional power under the “public rights” doctrine to determine when and against whom a constitutional “case” arises); James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 *Harv. L. Rev.* 643, 737 (2004) (interpreting dicta asserting congressional power to deny jurisdiction over suits against the government and its officers as “concerning the power of Congress to regulate the timing of judicial review in ways that permissibly advance the proprietary interests of the government”).

<sup>266</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>267</sup> 169 F.2d 254 (2d Cir. 1948).

<sup>268</sup> The Hart & Wechsler case book treats *Battaglia* as the leading case on congressional power to bar the exercise of jurisdiction over constitutional claims by any court. Fallon et al., Hart & Wechsler, *supra* note 11, at 305.

point the way to correct decisions of most of the other cases sketched above.

### 1. *Battaglia v. General Motors Corp.*

*Battaglia* involved the constitutionality of the Portal-to-Portal Act, all pertinent details of which were included in Case 1. Sections 2(a) and 2(b) substantively eliminated employers' liability under the court decisions that Congress sought retroactively to overrule. Section 2(d) withdrew both federal and state court jurisdiction to enforce the liabilities that Sections 2(a) and 2(b) abolished.

A few district court decisions held that Section 2(d) deprived the courts of jurisdiction to inquire into whether Sections 2(a) and 2(b) violated the Due Process Clause or Takings Clause of the Fifth Amendment.<sup>269</sup> But the Second Circuit, in *Battaglia*, reasoned that the questions of whether the Portal-to-Portal Act validly stripped the courts of jurisdiction and whether it violated the Fifth Amendment were inextricably linked:

[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation. . . . Thus, regardless of whether subdivision (d) of section 2 had an independent end in itself, if one of its effects would be to deprive the appellants of property without due process or just compensation, it would be invalid.<sup>270</sup>

Having so reasoned, the *Battaglia* court addressed the validity of Sections 2(a) and 2(b), which it sustained, before ruling that the jurisdictional withdrawal in Section 2(d) was also valid.<sup>271</sup>

### 2. *What Battaglia Forbids and Permits*

In thinking about *Battaglia*, it would be a mistake to focus on what the Second Circuit "said [that] Congress could *not* do" to the

---

<sup>269</sup> See *Battaglia*, 169 F.2d at 257 (citing cases).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 261–62.

exclusion of what it said that Congress could do.<sup>272</sup> Although *Battaglia* cites limits on Congress's power to strip all courts of jurisdiction over constitutional claims, the Second Circuit actually *upheld*, rather than invalidated, a withdrawal of jurisdiction over cases asserting claims that the Portal-to-Portal Act violated the Constitution.

*Battaglia* did so, of course, only after ascertaining that the stripping of jurisdiction did not deprive the plaintiffs of constitutional rights under the Due Process and Takings Clauses. But what it means to say that a congressional elimination of jurisdiction would violate the Takings or, especially, the Due Process Clause requires unpacking. It is superficially attractive to read *Battaglia* as standing for the proposition that Congress cannot preclude the *adjudication* of any valid claim of deprivation of a legal, or at least a constitutional, right.<sup>273</sup> This, however, is a manifestly untenable position—as is brought out by Case 2, involving a constitutionally permissible withdrawal of jurisdiction to entertain suits for injunctions against the collection of federal taxes. When Congress can preclude the remedy that a plaintiff seeks, as it can in Case 2, it would make no sense to maintain that Congress cannot deny all courts jurisdiction to entertain suits in which plaintiffs seek that remedy alone.

A further difficulty with reading *Battaglia* as barring withdrawals of all judicial jurisdiction to entertain valid constitutional claims is that it is impossible to distinguish valid from invalid claims prior to adjudication. Yet if Congress could not preclude the exercise of jurisdiction to decide any constitutional claims on the merits, the conclusion would follow that the Second Circuit actually decided *Battaglia* *wrongly*, not *rightly*, in a small but significant respect. The Second Circuit should have invalidated, rather than upheld, the Portal-to-Portal Act's jurisdiction-stripping provision and placed its dismissal of *Battaglia*'s suit on the ground that the plaintiff's claim failed on the merits, not the absence of jurisdiction.

---

<sup>272</sup> Hart, *supra* note 15, at 1374–75 (discussing *Crowell v. Benson*, 285 U.S. 22 (1932)).

<sup>273</sup> See, e.g., Redish & Woods, *supra* note 196, at 93 (“There exists a due process right to an independent judicial determination of constitutional rights.”); Vladek, *supra* note 80, at 2132 (“*Battaglia* suggested a model for how courts could decide . . . cases [involving total strips of judicial jurisdiction]: first reach the question whether the underlying legal claim has merit, and only *then* reach the possible unconstitutionality of the foreclosure of jurisdiction.”).

At first blush, this approach might seem preferable to the one that the court actually took. It would offer the apparent advantage of conceptually disentangling jurisdictional questions from questions involving substantive rights to relief. But the appearance that these inquiries can be rigidly separated is chimerical. When a plaintiff's federal claim to relief is not "substantial," federal "arising under" jurisdiction does not lie.<sup>274</sup>

Once it is recognized that *Battaglia* cannot forbid Congress from ever barring jurisdiction over valid claims of constitutional right—such as those that a taxpayer might be barred from asserting in a suit for an injunction in Case 2—a more perspicuous formulation of what the *Hart & Wechsler* casebook characterizes as "the *Battaglia* principle"<sup>275</sup> comes into view: *Battaglia* squarely holds that when Congress can validly extinguish a substantive right, it can also strip courts of jurisdiction to enforce the right that it has abolished. By extrapolation, when Congress can validly extinguish a right to one or more judicial remedies, it can also take away judicial jurisdiction over suits in which plaintiffs seek remedies that Congress has permissibly precluded. As in *Boumediene*, however, a statute withdrawing judicial jurisdiction to award a constitutionally necessary remedy constitutes a means to an invalid end and, accordingly, is "not an exercise of the acknowledged power to Congress" to define and limit judicial jurisdiction.<sup>276</sup> To state the principle that best explains *Battaglia* in a sentence, limits on Congress's power to preclude judicial remedies for constitutional rights violations also function as limits on Congress's power to eliminate the judicial jurisdiction that would be necessary for courts to award constitutionally necessary remedies.

### C. Constitutionally Necessary Remedies

Although I have maintained that Congress's power to bar all judicial jurisdiction is closely linked to its authority to control remedies, I could not hope, here, to set out a full theory of constitutionally necessary remedies. That vast topic would require an article

---

<sup>274</sup> See *Bell v. Hood*, 327 U.S. 678, 681–83 (1946).

<sup>275</sup> See Fallon et al., *Hart & Wechsler*, supra note 11, at 308.

<sup>276</sup> *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872).

(or more likely a book) in itself. Nevertheless, a brief discussion will put at least some flesh on the bones of the *Battaglia* principle.

As suggested already, consideration of constitutionally necessary remedies almost inescapably begins with Professor Hart's incisive observation that complaints about the preclusion of particular remedies "can rarely be of constitutional dimension."<sup>277</sup> To illustrate that the Constitution seldom dictates the availability of one particular remedy, Hart used the example of a taxpayer who objects on constitutional grounds to an assessment of tax liability.<sup>278</sup> Even when the taxpayer's objection is constitutionally meritorious, Congress can, as in Case 2, preclude the courts from awarding injunctive relief.<sup>279</sup> Then, after the taxpayer has tendered payment, sovereign immunity—which generally bars unconsented suits against the sovereign, though not usually properly pleaded actions against governmental officials<sup>280</sup>—will complicate any argument that the taxpayer has a right to recover from the state or federal treasury.<sup>281</sup> In accepting that sovereign immunity might bar a suit to recover taxes paid under duress, Hart pointed to an early constitutional practice in which taxpayers who had been coercively compelled to pay their taxes could sue the tax collector, rather than the government.<sup>282</sup> If this avenue to raise a constitutional claim remained open, then Hart thought preclusion of suits against the sovereign constitutionally acceptable, as history has understood it to be.<sup>283</sup>

In Hart's view, the hard constitutional question was whether, as in Case 3, Congress could not only preclude injunctions against the collection of taxes, but also bar all suits to recover coercively collected taxes either from the government or from the tax collector. The case most nearly on point, he thought, was *Cary v. Curtis*,<sup>284</sup> in

---

<sup>277</sup> Hart, *supra* note 15, at 1366.

<sup>278</sup> *Id.* at 1367–70.

<sup>279</sup> *Id.* at 1369.

<sup>280</sup> See Fallon et al., Hart & Wechsler, *supra* note 11, at 845 (“[I]t was historically taken for granted that sovereign immunity did not always or perhaps even typically bar suits against governmental officers.”).

<sup>281</sup> See *id.* at 312–13.

<sup>282</sup> Hart, *supra* note 15, at 1367–68 (discussing *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845)).

<sup>283</sup> See *id.* at 1369.

<sup>284</sup> 44 U.S. (3 How.) 236 (1845).

which sovereign immunity barred suit against the government and Congress by statute had forbidden actions against the tax collector. In *Cary*, the Supreme Court justified its refusal to find a constitutional violation partly on speculation that other remedies remained available.<sup>285</sup> “Personally, I think [a taxpayer] has” a right to litigate the legality of a tax, “[b]ut I can’t cite any really square decision,” Hart concluded.<sup>286</sup> “The multiplicity of remedies, and the fact that Congress has seldom if ever tried to take them all away, has prevented the issue from ever being squarely presented.”<sup>287</sup>

In intimating that the Constitution might mandate that every victim of a constitutional violation must have some effectual remedy, Hart might have appealed to the memorable dictum of *Marbury v. Madison* that for every legal right, there must be a legal remedy.<sup>288</sup> Yet *Marbury*’s statement on this point reflects an aspiration, not an enforceable rule of constitutional law.<sup>289</sup> I have already alluded to the doctrine of sovereign immunity, which typically bars suits against the government without the government’s consent. Then, when aggrieved parties try to elude the sovereign immunity bar by suing government officers, “official immunity” doctrines frequently preclude relief, especially the recovery of damages.<sup>290</sup> As a result of the conjunction of sovereign and official immunity, situations routinely arise in which victims of constitutional violations may have no individually effective remedy.<sup>291</sup>

---

<sup>285</sup> Id. at 250 (“The claimant had his option to refuse payment . . . [and] was not without other modes of redress, had he chosen to adopt them.”).

<sup>286</sup> Hart, supra note 15, at 1369.

<sup>287</sup> Id.

<sup>288</sup> 5 U.S. 137, 163 (1803). Chief Justice Marshall wrote:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . .

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Id.

<sup>289</sup> See Fallon & Meltzer, supra note 261, at 1778–79.

<sup>290</sup> On official immunity doctrine, see generally Fallon et al., Hart & Wechsler, supra note 11, at 986–1011. Such doctrines seldom if ever preclude the issuance of injunctions against officials performing executive functions, other than the President of the United States. See id. at 1009–11.

<sup>291</sup> See Fallon & Meltzer, supra note 261, at 1779–86.



Daniel Meltzer and I have tried to make sense of the conjunction of immunity doctrines with cases echoing *Marbury v. Madison*'s dictum that for every right there must be a remedy by postulating that two principles underlie the law of constitutional remedies.<sup>292</sup> The first, which represents the aspiration of individual redress for official wrongs, establishes a presumption that the Constitution requires some form of individually effective relief in all cases.<sup>293</sup> But this principle is not absolute and will sometimes yield to interests in efficient government administration, such as those that immunity doctrines protect. The second principle, reflecting separation-of-powers values and an ideal of the rule of law, looks to systemic needs for constitutional remedies.<sup>294</sup> It holds that even when individually effective relief is not available for every violation of constitutional rights, there must be a sufficient scheme of available remedies to ensure that constitutional rights do not become nullities and that government officials remain answerable as a systemic matter to the demands of law.<sup>295</sup>

These two principles accommodate the phenomenon of the substitutability of remedies that Professor Hart emphasized. They also explain why, despite gaps in the availability of individually effective remedies, congressional attempts to preclude all possible remedies for the systematic or ongoing violation of constitutional rights—as in several of the hypothetical cases that introduced this Part—should be deemed intolerable. It would be incompatible with the Constitution's evident aspiration to establish a government subject to the rule of law for Congress to be able to license ongoing lawbreaking through the device of a jurisdictional withdrawal. Because of the flexibility of the two principles that I have argued underlie the law of constitutional remedies, those principles will not point directly to a determinate result in every case. Nevertheless, they rationalize a number of superficially contradictory doctrines and provide a framework for assessing the constitutional necessity

---

<sup>292</sup> See *id.* at 1787–91.

<sup>293</sup> See *id.* at 1789 (“[T]he aspiration to effective individual remediation for every constitutional violation represents an important remedial principle, but not an unqualified command.”).

<sup>294</sup> See *id.* at 1790.

<sup>295</sup> See *id.* at 1789 (“What would be intolerable is a regime of public administration that was systematically unanswerable to the restraints of law.”).

of particular remedies under particular circumstances. As *Boumediene* teaches and as Professor Hart averred, some remedies are constitutionally necessary in the absence of a constitutionally adequate substitute. Under modern constitutional doctrine, moreover, the constitutional necessity of any particular remedy should be regarded as a function not only of the availability or unavailability of other remedies, but also of the particular constitutional provision under which a party seeks relief.

### *1. Nullification of Constitutionally Invalid Laws*

Under *Marbury v. Madison*, a constitutionally invalid law is not law at all. A statute that purported to require judicial enforcement of constitutionally defective laws—for example, by vesting courts with criminal enforcement responsibility but depriving them of jurisdiction to inquire into the validity of the laws that they were charged to enforce—would itself be constitutionally invalid.<sup>296</sup> A court should, and under *Marbury* must, ignore or nullify it.

Difficult jurisdiction-stripping issues have arisen when Congress has directed one court to enforce a statute and assigned to another the responsibility for determining the statute's validity, and has precluded the enforcement court from assessing the constitutionality of the statute that Congress charged it with enforcing.<sup>297</sup> Although I cannot pause to probe the issues that such arrangements pose under Article III and the Due Process Clause, the essential point for current purposes is that nullification of an invalid statute or regulation is a constitutionally necessary remedy that some court must have jurisdiction to provide to any party against whom the statute or regulation would otherwise be judicially enforced.<sup>298</sup>

---

<sup>296</sup> See Hart, *supra* note 15, at 1373.

<sup>297</sup> See *Yakus v. United States*, 321 U.S. 414, 443–48 (1944); cf. *United States v. Mendoza-Lopez*, 481 U.S. 828, 838–39 (1987) (holding that a court could not predicate criminal liability on a prior administrative determination where there had not been a meaningful opportunity for judicial review of the administrative rule).

<sup>298</sup> See Hart, *supra* note 15, at 1378–79. Professor Monaghan has dubbed the rule that a court cannot be required to enforce a constitutionally invalid rule the “valid rule requirement.” Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 *Sup. Ct. Rev.* 195 (1989); Henry P. Monaghan, *Overbreadth*, 1981 *Sup. Ct. Rev.* 1, 4–14; cf. John Harrison, *Jurisdiction and Remedies: Congressional Power and Constitutional Remedies*, 86 *Geo. L.J.* 2513, 2521–23 (1998) (arguing that

## 2. *Habeas Corpus*

*Boumediene v. Bush* holds that the Suspension Clause makes either habeas corpus or an effectual substitute a constitutionally necessary remedy for anyone who would have had access to the writ in 1789—and possibly to some others as well.<sup>299</sup>

## 3. *Post-Deprivation Monetary Remedies for Coercive Deprivations of Property and Liberty*

As noted above, it not infrequently happens that following the deprivation of a constitutional right, sovereign immunity will bar a damages remedy against the government, while official immunity will preclude relief against the official through whom the government acted. In some circumstances, however, the Supreme Court has held that the Constitution mandates post-deprivation monetary remedies for past constitutional violations if pre-deprivation remedies were not available. A leading case is *Reich v. Collins*, which initially appeared to hold that the Due Process Clause mandates post-deprivation monetary remedies for the coercive collection of unconstitutional taxes, state sovereign immunity notwithstanding.<sup>300</sup> Five years later, in an opinion expanding the reach of sovereign

---

nullification by an enforcement court is the only constitutionally necessary remedy for constitutional violations).

<sup>299</sup> 128 S. Ct. 2229, 2248 (2008) (noting that “‘at the absolute minimum’ the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified” (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001))). Absent a suspension of the writ, the status of habeas corpus as a constitutionally necessary remedy, when joined with the *Marbury* principle that a constitutionally invalid assertion of authority is not law at all, refutes the suggestion of Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 *Stan. L. Rev.* 755, 813–32 (2004), that the constitutional rights that would be violated by mass detentions could be treated as “liability rules,” which mandate post-deprivation compensation, rather than as “property rules,” which presumptively authorize injunctive relief. On a petition for habeas corpus, the detaining officer must show legal justification for a detention, and if the purported justification is not a legally valid one, then the court must issue the writ.

<sup>300</sup> 513 U.S. 106, 111–14 (1994). To largely the same effect are a series of pre-*Reich* cases holding that state courts could not invoke non-retroactivity principles to deny refunds of tax payments exacted under laws subsequently held to be unconstitutional. See *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 100 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Am. Trucking Ass’ns v. Smith*, 496 U.S. 167, 188 (1990).

immunity,<sup>301</sup> the Court recharacterized *Reich* as having mandated a post-deprivation remedy only because state law had promised one.<sup>302</sup> But even when *Reich* is limited in this way, it stands for the proposition that sometimes the Due Process Clause requires post-deprivation monetary remedies for the coercive collection of unconstitutional taxes.

Dictum in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* also describes just compensation as a constitutionally mandated remedy for the taking of private property for public use.<sup>303</sup> A subsequent opinion treats as unsettled the question of whether sovereign immunity might modify the Just Compensation Clause's dictate.<sup>304</sup> But in cases involving cities and counties, which may possess the power of eminent domain but do not enjoy sovereign immunity, the Just Compensation Clause establishes a constitutionally necessary post-deprivation remedy.

Although the Supreme Court has thus held that both the Due Process Clause and the Just Compensation Clause sometimes mandate monetary remedies, it has seldom if ever suggested that other constitutional guarantees have the same effect, even when suits for pre-deprivation remedies—such as injunctions—would have proven impossible to bring. In 1971, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>305</sup> the Court recognized a non-statutory federal cause of action for damages against federal officials who violated the Fourth Amendment.<sup>306</sup> It did not, however, describe the right to sue as constitutionally mandated. In subsequent cases, the Court has increasingly treated *Bivens* actions seeking damages from federal officials who violated other constitutional provisions as “disfavored”<sup>307</sup> and has said that it is reluctant to “extend *Bivens* liability ‘to any new context or new category of

---

<sup>301</sup> *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that a state may invoke sovereign immunity to preclude non-consented suits against it by private parties for violations of federal law in state as well as federal court).

<sup>302</sup> See *id.* at 740.

<sup>303</sup> 482 U.S. 304, 314–16 (1987).

<sup>304</sup> See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999).

<sup>305</sup> 403 U.S. 388, 397 (1971).

<sup>306</sup> Although 42 U.S.C. § 1983 creates a cause of action against state officials who violate federal constitutional rights, there is no comparable statutory provision creating a cause of action against federal officials who violate the Constitution.

<sup>307</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

defendants.”<sup>308</sup> Even where *Bivens* actions do lie, the Supreme Court has consistently held that defendant officials possess either absolute or qualified immunity from suits for damages.<sup>309</sup>

#### *4. Injunctive or Similarly Effective Relief Against Ongoing Deprivations of Constitutional Rights That Would Not Be Adequately Compensable by Damages*

The conventional wisdom cites *Ex parte Young*<sup>310</sup> as having ruled that the Due Process Clause of the Fourteenth Amendment sometimes mandates the availability of an injunctive remedy for parties wishing to challenge a constitutionally invalid state criminal statute.<sup>311</sup> “[T]o impose upon a party . . . the burden of obtaining a judicial decision . . . only upon the condition that if unsuccessful he must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts . . . and [is] therefore invalid,” the Court said.<sup>312</sup> The conventional wisdom similarly views *Young* as a generative source of authority for the proposition that constitutional provisions such as the Fourteenth Amendment “provide[] a cause of action” for injunctive relief against government officials<sup>313</sup> when the requisites for equitable relief are met.<sup>314</sup>

In a recent revisionist article, John Harrison maintains that the claim to relief in *Ex parte Young* “did not rest on a novel cause of action derived from the Fourteenth Amendment,” but instead invoked “general” or common law principles authorizing suits to enjoin prosecutions on the basis of valid legal defenses.<sup>315</sup> With the issue thus framed, the question of the historically understood or intended meaning of *Ex parte Young* seems to me to be as difficult as many questions involving the original understanding of constitutional language. Harrison appears correct that federal equity prin-

---

<sup>308</sup> *Id.* (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

<sup>309</sup> See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

<sup>310</sup> 209 U.S. 123 (1908).

<sup>311</sup> See Fallon et al., Hart & Wechsler, *supra* note 11, at 891.

<sup>312</sup> *Young*, 209 U.S. at 148.

<sup>313</sup> Fallon et al., Hart & Wechsler, *supra* note 11, at 891.

<sup>314</sup> The requisites for injunctive relief also include an equitable calculus involving the balance of public and private interests. See, e.g., *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496–97 (2001); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982).

<sup>315</sup> John Harrison, *Ex parte Young*, 60 *Stan. L. Rev.* 989, 990 (2008).

ciples sometimes permitted anti-suit injunctions.<sup>316</sup> At the same time, some of *Young*'s language at least intimates the existence of a constitutional right to injunctive relief, without which no one might have risked challenging an unconstitutional criminal statute.<sup>317</sup> Moreover, even if Professor Harrison were right about *Ex parte Young*, subsequent Supreme Court cases have unquestionably recognized rights to sue for injunctions directly under the Constitution, without regard to whether such suits could have gone forward under traditional equity rules that generally authorized suits for injunctions only in cases involving tortious misconduct or threats to bring lawsuits. Post-*Young* doctrine includes cases in which the Court has upheld suits to enjoin federal officials' alleged violations of the Establishment and Free Speech Clauses,<sup>318</sup> engagement in gender and race discrimination,<sup>319</sup> and failures to provide procedural due process.<sup>320</sup>

The timing of the most currently important post-*Young* cases bears comment. Writing in 1953, Professor Hart asserted that plaintiffs rarely if ever have a constitutional right to injunctive relief.<sup>321</sup> But Hart wrote on the eve of a constitutional revolution, often associated with the 1954 decision in *Brown v. Board of Education*,<sup>322</sup> which reversed long prevailing assumptions and made injunctive relief the norm, rather than the exception, in cases seeking to enforce broadly shared rights the value of which would be hard to quantify.<sup>323</sup>

---

<sup>316</sup> See *id.* at 998–1000. Although Professor Harrison cites a number of treatises supporting his claim on this point, he does not identify any square rulings by the Supreme Court prior to *Ex parte Young* that actually upheld an anti-suit injunction.

<sup>317</sup> See *supra* note 312 and accompanying text.

<sup>318</sup> See, e.g., *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 457, 480 (1995) (upholding injunctive relief to protect government employees' First Amendment rights); *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (upholding plaintiffs' standing to sue to enjoin an alleged Establishment Clause violation).

<sup>319</sup> See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (gender discrimination); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (race discrimination).

<sup>320</sup> See, e.g., *United States Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973).

<sup>321</sup> See Hart, *supra* note 15, at 1366.

<sup>322</sup> 347 U.S. 483 (1954).

<sup>323</sup> See Fallon et al., Hart & Wechsler, *supra* note 11, at 724; Kontorovich, *supra* note 299, at 818–20 (discussing “the obscure origins” of the “injunctive essentialis[t]” assumption that injunctions are the normal and mandatory remedy for constitutional rights violations).

None of these cases holds squarely that the Constitution creates a right to equitable relief. It is, therefore, arguable that suits for injunctions against federal race and gender discrimination and Establishment Clause violations assert “implied” causes of action, analogous to *Bivens* suits for damages, that are as constitutionally gratuitous as the Court believes *Bivens* to be. The Court, however, has treated suits for injunctions against ongoing constitutional violations strikingly differently from *Bivens* actions. In cutting back on *Bivens*, the Court has said that the decision whether to authorize damages remedies for constitutional violations is more appropriately made by Congress than the courts and that judges should be wary of recognizing “implied” causes of action.<sup>324</sup> By contrast, the post-*Brown* Court, so far as I am aware, has never suggested that injunctions against ongoing constitutional violations are constitutionally problematic in the way it now believes *Bivens* actions to be.

Under these circumstances, the suggestion that Congress could eliminate all courts’ jurisdiction to award injunctive as well as damages remedies for at least some constitutional violations—such as race discrimination in Case 6—strikes me as wholly out of joint with the substantive constitutional law of the modern day. The jurisdiction-stripping imagined in Case 6 should be judged unconstitutional under cases such as *Bolling v. Sharpe*<sup>325</sup> and *Adarand Constructors, Inc. v. Peña*,<sup>326</sup> which held that the Due Process Clause bars most if not all race discrimination by the federal government. To quote Henry Hart, it would be “monstrous illogic . . . [t]o build up [Congress’s] mere power to regulate jurisdiction into a power” to nullify rights or totally to preclude their enforcement.<sup>327</sup> The substantive rights recognized in *Bolling* and *Adarand* were almost surely not anticipated by the Constitution’s Framers and ratifiers, but, once those rights are established, they can generate entitlements to remedies. This position will seem radical only if we assume, falsely and selectively, that those who wrote and ratified the Constitution made all of the important decisions and that nothing remained to be liquidated by practice and precedent.

---

<sup>324</sup> See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947–48 (2009).

<sup>325</sup> 347 U.S. 497, 500 (1954).

<sup>326</sup> 515 U.S. 200, 235 (1995).

<sup>327</sup> Hart, *supra* note 15, at 1371.

*5. Remedies for Deprivations of “New Property”*

Beginning in the 1970s, the Supreme Court has said on several occasions that congressional preclusion of judicial review of constitutional claims arising from determinations of entitlements to benefits, as in Case 7, or from dismissals from federal employment would present serious constitutional questions.<sup>328</sup> Justice Scalia has derided the constitutional concern.<sup>329</sup> According to him, the doctrine of sovereign immunity, among others, demonstrates that there can be no right to a judicial remedy in benefits cases.<sup>330</sup> If I am correct that rights to judicial review frequently depend on rights to judicial remedies, then Justice Scalia frames an apt question. But his answer is mistaken, or at least too blunt.

Substantive constitutional doctrine now establishes unmistakably that even when the government dispenses constitutionally gratuitous “privileges”—such as education, employment, or welfare—constitutional guarantees generate rights. To cite just a few examples, *Brown v. Board of Education*<sup>331</sup> and its companion case, *Bolling v. Sharpe*,<sup>332</sup> recognized rights to nondiscrimination in the distribution of educational opportunities. Numerous cases hold that the First Amendment confers rights on public employees not to be dismissed from constitutionally gratuitous jobs on constitutionally forbidden grounds.<sup>333</sup> Welfare programs can create property interests that in turn generate rights to fair administrative procedures under the Due Process Clause.<sup>334</sup>

For so long as the doctrine of sovereign immunity remains relatively robust, Justice Scalia seems correct that Congress could validly preclude direct suits against the government in cases arising from the administration of education, employment, and welfare programs. (I shall return to issues arising from the withdrawal of jurisdiction to order compensatory payments out of the state and

---

<sup>328</sup> See, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974).

<sup>329</sup> See *Webster*, 486 U.S. at 611–12 (Scalia, J., dissenting).

<sup>330</sup> See *id.* at 611–14.

<sup>331</sup> 347 U.S. 483, 493 (1954).

<sup>332</sup> 347 U.S. 497, 500 (1954).

<sup>333</sup> E.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 565 (1968).

<sup>334</sup> E.g., *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).



federal treasuries below.) The doctrine of sovereign immunity, however, is only one aspect of a complex doctrinal mosaic. Constitutional rights run against governmental officials, who cannot claim sovereign immunity, as well as against the government itself.<sup>335</sup> Moreover, as discussed above, substantive constitutional doctrines sometimes give rise to rights to remedies, which can be remedies against government officials rather than the government. Recognizing that substantive rights sometimes entail rights to remedies, I find it simply unimaginable that Congress, if it so chose, could simultaneously preclude both state and federal courts from exercising jurisdiction over all constitutional claims to all forms of relief arising out of constitutionally gratuitous programs, including, for example, challenges to race- or gender-based discrimination and to First Amendment violations by government employers. As Justice Brandeis pungently put it, sometimes “the constitutional requirement of due process is a requirement of judicial process.”<sup>336</sup> When a right to judicial process exists, congressional action precluding all access to such process would violate the Due Process Clause.

Eliding complex questions about the substitutability of remedies, my principal point is a general one. Issues involving substantive constitutional rights, rights to judicial remedies, and congressional power over jurisdiction are complexly interrelated. The emergence of new constitutional rights in the twentieth and twenty-first centuries may entail new constitutionally necessary remedies to make those rights meaningful. And constitutional rights to remedies may, in turn, limit congressional power to curb jurisdiction.

#### IV. STRIPPING OF JUDICIAL JURISDICTION TO REVIEW AGENCY ACTION

Many leading discussions of Congress’s power to withdraw jurisdiction from the federal courts start and finish with the question of whether Congress can leave the state courts as ultimate guarantors

---

<sup>335</sup> See, e.g., *Ex parte Young*, 209 U.S. 123, 155–56 (1908) (“[I]ndividuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.”).

<sup>336</sup> *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).

of constitutional rights.<sup>337</sup> This perspective ignores the realities of federal adjudication in the modern world. Today, non-Article III judges in administrative agencies and legislative courts vastly outnumber Article III judges and collectively adjudicate far more cases.<sup>338</sup> Accordingly, the topic of Congress's power to substitute non-Article III federal adjudicators for Article III courts and to preclude judicial review of the non-Article III tribunals' decisions holds great importance.<sup>339</sup>

In the context of congressional employment of non-Article III federal tribunals, the term "jurisdiction-stripping" can refer to one or both of two overlapping sets of issues. The first set involves the permissibility of Congress's depriving the Article III courts of original jurisdiction by assigning cases to legislative courts or administrative agencies. The second, closely related set involves whether Congress, after having employed a non-Article III tribunal to resolve a dispute in the first instance, can then preclude judicial review of that tribunal's action.

As Louis Jaffe observed, judicial review of administrative action is a "necessary condition" for the political legitimacy of the modern administrative state.<sup>340</sup> Accordingly, Congress has made judicial review the norm.<sup>341</sup> Applicable statutes typically contemplate: (a)

---

<sup>337</sup> See, e.g., Amar, *Neo-Federalist View*, supra note 16, at 212–16; Gunther, supra note 4, at 914–16.

<sup>338</sup> See generally Fallon et al., *Hart & Wechsler*, supra note 11, at 36–47 (collecting data on non-Article III and on Article III judges and dockets). In perhaps the most striking indication of the current practical significance of adjudication by non-Article III federal tribunals, "the Social Security Administration alone conducts roughly 650,000 hearings per year—a caseload larger than the civil docket of all Article III courts combined." *Id.* at 39.

<sup>339</sup> See, e.g., Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 *Vand. L. Rev.* 1021, 1027–31 (1994).

<sup>340</sup> Louis Jaffe, *Judicial Control of Administrative Action* 320 (1965) (noting that judicial review is a "necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid").

<sup>341</sup> See Richard J. Pierce, Jr. et al., *Administrative Law and Process* 133 (4th ed. 2004) ("Congress has expressly provided a statutory right to judicial review of most agency actions, either by including such a right in the organic act that authorizes the agency to take the challenged action or by making the agency's action subject to the judicial review provisions of the Administrative Procedure Act."); see also *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action."). Many statutes specifically authorize judicial review of administrative action at the be-

de novo judicial review of agency determinations of constitutional questions; (b) judicial review of agency determinations of law, subject to the prescriptions of judicial deference to agency interpretations outlined in such cases as *Chevron USA, Inc. v. National Resources Defense Council, Inc.*<sup>342</sup>; and (c) highly deferential judicial review of agency determinations of fact.<sup>343</sup> Against this background, any further circumscription of judicial review could be regarded as jurisdiction-stripping.

Congress has not so regularly provided for the Article III courts to review the decisions of so-called “legislative courts”—non-Article III tribunals denominated as “courts,” including the local courts for various territories and the District of Columbia.<sup>344</sup> Nevertheless, questions about the permissible use of such tribunals to decide cases within the constitutionally authorized jurisdiction of the Article III courts could easily fall under the topic of jurisdiction-stripping, too.

#### *A. The Scope of the Inquiry*

In an article written more than twenty years ago, I advocated resolving constitutional issues arising from congressional assignment of cases to non-Article III tribunals under an “appellate review theory.”<sup>345</sup> According to appellate review theory, Congress could employ non-Article III tribunals to adjudicate cases that the Article III courts otherwise could have decided if, but only if, it provided for sufficiently searching review in an Article III court.<sup>346</sup> The earlier article supported appellate review theory on the grounds that it was consistent with the language of Article III, derived

---

hest of aggrieved private parties. The Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06 (2006), which Congress enacted in 1946, provides a more general authorization, albeit one subject to some exceptions. These include exceptions for cases in which “statutes preclude judicial review,” *id.* § 701(a)(1), and “agency action is committed to agency discretion by law,” *id.* § 701(a)(2).

<sup>342</sup> 467 U.S. 837, 838, 844 (1984).

<sup>343</sup> See generally *Pierce et al.*, *supra* note 341, at 119–26 (describing how courts “typically review three aspects of agency decisions—conclusions of law, findings of fact, and procedures used in the decision-making process”).

<sup>344</sup> See *Fallon et al.*, *Hart & Wechsler*, *supra* note 11, at 36–39 (surveying legislative courts).

<sup>345</sup> *Fallon*, *supra* note 203, at 917.

<sup>346</sup> *Id.* at 918, 933.

strong support from precedent and policy concerns, and accorded with the animating purposes of Article III and the separation of powers, even if it did not exactly match the Founding generation's specific expectations of how Article III would apply.<sup>347</sup>

The central ambition of appellate review theory still seems to me to be correct. Although it is too late to insist that the Constitution forbids a variety of forms of adjudication by non-Article III tribunals—centrally including military courts or commissions, territorial courts, and administrative agencies—the assignment of judicial power to federal tribunals that lack Article III safeguards of judicial independence can threaten individual rights and the separation of powers. Appellate review helps to protect constitutional values without quixotically demanding eradication of the administrative state. *Boumediene v. Bush* does not endorse this appellate review approach but is consistent with it. The *Boumediene* Court did not question Congress's entitlement to provide for military commissions to adjudicate enemy combatant status in the first instance, but it held that the Constitution mandated habeas corpus review by an Article III court.<sup>348</sup>

Despite the continuing attractions of appellate review theory, Professor Pfander has persuaded me that if the Supreme Court were to embrace appellate review theory today, it would probably need both to invalidate more adjudicative structures (due to the absence of adequate appellate review) and apply more varied and lax standards for gauging adequacy (in order to avoid yet more invalidations) than I had once anticipated.<sup>349</sup> In addition, in accordance with arguments made already, I now believe that a court implementing appellate review theory should begin with a threshold question with which my earlier article had proposed to dispense: does Congress have a constitutionally valid purpose for employing a non-Article III tribunal in the first instance? Finally, subsequent judicial decisions, including *Boumediene*, make clear that the Supreme Court will frame its analysis of some jurisdiction-stripping schemes under constitutional provisions other than Article III, such as the Suspension Clause and the Seventh Amendment.<sup>350</sup>

---

<sup>347</sup> See id. at 943–49.

<sup>348</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

<sup>349</sup> See Pfander, *supra* note 265, at 749–57, 775.

<sup>350</sup> See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–55 (1989).

Under these circumstances, I shall not attempt here to fit as many doctrinal developments as possible into the framework of appellate review theory. Nor shall I try to work out how appellate review theory might be adjusted, especially through variations in the requisite scope of appellate review, to deal with every constitutional issue potentially arising from congressional employment of non-Article III federal adjudicators. Instead, I shall focus on the most salient jurisdiction-stripping issues stemming from congressional reliance on legislative courts and administrative adjudication. These involve the determination of an otherwise justiciable case or issue by an administrative agency, or by a legislative court other than a territorial court, and the total or partial preclusion of judicial review of the agency's or the legislative court's decision. Among the issues that I leave for another day are those generated by congressional assignment of disputes to multi-national tribunals,<sup>351</sup> those involving the use of magistrate judges,<sup>352</sup> and those presented by territorial courts.<sup>353</sup>

As in Parts II and III, my efforts to define limits on Congress's powers to strip jurisdiction will reflect a multi-factored, constructivist coherence approach. Although I shall not hesitate to offer judgments about how the law ought to develop in the future, I assume that central modern doctrines and practices are crucially important in determining how courts would, and should, respond to jurisdiction-stripping initiatives.

### *B. Some Varieties of Jurisdiction-Stripping Issues*

Because the only constitutionally authorized function of the Article III courts is to adjudicate cases,<sup>354</sup> Congress cannot "strip" the Article III courts of jurisdiction except insofar as it *either* precludes them from deciding cases *or*, as occurs more commonly, bars them

---

<sup>351</sup> See generally Fallon et al., Hart & Wechsler, *supra* note 11, at 367–73 (surveying issues presented by United States participation in treaties and conventions that contemplate use of non-Article III international tribunals).

<sup>352</sup> See generally *id.* at 363–67 (discussing powers of magistrate judges and surrounding constitutional questions).

<sup>353</sup> My reason for not discussing territorial courts is that they play a role that is partly, though not wholly, analogous to that of state courts.

<sup>354</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737, 750 (1984) (“Article III of the Constitution confines the federal courts to adjudicating actual ‘cases’ and ‘controversies.’”).

from deciding issues within a case by requiring them to accord deference or preclusive effect to an agency's judgment. The varieties of administrative action are highly diverse. Accordingly, a catalogue of jurisdiction-stripping issues must also be diverse. In the remainder of this Part, I shall separately consider attempted preclusions of judicial review of agency decisions that: (1) directly authorize criminal punishment or physical detention; (2) determine judicially enforceable legal duties; (3) coercively enforce the law against private citizens without resulting in ongoing physical detentions; and (4) reject claims of entitlement to governmentally distributed benefits or opportunities. As should soon become clear, analysis of many of these issues builds on, and in some cases repeats, now familiar themes.

*1. Agency Actions Authorizing Criminal Punishments or Other Bodily Detentions*

*a. Criminal Punishments*

It is sometimes said categorically that agencies cannot impose the penalty of criminal imprisonment.<sup>355</sup> The leading support for this claim comes from *Wong Wing v. United States*, which held on habeas that Congress could not authorize an administrative agency to prescribe criminal punishment for a non-citizen.<sup>356</sup> Under the Fifth and Sixth Amendments, the Court ruled, "even aliens [can]not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law."<sup>357</sup>

Whether it is categorically true that agencies cannot impose criminal punishments may depend on how one classifies military tribunals. From the beginning of the republic, courts martial have tried members of the American armed forces for alleged service-connected crimes.<sup>358</sup> In addition, military courts, commissions, or tribunals have long had authority to impose criminal sanctions for violations of the laws of war.<sup>359</sup> Insofar as the permissibility of juris-

---

<sup>355</sup> See, e.g., Bernard Schwartz, *Administrative Law* 98–99 (3d ed. 1991).

<sup>356</sup> 163 U.S. 228, 229, 237–38 (1896).

<sup>357</sup> *Id.* at 238.

<sup>358</sup> See Pfander, *supra* note 265, at 715–17.

<sup>359</sup> See David J. Bederman, *Article II Courts*, 44 *Mercer L. Rev.* 825, 834–35 (1993).

diction-stripping legislation is concerned, nothing should hinge on whether military tribunals are classified as legislative courts or as sub-units in the Defense Department—an administrative agency with rulemaking as well as administrative and judicial functions.

Even when military adjudication is permissible in the first instance, *Boumediene v. Bush* makes clear, as noted above, that the Suspension Clause will often require judicial review via habeas or a constitutionally adequate substitute. Although *Boumediene* involved the habeas rights of petitioners subject to non-criminal detention, its rationale almost inevitably extends to petitioners that military tribunals have convicted of violating the laws of war. *Boumediene*'s rationale must seemingly also extend to members of the American armed forces who have been convicted of crimes by courts martial.<sup>360</sup> If so, legislation purporting to preclude the Article III courts from providing such review would violate the Suspension Clause.

Where judicial review of administrative action must exist, a further issue involves the constitutionally necessary scope of judicial inquiry. This question is too intricate to permit thorough analysis here.<sup>361</sup> Under *Boumediene*, however, the scope of available review must be at least as broad as in 1789,<sup>362</sup> with functional considerations apparently also mattering.<sup>363</sup>

---

<sup>360</sup> Apart from habeas, the provisions for judicial review of courts martial are quite limited. Following review within the military chain of command, current law provides for review by an Article I Court of Appeals for the Armed Forces, see 10 U.S.C. §§ 941–42 (2006), the decisions of which are reviewable on certiorari by the Supreme Court, 28 U.S.C. § 1259 (2006). See generally Note, Military Justice and Article III, 103 Harv. L. Rev. 1909, 1912–18 (1990) (describing provisions for and history of judicial review of decisions of military courts). Under *Boumediene*, the requisite scope of habeas review may vary with the extent of the procedural safeguards that a military tribunal provides. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2267–69 (2008).

<sup>361</sup> For a pre-*Boumediene* analysis of the minimal requisites of habeas review of detentions authorized by military commissions, see Fallon & Meltzer, *supra* note 30, at 2095–111.

<sup>362</sup> 128 S. Ct. at 2248.

<sup>363</sup> See *id.* at 2266–71 (noting that “common-law habeas corpus was, above all, an adaptable remedy” and surveying a variety of historical and modern authorities in discussing the necessary scope of review of decisions by military tribunals).

*b. Bodily Detentions*

The Constitution rarely permits non-criminal bodily detentions.<sup>364</sup> Even more rarely will the Constitution permit such detentions without prior judicial authorization. But there are exceptions. For example, the Immigration and Naturalization Service frequently detains non-citizens and sometimes coercively removes them based on administrative determinations.<sup>365</sup> Additionally, as contemplated in *Boumediene*, Defense Department tribunals can make quasi-judicial determinations of whom the government can lawfully detain preventively as enemy combatants.

Even when the Constitution permits bodily detentions based on an initial administrative adjudication, *Boumediene* establishes that Congress cannot strip the courts of jurisdiction to inquire into the lawfulness of the administrative action in cases subject to the Suspension Clause.<sup>366</sup> Though *Boumediene* involved the detention of suspected enemy combatants under the laws of war, the Court's decision leaves no doubt about the constitutional underpinnings of *INS v. St. Cyr*, which held that a petitioner detained for purposes of removal under the immigration laws had a right of access to habeas corpus.<sup>367</sup>

*2. Agency Action Determining Private Citizens' Legally Enforceable Duties*

Congress sometimes authorizes agency officials, rather than Article III courts, to determine private parties' legally enforceable duties. Sometimes agencies determine rights and duties through adjudicative or quasi-adjudicative applications of law to fact. Other times they specify legal obligations through rulemaking.

---

<sup>364</sup> See Fallon & Meltzer, *supra* note 30, at 2067.

<sup>365</sup> See Thomas Alexander Aleinikoff et al., *Immigration Process and Policy* 582–629 (3d ed. 1995) (describing administrative procedures for removal of aliens).

<sup>366</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2269–77 (2008); see also *INS v. St. Cyr*, 533 U.S. 289, 308–14 (2001).

<sup>367</sup> 533 U.S. at 308–14 (2001). Many questions about the necessary scope of habeas review remain unanswered, partly because of historical uncertainties and partly because *Boumediene*, in particular, suggested that context matters greatly. See 128 S. Ct. at 2267–71.



*a. Adjudicative Determinations of One Private Party's Civil Liability to Another Private Party*

*Crowell v. Benson* held that Congress could provide for administrative adjudication of one private party's rights against another under a federal statute (the Longshoremen and Harbor Workers' Compensation Act) as long as an Article III enforcement court conducted a de novo review of the agency's determinations of law and jurisdictional fact.<sup>368</sup> Described differently, *Crowell* permitted Congress to assign initial adjudicative responsibilities to an agency and to mandate considerable judicial deference to the agency's factfinding in a civil enforcement proceeding.

Since *Crowell*, the Supreme Court has consistently upheld administrative adjudication pursuant to what it has termed "the agency model,"<sup>369</sup> which applies when agencies adjudicate disputes under their governing statutes, subject to appellate review in an Article III court. Moreover, subsequent cases have eroded *Crowell's* specifications concerning the Article III courts' necessary powers in cases of agency adjudication of what the *Crowell* Court called a "private right," involving "the liability of one individual to another under the law as defined."<sup>370</sup> The category of "jurisdictional fact" now has little significance.<sup>371</sup> Under *Chevron* and related doctrines, reviewing courts must frequently accord substantial deference to agencies' determinations of law.<sup>372</sup> In the domain of agency adjudication of private parties' legally enforceable duties to one another under federal law, it is therefore hard to deny that current practice and modern doctrine have wandered far from the original constitutional understanding,<sup>373</sup> under which "private rights" matters were apparently regarded as the exclusive province of the courts.<sup>374</sup>

---

<sup>368</sup> 285 U.S. 22, 50–65 (1932).

<sup>369</sup> See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851–52 (1986).

<sup>370</sup> 285 U.S. at 51.

<sup>371</sup> See Fallon et al., *Hart & Wechsler*, supra note 11, at 334–35.

<sup>372</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); *Pierce et al.*, supra note 341, at 383–88.

<sup>373</sup> See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1231–36 (1994).

<sup>374</sup> See, e.g., *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) ("[W]e do not consider [that] congress can . . . withdraw from

Although it is far too late for courts to apply an exclusively originalist approach on a consistent basis, and the agency model enjoys entrenched status, the Supreme Court has displayed considerable uncertainty about whether and when Article III will permit an agency adjudicating a case under its governing statute to exercise pendent jurisdiction over related state law claims.<sup>375</sup> The Court has similarly anguished about the exercise of pendent jurisdiction over state law claims by Article I bankruptcy courts.<sup>376</sup> In my view, the Court's anxieties about allowing pendent adjudication of state common law claims, subject to review by the Article III courts, arise largely from the kind of misplaced and selective Article III originalism that I have criticized throughout this Article.<sup>377</sup>

---

judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty . . .").

<sup>375</sup> The central case is *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 857 (1986), which upheld the constitutionality of the exercise of pendent jurisdiction over a state law claim by the Commodity Futures Trading Commission, but did so only after, first, relying on the parties' consent to obviate fairness concerns, *id.* at 848–50, and second, conducting an elaborate multi-factor analysis to assure itself the scheme under review posed no undue threat to separation-of-powers values, *id.* at 850–57. The decision left it entirely unclear whether pendent jurisdiction would be constitutionally acceptable in the absence of consent.

<sup>376</sup> See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 50 (1989); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52 (1982).

<sup>377</sup> The best defense of an originalist or quasi-originalist approach of which I know is Nelson, *Adjudication*, *supra* note 31, which reads Article III through the lens of nineteenth-century legal categories. According to Professor Nelson, legal thought and doctrine of that era drew a sharp distinction between “private rights” disputes, any adjudication of which was an inherently judicial act that Congress could assign only to Article III courts, and disputes involving “public rights” and “privileges,” the adjudication of which could be viewed as “execution” of the law assignable to administrative agencies. *Id.* at 566–72. Although Nelson appears to believe that continued adherence to the nineteenth-century framework would be functionally beneficial in categorically barring Congress from diminishing judicial protection of “private rights,” see *id.* at 609, his formalist quasi-originalism grows selective when he acknowledges that “[s]tatutory entitlements” that would historically have fallen in the category of privileges “trigger the modern doctrine of procedural due process” that might sometimes require judicial review of administrative action. See *id.* at 626, 626 n.259. In addition, Nelson can rationalize agency adjudication in private rights cases such as *Crowell v. Benson* only by adopting the plain fiction that agency decisionmakers function as “adjuncts” to Article III courts rather than as independent adjudicators. See *id.* at 601–02. Although Nelson makes an impressive case that residues of nineteenth-century legal thought exert a continuing, often unrecognized influence on modern doctrine, see *id.* at 613–24, I fail to understand why that influence should be categorically conclusive in some cases, such as those involving pendent agency jurisdiction over state law claims, but not in others.

A more sensible approach would begin by recognizing, as the Supreme Court did in *Boumediene*, that the Framers could not possibly have foreseen the issue to which modern circumstances give rise: does the Constitution permit an administrative agency, adjudicating the liability of one private party to another pursuant to “the agency model,” to assert pendent jurisdiction over state law claims? With the question so framed, it should matter deeply that twentieth- and twenty-first-century precedents, beginning with *Crowell v. Benson*, have widely authorized administrative adjudication, but also have appropriately insisted that there must be functionally sensible limits on Congress’s capacity to rely on administrative agencies to determine the judicially enforceable civil liability of one private party to another. Although the pertinent cases are not always consistent in their reasoning,<sup>378</sup> I would extract from them three considerations that should guide determinations of constitutional permissibility. The first involves the nature and force of Congress’s reasons for wanting to confer pendent jurisdiction over state law claims on a non-Article III tribunal otherwise operating under the agency model.<sup>379</sup> Typically, but perhaps not always, Congress will have legitimate reasons, involving efficiency and convenience, to provide for the adjudication of federal and related state law claims in a single proceeding. The second variable involves potential non-Article III obstacles to agency adjudication. For example, if a state law claim or counterclaim constitutes a “suit at common law,” then the Seventh Amendment would guarantee a right to trial by jury, not by an agency, absent waiver.<sup>380</sup> The final consideration should be whether there is adequate review in an Article III court to protect underlying Article III values. Typically and perhaps always, however, appellate review that satisfies Article III with respect to federal claims should also satisfy Article III with respect to state law claims. Contrary arguments that depend

---

<sup>378</sup> See Fallon et al., Hart & Wechsler, *supra* note 11, at 362–63.

<sup>379</sup> See *Schor*, 478 U.S. at 851.

<sup>380</sup> The question whether an action before an agency is a “suit at common law” subject to the Seventh Amendment can itself be an intricate one. See Fallon et al., Hart & Wechsler, *supra* note 11, at 361–62 (summarizing leading cases).

on exclusive originalist premises invite inconsistency and confusion in an age of administrative adjudication.<sup>381</sup>

*b. Quasi-Adjudicative Determinations of Duties Enforceable Under the Criminal Law.*

Sometimes Congress has made the violation of agency orders the predicate for imposition of criminal liability by an Article III court. It did so, for example, in the World War II-era selective service statute that came before the Supreme Court in *Falbo v. United States*<sup>382</sup> and *Estep v. United States*.<sup>383</sup> In the latter case, the Court held, as a matter of statutory construction, that although Congress had made the decisions of local draft boards “final” when it authorized prosecutions in federal court for failure to submit to induction, it had not precluded a judicial inquiry into whether draft boards had acted beyond their jurisdiction by reaching determinations with “no basis in fact.”<sup>384</sup> Well prior to *Estep*, moreover, Congress had prescribed criminal penalties for violations of cease-and-desist orders promulgated by administrative agencies. In doing so, it had severely limited judicial inquiries into the agency factfinding supporting those orders.<sup>385</sup>

These precedents make it hard to conclude that congressionally mandated judicial deference to agency decisions in criminal cases should be deemed categorically prohibited by Article III. Nevertheless, the special burdens and stigma of criminal punishment should require more extensive judicial process under the Due Process Clause, and possibly under Article III as well, than do impositions of civil liability. The Supreme Court rested on the Due Process Clause in *United States v. Mendoza-Lopez*, which held, in

---

<sup>381</sup> Cf. *N. Pipeline Constr. Co.*, 458 U.S. at 90 (Rehnquist, J., concurring) (concluding that Congress could not assign to an Article I bankruptcy court common law claims that “are the stuff of the traditional actions . . . tried by the courts at Westminster in 1789”). There should be no practical ground for concern that Congress threatens the constitutionally central role of the Article III courts when it provides for agency adjudication of a small set of state law claims, many of which, because they do not arise under federal law, would afford no independent basis for original jurisdiction in an Article III court anyway.

<sup>382</sup> 320 U.S. 549, 554 (1944).

<sup>383</sup> 327 U.S. 114, 119–20 (1946).

<sup>384</sup> *Id.* at 122.

<sup>385</sup> See Nelson, *supra* note 31, at 596–98.

part, that “the result of an administrative proceeding may not be used as a conclusive element of a criminal offense” in the absence of an opportunity for judicial review of the administrative determination.<sup>386</sup> When criminal penalties potentially attend the violation of an agency’s order, a stronger argument may also be made that the Constitution mandates the availability of injunctive or even preliminary injunctive remedies.<sup>387</sup>

*c. Rulemaking as a Predicate for the Civil Liability of One Private Party to Another*

Agencies sometimes determine private parties’ rights and obligations through rulemaking, not adjudication. Congress’s assignment of rulemaking responsibilities to agencies does not inherently threaten the courts’ necessary or traditional functions. Because Article III will permit federal courts only to decide cases or controversies, Congress could not vest the Article III courts with rulemaking authority even if it wished to do so.

Agency rulemaking may, of course, generate cases or controversies. It is, therefore, constitutionally permissible for Congress to authorize judicial review of agency rulemaking, as it normally does under the Administrative Procedure Act (“APA”). But neither Article III nor any other provision of the Constitution uniquely requires APA review. From a constitutional perspective, the question is whether, and if so when, an agency’s determination of private obligations through rulemaking violates legal rights for which the Constitution mandates the availability of a judicial remedy. As emphasized above, Congress typically has great flexibility in the choice of remedies, even when the Constitution requires that a party whose rights have been violated must have some mode of redress. Accordingly, there is no constitutional problem with preclusion of APA review of rulemaking that establishes legally enforceable duties as long as parties against whom a rule can be enforced can bring their legal complaints before a court in another form—for example, in a suit for declaratory or injunctive relief, or as a de-

---

<sup>386</sup> 481 U.S. 828, 838 n.15 (1987).

<sup>387</sup> Cf. *Lockerty v. Phillips*, 319 U.S. 182, 189 (1943) (citing statutory severability as a ground for not needing to rule on whether the Constitution mandates the availability of interlocutory relief pending final adjudication of the validity of regulations enforceable by criminal penalties and treble damages).

fense in a civil or criminal enforcement action (provided that the alternative procedure affords due process).

When Congress mandates judicial deference to agencies' determinations of legally enforceable duties, hard questions can arise about the constitutionally requisite scope of judicial inquiry into the correctness of agency determinations. *Chevron* and related doctrines make clear, however, that Congress, if it so chooses, can require considerable deference to agency determinations of statutory law.<sup>388</sup>

### 3. Agency Actions Coercively Enforcing the Law Against Private Citizens Without Resulting in Ongoing Physical Detentions

Agency officials frequently take a variety of coercive actions without first resorting to any court. Above, I discussed one example at length: Congress can require taxpayers to pay first and litigate later.<sup>389</sup> When Congress does so, it can also authorize the coercive collection of taxes from those who refuse to pay.<sup>390</sup> Similar principles apply to the enforcement of customs regulations at the border.<sup>391</sup>

In attempting to explain permissible cases of extra-judicial governmental coercion, courts and commentators have sometimes cited the "public rights" tradition as explicated in *Murray's Lessee v. Hoboken Land & Improvement Co.*,<sup>392</sup> in which the Supreme Court asserted that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, . . . but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."<sup>393</sup> Tradition has listed government officials' co-

---

<sup>388</sup> See supra note 342 and accompanying text. *Chevron* deference can apply even in cases in which statutes impose criminal penalties for the violation of regulations and the validity of regulations under a statute is the question in issue. See Sanford N. Greenberg, Who Says It's a Crime? *Chevron* Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability, 58 U. Pitt. L. Rev. 1, 40 (1996).

<sup>389</sup> See, e.g., *Phillips v. Comm'r*, 283 U.S. 589, 595-97 (1931); *Snyder v. Marks*, 109 U.S. 189, 194 (1883).

<sup>390</sup> See, e.g., *Phillips*, 283 U.S. at 599; *Springer v. United States*, 102 U.S. 586, 593-94 (1880).

<sup>391</sup> See *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929).

<sup>392</sup> 59 U.S. (18 How.) 272, 284 (1856).

<sup>393</sup> *Id.*

ercise, non-criminal enforcement of public law as falling within the public rights domain.<sup>394</sup> Academic commentary has echoed *Murray's Lessee* in noting that “the whole point of the [traditional] ‘public rights’ analysis was that no judicial involvement at all was required—executive determination alone would suffice.”<sup>395</sup>

This report of the public rights tradition is both misleading and pernicious.<sup>396</sup> Above I discussed attempted congressional preclusions of judicial review of coercive tax collection as requiring inquiry into whether and when the Constitution mandates judicial remedies for constitutional violations.<sup>397</sup> Now, when the question is whether and when Congress can preclude judicial review of administrative action,<sup>398</sup> the analysis should proceed no differently.

Seldom if ever will the Constitution demand the kind of judicial review of agency action that now constitutes the norm under the APA and other modern statutes. Because Congress could invoke sovereign immunity to preclude direct suit against the United States, it can strip courts of authority to conduct forms of judicial review that could never have existed without congressional authorization. As my earlier discussion should also have made clear, however, the constitutional inquiry cannot end at this point. Following the permissible withdrawal of one remedy for an alleged constitutional violation, the question would loom whether the Constitution requires some *other* remedy in some other kind of judicial proceeding to stop constitutional guarantees from being reduced to a nullities. Again as discussed above, the answer to that question should often be yes, at least in cases involving ongoing deprivations of liberty or property that injunctive relief would redress.

In other words, in cases involving alleged violations of constitutional rights, the price of a valid congressional preclusion of ordinary, statutorily authorized judicial review of administrative action might be the substitution of constitutionally based suits for dam-

---

<sup>394</sup> See Fallon et al., Hart & Wechsler, *supra* note 11, at 332–33.

<sup>395</sup> Peter L. Strauss, *The Place of the Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 632 (1984) (original emphasis omitted).

<sup>396</sup> See Pfander, *Article I Tribunals*, *supra* note 265, at 731–38.

<sup>397</sup> See *supra* notes 275–294 and accompanying text.

<sup>398</sup> The Administrative Procedure Act provides that agency decisions are unreviewable when a statute expressly precludes judicial review, 5 U.S.C. § 701(a)(1) (2006), and when a decision is “committed to agency discretion by law,” *id.* § 701(a)(2).

ages or, more frequently—in light of limitations that the Supreme Court has imposed on the availability of *Bivens* actions<sup>399</sup>—injunctive relief against the officials who engaged in coercive action on the government’s behalf. A preclusion of *all* judicial jurisdiction to enforce a constitutional guarantee, through suits against government officers as well as through statutory review of administrative action, should be deemed to violate both the rights guarantees that Congress sought to exclude from judicial enforcement and the Due Process Clause.

Different issues would arise if Congress, instead of wholly precluding judicial review, mandated judicial deference to the agency determinations of fact and law that underlie coercive agency action. Under modern doctrine, prescriptions of deference would appear as permissible in this context as in any other.

#### *4. Agency Decisions Involving the Distribution or Withholding of Material Benefits Such as Money, Education, or Employment*

As with respect to agency actions coercively enforcing regulatory obligations, Congress could undoubtedly strip the Article III courts of jurisdiction to conduct APA-style statutory review of agency decisions denying benefits or terminating employment.<sup>400</sup> If Congress did so, however, the question would again arise whether, under the circumstances, the Constitution mandates the availability of another remedy for constitutional rights violations. Whatever the original constitutional understanding, it is well-settled today that

---

<sup>399</sup> See Fallon et al., Hart & Wechsler, supra note 11, at 735–40 (describing “retrenchment” from *Bivens*).

<sup>400</sup> Such preclusion would be consistent with early historical practice. For example, the first Congress established a scheme for the payment of pensions to veterans of the Revolutionary War. See Act of Sept. 29, 1789, ch. 25, 1 Stat. 95. Although the Constitution would have permitted the assignment of disputed claims to Article III courts for authoritative resolution, early Congresses consistently withheld federal jurisdiction of cases in which the government would have been a defendant. See *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 430 (1990) (“Congress’ early practice was to adjudicate each individual money claim against the United States, on the ground that the Appropriations Clause forbade even a delegation of individual adjudicatory functions where payment of funds from the Treasury was involved.”); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 *Geo. Wash. Int’l L. Rev.* 521, 576 n.206 (2003) (citing William Cowen et al., *The United States Court of Claims, a History Part II: Origin, Development, Jurisdiction, 1855–1978*, at 5 (1978)).



citizens have a variety of substantive and procedural constitutional rights that government officials can infringe as much when distributing benefits as when enforcing regulatory duties. To cite obvious examples, the government cannot, when distributing benefits, draw invidious distinctions,<sup>401</sup> penalize speech or association,<sup>402</sup> or act in procedurally arbitrary ways.<sup>403</sup>

With respect to these matters of substantive constitutional law, controlling modern precedents treat original understandings and early historical practice as nearly irrelevant. As pointed out above, race-based discrimination by the federal government would have been understood as constitutionally permissible in the late eighteenth and early nineteenth centuries, but is not permissible now. Free speech rights have expanded dramatically, as have procedural due process rights. As substantive constitutional rights have expanded, so, I have suggested, has the set of constitutionally necessary judicial remedies for violations of those rights. For example, just as it is “unthinkable” today that the federal government could operate schools distributing the “benefit” of free education only to whites,<sup>404</sup> so it should be unthinkable that Congress could preclude all access to judicial remedies for unlawful discrimination. If Congress cannot eliminate the right, then neither can it eliminate all judicial remedies for violations of the right.

The Supreme Court has never had occasion so to hold, because no case squarely presenting the question has ever arisen. Moreover, as I acknowledged above, the conjunction of the doctrines of sovereign and official immunity makes it impossible to maintain that the Constitution mandates an individually effective remedy for every violation of a constitutional right. Suits seeking monetary compensation for past violations—in which the bite of official immunity manifests itself most frequently—are those in which effective remedies are most commonly denied.

Nevertheless, the Supreme Court has correctly identified the central point in cases in which it has invoked the doctrine of constitutional avoidance to refuse to read statutes as having precluded

---

<sup>401</sup> See, e.g., *Heckler v. Mathews*, 465 U.S. 728, 744–46 (1984); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973).

<sup>402</sup> See, e.g., *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (plurality opinion).

<sup>403</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261–63 (1970).

<sup>404</sup> *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

judicial review of constitutional questions arising from agency determinations in benefits and employment cases.<sup>405</sup> Even though Congress could withdraw statutory review if it permitted non-statutory suits against government officers, it seems highly unlikely that Congress, if determined to preclude statutory review, would mean to allow other actions for constitutional remedies. Yet if Congress were understood to have precluded all judicial remedies for constitutional rights violations, the Court seems clearly right that a very serious constitutional question would be presented.

The crucial point should now be familiar: analysis of the permissibility of congressional preclusion of judicial review can commence with the text and original understanding of Article III, but it cannot conclude there. Constitutional provisions besides Article III are frequently pertinent. Issues involving the preclusion of judicial review are often bound up with substantive constitutional doctrine and with constitutional rights to remedies. In the complex and dynamic interplay among doctrines defining substantive rights, rights to remedies, and congressional power to preclude judicial review, original understandings require synthesis with subsequent, non-originalist constitutional developments.

Especially difficult questions of synthesis can arise when Congress purports to bar all judicial review of agencies' determinations of statutory, rather than constitutional, law. As I have pointed out before, aspects of both modern due process and Article III doctrine have acquired a strikingly "managerial" focus, with courts sometimes insisting that they must be able to review agencies' articulations of broadly applicable legal rules, even when they accept the preclusion of review of agencies' case-by-case applications of law to fact.<sup>406</sup> The notion that modern doctrine might require judicial review of agency determinations of law with far-reaching implications should not be ruled out solely on the basis of exclusive originalism.

---

<sup>405</sup> See, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974).

<sup>406</sup> See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 *Colum. L. Rev.* 309, 333-37 (1993).

## CONCLUSION

Questions involving Congress's power to strip jurisdiction from the federal and state courts are multifarious, multidimensional, and frequently complex. *Boumediene v. Bush*<sup>407</sup> in no way alters this basic fact. Nevertheless, *Boumediene*—the first Supreme Court case to hold a jurisdiction-stripping statute unconstitutional since *United States v. Klein*<sup>408</sup>—provides not only an apt occasion, but also a partial template, for reconsidering debates about congressional power over jurisdiction. *Boumediene*, which rested on Article I's Suspension Clause, serves as a reminder that provisions of the Constitution besides Article III bear crucially on Congress's power to control judicial jurisdiction. *Boumediene* also demonstrates that the original understanding of how constitutional language would be applied is just one consideration, and not always the decisive one, in gauging Congress's authority.

Debates about jurisdiction-stripping have too often proceeded on exclusively originalist grounds. As is the case with other issues, assessments of the constitutionality of jurisdiction-stripping should turn on multiple factors, including judicial precedent, functional considerations, and inferences from the Constitution's structure, as well the original understanding of the text of Article III. At the very least, participants in jurisdiction-stripping debates need to reckon with issues of constitutional theory involving the appropriate synthesis of original understandings, when they are identifiable, with non-originalist substantive constitutional doctrines and with other factors of recognized interpretive significance in other areas of constitutional law.

The synthesis advocated in this Article defies brief summary because, as I have emphasized, the general topic of jurisdiction-stripping encompasses diverse elements. But three themes have helped to organize my analysis.

First, notwithstanding contrary language in the 1869 case of *Ex parte McCordle*,<sup>409</sup> Congress's purpose or motive in enacting jurisdiction-stripping legislation may sometimes bear crucially on such legislation's constitutionality. More precisely, legislation enacted

---

<sup>407</sup> 128 S. Ct. 2229 (2008).

<sup>408</sup> 80 U.S. (13 Wall.) 128, 147 (1872).

<sup>409</sup> 74 U.S. (7 Wall.) 506, 514 (1869).

with the aim of inviting state courts to defy applicable Supreme Court precedent is not necessary and proper to any constitutionally legitimate purpose and should be held unconstitutional on that basis. Some evidence exists that the Supreme Court recognized the pertinence of motivation to the constitutionality of jurisdiction-stripping legislation as early as the nineteenth century. In any event, scrutiny of legislative motivation is now the norm, not an anomaly, in constitutional law. Indeed, the Supreme Court has prescribed a motive-based analysis to appraise the constitutionality of state legislation withdrawing state court jurisdiction to adjudicate federal claims. Purpose-based analysis should apply equally to congressional enactments purporting to strip judicial jurisdiction.

Second, Congress cannot use its power to control jurisdiction to preclude constitutionally necessary remedies for the violation of constitutional rights. It is not always easy to determine which remedies are constitutionally necessary. The Constitution does not require individually effective redress for all constitutional violations, especially in cases involving plaintiffs for whom “it is damages or nothing.”<sup>410</sup> Nonetheless, the Supreme Court has held that some remedies are indeed constitutionally mandatory. *Boumediene* found habeas corpus to be a constitutionally necessary remedy in the absence of an adequate substitute. The Supreme Court has held that the Constitution mandates monetary remedies for some unconstitutional deprivations of property. In cases involving ongoing deprivations of liberty, the Court has held that the Constitution sometimes creates rights to injunctive relief from ongoing constitutional violations. Writing in 1953, Henry Hart asserted that the Constitution very seldom confers rights to injunctions.<sup>411</sup> But Hart wrote before a twentieth-century constitutional revolution that made injunctive remedies the norm, not the exception, in cases involving ongoing violations of rights that have no easily quantifiable values, such as rights to vote and to be free from invidious discrimination. In some cases, maybe many, newly recognized constitutional rights entail rights to injunctions when no other remedy is available. Congress’s power over jurisdiction does not encompass

---

<sup>410</sup> *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

<sup>411</sup> Hart, *supra* note 15, at 1366.

any authority to destroy those rights. Regardless of original understandings, it should be as “unthinkable” today that Congress could lawfully preclude all judicial jurisdiction to provide remedies for vote dilution or invidious discrimination as it was “unthinkable” in 1954 that the Due Process Clause might tolerate race-based discrimination by the federal government.<sup>412</sup>

Third, as *Boumediene* teaches, issues involving congressional preclusion of judicial jurisdiction are often bound up with issues involving the permissible use of non-Article III federal tribunals such as legislative courts and administrative agencies. In this context, too, *Boumediene*’s approach is instructive. Even when initial adjudication by a non-Article III tribunal is permissible, the Constitution may mandate the availability of either appellate review or some other mode of access to an Article III court. Some such mandates may issue from Article III, but other constitutional provisions—including the Suspension and Due Process Clauses—are sometimes pertinent.

It is often thought that Congress can preclude judicial review of agency action involving “public rights.” The reality is much more complex. If Congress wishes, it can preclude the types of judicial review of agency applications of law to fact that now constitute the norm under the APA and other modern statutes. Congress would go too far, however, if, besides precluding statutory forms of judicial review, it purported to bar other modes of access to court—such as suits against government officers for damages and especially injunctive relief—through which parties whose rights have been violated could seek constitutionally necessary remedies.

Once again, it is impossible to think deeply about the preclusion of jurisdiction without thinking about constitutionally necessary remedies under modern constitutional doctrines, rooted in provisions of the Constitution other than Article III, that have sometimes diverged from original constitutional understandings. Although analysis of jurisdiction-stripping has characteristically begun with the text and original understanding of Article III, it is often a fallacy to believe that it can terminate there.

---

<sup>412</sup> *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).