

Congressional Power to Strip State Courts of Jurisdiction

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The very substantial literature on the scope of congressional power to strip courts of jurisdiction contains a gap: it does not discuss the source of the affirmative power of Congress to strip state courts of their jurisdiction. Laws granting exclusive federal court jurisdiction over some category of cases are necessary and proper to the exercise of the power to ordain and establish lower federal courts, but what power does Congress exercise when it strips both state and federal courts of jurisdiction? The answer depends on the nature of the case. In stripping all courts of the power to hear federal statutory claims and challenges to federal statutes, Congress exercises whatever affirmative power authorizes the substantive statute. However, Congress lacks affirmative power to strip all courts of jurisdiction to hear constitutional challenges to state laws. That conclusion is important in its own right but also complements views about the scope and limits of congressional power under the Exceptions Clause of Article III—such as Henry Hart’s contention that the Supreme Court must have such jurisdiction as necessary to play its “essential role” in our constitutional system. The limit on affirmative congressional power to strip state courts of jurisdiction to hear constitutional challenges to state laws ensures that there will be cases over which the Supreme Court can exercise its appellate jurisdiction in order to play its essential role.

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I. Introduction

Thirty-five years ago, Professor William Van Alstyne characterized the scholarly literature on the power of Congress to strip courts of jurisdiction as “choking on redundancy,”¹ and there has been no shortage of additional high-quality commentary on the subject in the intervening years.² Yet for all of the writing on jurisdiction stripping, virtually no scholarship addresses the question of what *affirmative power* Congress exercises when it strips the jurisdiction of *state* courts.

This Article fills the gap. It argues that Congress has affirmative power to strip state courts of jurisdiction to hear federal claims³ in most but not all circumstances. It distinguishes among four categories of state court jurisdiction stripping.

1. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 n.9 (1984) (quoting a letter from William Van Alstyne, Professor of Law, Duke Law School, to Gerald Gunther, Professor of Law, Stanford Law School (Feb. 28, 1983)).

2. See, e.g., Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1048–53 (2010) (reexamining Congress’s power to strip federal courts of jurisdiction in the wake of *Boumediene v. Bush*, 553 U.S. 723 (2008), which held that a statute framed as stripping a federal court of jurisdiction violated the Suspension Clause); Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 252 (2012) (arguing that the executive branch has an incentive to use its enforcement power to oppose congressional jurisdiction-stripping measures).

3. For brevity throughout this Article, I generally use the term “claim” to encompass both claims and defenses. Whether an issue arises by way of claim or defense may matter for statutory jurisdiction but, with one possible exception discussed below, see *infra* note 86, not for purposes of Article III.

A.

When Congress vests exclusive original jurisdiction over some class of federal claims in the lower federal courts (as it has done with respect to intellectual property claims,⁴ for example), it exercises its power to “ordain and establish” lower federal courts under Article III⁵ and, with respect to claims under or regarding federal statutes, whatever enumerated power authorizes the adoption of the statute. Congress can, if it chooses, divest state courts of jurisdiction over such claims in order to steer litigation into federal courts. Legislation vesting exclusive jurisdiction in federal court is so uncontroversial as not to register as “jurisdiction stripping” at all. Accordingly, all of the interesting cases involving congressional stripping of jurisdiction from state courts involve *simultaneous* stripping of jurisdiction from federal courts (as indicated in the mere parenthetical references to federal courts in the next three categories of jurisdiction stripping).

B.

When Congress divests state (and federal) courts of jurisdiction to hear claims arising under federal statutes, it exercises whatever congressional power authorizes the federal statute itself. The greater power not to have enacted the statute in the first place includes the lesser power to enact a statute that does not give rise to statutory claims justiciable in state (or federal) courts. This class of jurisdiction stripping might be thought to raise concerns related to the doctrine of procedural due process: if Congress purports to grant substantive rights, there could be limits on its ability to deny those rights via procedural limits, including limits on state court jurisdiction. However, given recent trends, that objection would likely fail if litigated.⁶

C.

When Congress divests state (and federal) courts of original jurisdiction to hear *constitutional* challenges to *federal* laws, it exercises whatever power warrants the substantive provisions of those federal laws. For example, the provision of the Portal-to-Portal Act that barred all courts from hearing constitutional challenges to the substantive provisions of the Act⁷ was necessary and proper to the exercise of the Commerce power, which authorized the substantive provisions of the Act. To be sure, a jurisdiction-

4. See 28 U.S.C. § 1338(a) (2012). The statutory text provides in relevant part:
The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.

Id.

5. U.S. CONST. art. III, § 1.

6. See *infra* subpart III(B).

7. 29 U.S.C. § 252(d) (2012).

stripping provision might violate due process or some other so-called external limit. Much of the voluminous literature on jurisdiction stripping addresses the nature and scope of such limits, typically by focusing on the lonely real-world example of the Portal-to-Portal Act.⁸ But the questions raised in this branch of the jurisdiction-stripping literature are best understood as concerning issues other than Congress's affirmative power.

D.

Thus we come to a category of jurisdiction stripping that warrants, but has not received, special attention. When Congress divests state (and federal) courts of jurisdiction to hear constitutional challenges to *state* (and local) laws (and policies), it acts beyond its enumerated powers. Because such a jurisdiction-stripping measure does not protect the jurisdiction of the lower federal courts, it cannot plausibly be described as necessary and proper to ordaining and establishing those courts—by contrast with the measures described in category A. And because constitutional challenges to state laws involve neither the application nor the validity of any federal statute, such a jurisdiction-stripping provision cannot plausibly be described as necessary and proper to the exercise of any federal power that could be said to warrant such a statute—by contrast with the measures described in categories B and C. As there is no other viable candidate for the affirmative power that Congress might be exercising in this fourth category, such laws are accordingly void.

This seemingly modest conclusion nonetheless has potentially important consequences because in modern times jurisdiction-stripping provisions have been most likely to be proposed for cases involving “cultural” issues—such as desegregation, abortion, the Pledge of Allegiance, and same-sex marriage⁹—where local regulations and state laws reflecting local, state, or regional cultural differences are more likely to resist national norms than are federal laws. To be sure, challenges to *federal* statutes on such issues also sometimes generate important constitutional decisions,¹⁰ but the landmark rulings tend to come in cases that challenge state or local laws and policies.¹¹ As Professor Michael Klarman has explained, the Supreme Court

8. See *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) (stating in dicta, in considering a challenge to the Portal-to-Portal Act, that Congress may not strip jurisdiction in such a way as to offend due process requirements under the Fifth Amendment).

9. See *infra* note 87.

10. See, e.g., *United States v. Windsor*, 570 U.S. 744, 775 (2013) (invalidating § 3 of the federal Defense of Marriage Act); *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (upholding federal Partial-Birth Abortion Ban Act).

11. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (invalidating state laws that barred same-sex couples from marrying); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (invalidating a Texas statute forbidding same-sex intimate relations); *Roe v. Wade*, 410 U.S. 113, 116–18 (1973) (invalidating Texas statutes that criminalized abortions); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (invalidating a Virginia law forbidding interracial marriage); *Griswold v.*

is less of a countermajoritarian institution than commonly assumed; rather, it tends to impose an emerging national consensus on laggard states and regions.¹²

Does the conclusion that Congress lacks the power to strip state courts of jurisdiction to entertain federal constitutional challenges to state laws really matter? One might think not. After all, the very forces that make the substantive laws of a state an outlier will likely be felt in the state's *courts* as well. Accordingly, the right to challenge a restrictive South Carolina abortion law only in the South Carolina courts or to challenge a restrictive Massachusetts gun-control law only in the Massachusetts courts may not be worth very much. Why should we care about Congress exceeding the bounds of its affirmative power by eliminating state court jurisdiction to hear federal constitutional challenges to state laws if state courts were not going to give a sympathetic hearing to such challenges anyway?

The short answer is that this objection is overstated. For one thing, state courts often take seriously their role as guarantors of federal constitutional rights, even in controversial cultural cases and even at potential professional cost to the state judges.¹³

Moreover, the limit identified here on Congress's affirmative power to strip state courts of jurisdiction to hear federal constitutional challenges interacts with other possible limits on jurisdiction stripping. As explained in greater detail below,¹⁴ the least controversial of the various theories that deny Congress an absolute power to strip federal courts of jurisdiction holds that the Supreme Court must retain so much of its power as to perform its essential role of ensuring the supremacy and uniformity of federal law.¹⁵ The so-called essential functions theory—which, by contrast with some of the more sweeping proposals for limits on congressional jurisdiction-stripping power, is not much embarrassed by the Judiciary Act of 1789—would require that the Supreme Court be permitted to review state court judgments rejecting

Connecticut, 381 U.S. 479, 480 (1965) (invalidating Connecticut statutes banning contraceptive use as applied to doctors providing contraceptives to married couples); *Brown v. Bd. of Educ.*, 347 U.S. 483, 486–88 (1953) (invalidating de jure racial segregation in public schools).

12. Michael Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 191–92 (1998).

13. See *infra* notes 95–107 and accompanying text.

14. See *infra* Part IV.

15. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (contending that Congress may not use its power to make exceptions to the Supreme Court's appellate jurisdiction in a way that “will destroy the essential role of the Supreme Court in the constitutional plan”); see also James E. Pfander, *Jurisdiction Stripping and the Supreme Court's Power to Supervise*, 78 TEXAS L. REV. 1433, 1435 (2000) (making a similar argument based on the need for the Supreme Court to maintain “supervisory” control of the lower federal courts); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17, 43 (1981) (offering “a narrowed form of the ‘essential function’ view of the Supreme Court's appellate jurisdiction”).

constitutional challenges to state laws. Accordingly, the conclusion that Congress lacks the affirmative power to strip state (along with federal) courts of the power to hear federal constitutional challenges to state laws could have real and important consequences by preserving access to the U.S. Supreme Court for such challenges.

That conclusion could take on greater urgency in our current era of political polarization, because the norms that have generally stopped Congress from flexing its muscles under Article III have been breaking down. Consider court packing. Although scholars continue to debate whether the Supreme Court's so-called "switch in time" led to the defeat of President Roosevelt's court-packing plan,¹⁶ since that episode, most politicians have understood court packing to be beyond the pale. Lately, however, court-packing proposals have emerged both from the right¹⁷ and the left.¹⁸ Political actors who deem court packing thinkable will have little reason to hesitate to consider jurisdiction stripping as well. Tracing the outer limits on congressional power over the federal courts could well become an exercise with important practical consequences.

Yet even if no practical consequences were to follow, the exercise undertaken in this Article would have analytical value. The stakes of the debate over jurisdiction stripping have never been primarily practical. The very high ratio of scholarly articles on jurisdiction stripping to actual instances of jurisdiction stripping shows that the issue has theoretical importance that goes beyond its immediate practical consequences. Clarifying the nature and scope of the limits on Congress's power to allocate decision-making authority among the state and federal courts helps to clarify the nature and scope of the broader role of the courts in our constitutional system.

The balance of this Article proceeds in four parts. Part II surveys the relevant legal landscape by providing a much condensed overview of the jurisdiction-stripping literature. It does so with an eye towards distinguishing the subject matter of prior theories from the distinct question of affirmative congressional power. Part III expounds the four categories of congressional stripping of state court jurisdiction identified above. Part IV identifies

16. For an excellent account of the scholarly debate, see generally Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165 (1999).

17. See Memorandum on the Proposed Judgeship Bill from Steven G. Calabresi, Professor Nw. Pritzker Sch. of Law, & Shams Hirji, J.D. 2017 Nw. Pritzker Sch. of Law, to the Senate and the House of Representatives (Nov. 7, 2017), <https://thinkprogress.org/wpcontent/uploads/2017/11/calabresi-court-packing-memo.pdf> [<https://perma.cc/BA7E-6G9S>] (writing to Congress to propose an increase in the number of lower federal court judgeships with the pretext of addressing workload issues but with the real goal of "undoing the judicial legacy of President Barack Obama").

18. See Bob Bauer, *Don't Pack the Courts*, ATLANTIC (July 6, 2018), <https://www.theatlantic.com/politics/archive/2018/07/dont-pack-the-courts/564479/> [<https://perma.cc/SR2T-87AJ>] (seeking to rebut "[p]rogressives responding to Supreme Court Justice Anthony Kennedy's retirement with a proposal for court packing").

practical and theoretical consequences by exploring the relation between the limit on affirmative congressional power and the limits proposed in the voluminous scholarly literature. Part V concludes.

II. The Jurisdiction-Stripping Landscape

The sparse case law and voluminous academic literature on jurisdiction stripping largely neglect the question of affirmative congressional power to limit the jurisdiction of state courts. The next Part addresses that question directly. This Part considers where the affirmative power question fits into the ongoing debate over jurisdiction stripping. We can usefully frame that debate against a default view that posits no limits at all on congressional power to strip federal courts of jurisdiction in the sorts of cases that we care about most.

The Supreme Court has never squarely rejected the default view, but it is difficult to reconcile with the Court's interpretation of the Suspension Clause as guaranteeing an affirmative right to habeas (absent a valid suspension) in *Boumediene v. Bush*.¹⁹ Because state courts lack competence to issue writs of habeas corpus in favor of persons in federal detention,²⁰ *Boumediene* implies that Congress must, at a minimum, make a federal judicial forum available in habeas cases. Whether *Boumediene* should be conceptualized as undermining the default view as a general matter or simply allowing that the default view must accommodate the Suspension Clause is a question far afield from the main subject of this Article, so I shall simply note it and move on to theories of jurisdiction stripping that posit additional departures from the default view.

The main body of academic literature rejecting the default view includes theories positing two kinds of constitutional limits on jurisdiction stripping: limits *internal* to Article III and limits *external* to Article III. We have just seen an example of the latter. The Suspension Clause is an external limit. As I shall explain momentarily, external-limits theories rely on many other constitutional provisions as well.

Theories of *internal* limits—such as the view articulated by Justice Joseph Story in *Martin v. Hunter's Lessee*²¹ and recast in modern times by Professor Akhil Amar,²² as well as variants on Professor Henry Hart's notion that the Supreme Court must be permitted to serve its essential role in our

19. 553 U.S. 723, 745 (2008).

20. *Tarble's Case*, 80 U.S. (1 Wall.) 397, 409 (1871).

21. 14 U.S. (1 Wheat.) 304, 335 (1816).

22. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 208–09 (1985) [hereinafter Amar, *A Neo-Federalist View*] (building on Justice Story's interpretation of Article III); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1516 (1990) [hereinafter Amar, *The Two-Tiered Structure*] (contending that the Judiciary Act of 1789 “validates the main tenets of Story's two-tier thesis”).

constitutional system²³—identify Article III itself as an obstacle to some versions of jurisdiction stripping. Whatever their functional justifications, such views can be understood as construing the scope of congressional power to constitute the lower federal courts and to make exceptions to the Supreme Court’s appellate jurisdiction. Internal-limits theories that build on Story’s view draw textual support from the repeated use of the term “all cases” in Article III, Section Two.²⁴ Internal-limits theories that build on Hart’s view draw on broader structural notions of the judicial role in constitutional democracy.²⁵

A second class of theories (which need not be mutually exclusive of the first) posits the existence of limits external to Article III. Least controversially, a statute that selectively strips jurisdiction according to an illicit criterion (such as the race, sex, or religion of a party) would violate the constitutional norm rendering that criterion illicit (in the foregoing examples, respectively, the equal-protection component of the Fifth Amendment’s Due Process Clause for race- and sex-based jurisdiction stripping, and the First Amendment’s Religion Clauses for religion-based jurisdiction stripping). External limits of this sort should be conceptualized as applications of the underlying constitutional provisions that render the particular criteria illicit rather than as affirmative limits on jurisdiction stripping as such. Put differently, one does not need anything so grand as a “theory of constitutional limits on jurisdiction stripping” to say that a law that denies jurisdiction to the federal courts to entertain habeas corpus petitions from Muslims but not from persons of other faiths would be unconstitutional.

More controversially, some scholars argue that Congress may not eliminate jurisdiction over any category of constitutional cases without violating the constitutional norms thereby removed from judicial cognizance, even where the jurisdiction-stripping provision does not itself deploy an illicit classification.²⁶ For example, under this approach, a law forbidding courts

23. Hart, *supra* note 15; see also MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 7–34 (1980) (arguing that due process concerns limit Congress’s jurisdiction-stripping power); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 *YALE L.J.* 498, 506 (1974) (arguing that the national judiciary was intended to, above all else, “hear and do justice”); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 *U. PA. L. REV.* 157, 165–67 (1961) (arguing that a review of early Supreme Court jurisprudence establishes the existence of certain indispensable functions); Sager, *supra* note 15, at 43 (offering a narrow version of Hart’s “essential function” theory).

24. See Amar, *The Two-Tiered Structure*, *supra* note 22, at 1501–02 (parsing the language of Article III, Section Two with a particular emphasis on the “shall” and “all” language within); *Hunter’s Lessee*, 14 *U.S.* at 329–33, 336 (discussing the effect of “shall” on Article III, Section Two).

25. See *infra* section IV(B)(2).

26. See, e.g., Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 *HARV. C.R.-C.L. L. REV.* 129, 141–46 (1981) (characterizing the removal of jurisdiction over a class of constitutional claims or defenses as the removal of protection for

from entertaining Establishment Clause challenges to the Pledge of Allegiance²⁷ would violate the Establishment Clause, a law forbidding courts from entertaining challenges to laws restricting abortion would violate the right to abortion, and so forth. Such theories could be seen as emanating from the underlying constitutional limits themselves (and thus could be assimilated to the first, uncontroversial category of external limits), but it is not clear why they should be—at least not as a general matter. A line of cases that made that sort of connection, albeit in a different context not having to do with jurisdiction, has in recent years been more or less repudiated.²⁸ Perhaps a sounder basis for this sort of external limit would be that Congress may not, in a constitutional case, use jurisdictional tools as a means of directing a particular outcome.²⁹ However, recent Supreme Court cases indicate that this

constitutional rights and thus an impermissible burden on the underlying constitutional rights); *see also* Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 821 (1983) (describing Tribe’s argument as seeming “too subtle” and “too daring,” but justifying the same conclusion on the ground that, based on choice-of-law principles, “[j]urisdictional bills that discriminate without sufficient reason against causes of action that the legislature did not create are unconstitutional”).

27. *See, e.g.*, Pledge Protection Act of 2007, H.R. 699, 110th Cong. § 1632 (2007) (proposed bill stating that no federal court has jurisdiction to hear or decide any question pertaining to the interpretation or validity of the Pledge of Allegiance).

28. In *Hunter v. Erickson*, 393 U.S. 385, 392–93 (1969), the Supreme Court articulated what later became known as the “political-process” theory. There the Court invalidated an Akron, Ohio amendment to the city charter that required a referendum vote in order to enact any housing antidiscrimination ordinance. *Id.* at 387, 393. In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982), the Court relied on the political-process theory to invalidate a successful Washington state ballot initiative that forbade race-based busing except as ordered by a court in constitutional litigation. In neither *Hunter* nor *Seattle* did the invalidated provision itself use a racial criterion, but the political-process theory condemned each one nonetheless because each imposed special obstacles to citizens seeking legal change to benefit racial minorities. The political-process theory can thus serve as a rough analogy for the more ambitious theories of external limits on jurisdiction stripping. Under the political-process theory, new state procedures that make it difficult for an identifiable group to obtain legal reforms that benefit the group may violate the equal protection rights of group members; likewise, one could argue that laws eliminating jurisdiction over some category of constitutional cases violates the rights of litigants who would otherwise bring those cases. The analogy was a good one so long as the political-process theory had bite, but the Court has recently all but eliminated the political-process theory. *See Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (plurality opinion) (upholding Michigan ban on affirmative action by public primary, secondary, and post-secondary educational institutions against a political-process-theory challenge); *id.* at 1634 (“The broad language used in *Seattle*, . . . went well beyond the analysis needed to resolve the case.”); *id.* at 1640 (Scalia, J., joined by Thomas, J., concurring in the judgment) (“I agree with those parts of the plurality opinion that repudiate th[e] political-process] doctrine.”). Not surprisingly, Professor Tribe’s approach relied on a powerful analogy to the then-robust political-process doctrine. *See* Tribe, *supra* note 26, at 149–50 (expounding the implications of *Hunter*).

29. *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227–28 (1995) (holding that a statute requiring the reopening of final court judgments was unconstitutional on separation-of-powers grounds); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 134, 147–48 (1871) (invalidating a statute requiring the Court to dismiss certain post-Civil War claims for want of jurisdiction in “all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant”

limit is relatively easy for Congress to circumvent through clever drafting.³⁰

The Portal-to-Portal Act³¹ was the closest Congress ever came to enacting a real-life example of “jurisdictional gerrymandering” (in Professor Laurence Tribe’s memorable phrase),³² resulting in the judicial articulation of this more controversial kind of external limit. The Act stripped all state and federal courts of jurisdiction to entertain due process challenges to the substantive provisions of the Act (which defined compensable working time for purposes of the Fair Labor Standards Act in a way that arguably disturbed vested rights under earlier judicial decisions).³³ The Second Circuit declared in *Battaglia v. General Motors*³⁴ that the jurisdiction-stripping provision would be invalid if the underlying substantive provision violated due process, but because the court found no substantive infirmity, it did not invalidate the jurisdiction-stripping provision either.³⁵ The Supreme Court has never directly addressed the issue that the Second Circuit addressed in what is best described as dicta.

Due to the dearth of other statutes and decided cases, in the seven decades since *Battaglia* was decided, scholars have repeatedly returned to it in order to frame questions for theories of external limits on jurisdiction stripping. Are due process claims unique? If not, are they among a small class of claims—including, in addition, takings claims—for which the substantive constitutional right also guarantees access to a court with jurisdiction in which to make the claim? Or, per the Blackstonian maxim *for every right a remedy*, does every substantive constitutional right carry with it a right to court access? Can theories built on the Blackstonian maxim be reconciled with immunity doctrines that sometimes block any remedy?³⁶ Or was the *Battaglia* court simply wrong to suggest that there are any external limits on

based on a pardon on both jurisdictional and separation-of-power grounds).

30. See *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (plurality opinion) (describing a federal statute stripping federal courts of jurisdiction over disputes relating to a particular parcel of land at issue in a pending case as a permissible change in the law and thus “well within Congress’ authority”); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438–40 (1992) (upholding a statute that referred to two pending cases by name and that plainly dictated the outcome of those cases, reasoning that the statute simply used a shorthand to change the applicable law).

31. Portal-to-Portal Act of 1947, Pub. L. No. 49, ch. 52, § 2(d), 61 Stat. 84, 86 (1947) (codified in relevant part at 29 U.S.C. § 252(d) (2012)).

32. See Tribe, *supra* note 26.

33. The jurisdiction-stripping provision was § 2(d) of the Portal-to-Portal Act, which was set forth in *Battaglia v. General Motors Corp.*, 169 F.2d 254, 256 n.3 (2d Cir. 1948).

34. 169 F.2d 254 (2d Cir. 1948).

35. *Id.* at 257, 259. Readers who are new to the subject might wonder how the court could even say that much, in light of the jurisdiction-stripping provision. The court held at the threshold that it at least had jurisdiction to determine its own jurisdiction. *Id.* at 256–57.

36. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1784–85 (1991) (concluding, after surveying “[m]odern [immunity] doctrines,” that “beyond any peradventure, [they] depart decisively from the notion that the Constitution requires effective remedies for all victims of constitutional violations”).

jurisdiction stripping beyond the use of illicit criteria in the jurisdictional provisions themselves (as in the uncontroversial race, sex, and religion examples)?

As the large body of high-quality scholarship on both internal and external limits on jurisdiction stripping indicates, these are fascinating questions. But I have promised that this is not yet another article about internal or external limits, at least not exactly. Rather, this Article asks an antecedent question—What is the source of Congress’s affirmative power to strip jurisdiction in the first place?

With respect to *federal* courts, the answer is clear and taken for granted in the internal limits literature: Article III. Pursuant to the Madisonian Compromise, Article III empowers Congress to “ordain and establish” lower federal courts.³⁷ It is possible to imagine that this power might only have been exercised on an all-or-nothing basis, in which case Congress would have to choose between creating no lower federal courts at all or creating them and vesting them with some minimum of jurisdiction to be determined by Article III. However, more or less since the enactment of the Judiciary Act of 1789, it has been understood that Congress’s greater power to create no lower federal courts includes the lesser power to create lower federal courts and vest in them only some of the jurisdiction that could be vested in them consistent with Article III, Section Two.³⁸ Thus, according to the conventional wisdom (which in its strongest form reduces to the default view described above) Congress’s power to strip the lower federal courts of jurisdiction is just the *nonexercise* of its power to create and vest jurisdiction in lower federal courts.

So far as the Supreme Court is concerned, Congress strips jurisdiction when it makes “Exceptions” to and “Regulations” of the appellate jurisdiction that the Court would otherwise have.³⁹ Since the Judiciary Act of

37. U.S. CONST. art. III, § 1.

38. For example, the 1789 Act did not vest general federal question jurisdiction in the lower federal courts that the Act created. Act to Establish the Judicial Courts of the United States, ch. 20, § 25, 1 Stat. 73, 85–87 (1789). Indeed, Congress has *never* vested all of the jurisdiction that it might vest in the lower federal courts. Today, for example, cases that present a federal question within the meaning of Article III, but in which the question does not appear on the face of the well-pleaded complaint, fall outside the scope of the jurisdiction granted by 28 U.S.C. § 1331 (2012), *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153–54 (1908), while diversity cases, in which there is not complete diversity or in which the amount in controversy is below \$75,000, fall outside the scope of the jurisdiction granted by 28 U.S.C. § 1332 (2012). The Supreme Court expressly endorsed the proposition that Congress can create lower courts without vesting in them all of the jurisdiction that could be vested consistent with Article III, Section Two in *Sheldon v. Sill*, 49 U.S. 441, 448–49 (1850); see also *The “Francis Wright,”* 105 U.S. 381, 385–86 (1881) (“[T]he rule . . . that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control.”).

39. U.S. CONST. art. III, § 2.

1789, Congress has exercised this power as well. Thus, under § 25 of the original Act, federal questions could only be heard by the Court by writ of error to state courts where the latter had ruled against the party staking his, her, or its case on federal law.⁴⁰ And since 1988, nearly the entirety of the Court's appellate docket has been filled with a small number of cases that the Court chooses by exercising the discretionary power to grant petitions for a writ of certiorari.⁴¹ As a practical matter, the vast majority of cases that could fall within the appellate jurisdiction as laid out in Article III are thus excepted from the Court's exercise of jurisdiction—unless one is prepared to say that the Court exercises appellate jurisdiction when it denies a petition for a writ of certiorari.

Various theories of internal limits on the scope of congressional power to strip federal courts of jurisdiction may add substantial qualifications to the foregoing accounts. In other words, theories of internal limits take for granted that Article III gives Congress the affirmative power to strip *some* or even *most* jurisdiction from both the lower federal courts and the Supreme Court. Such theories simply posit that this jurisdiction-stripping power is itself limited by Article III as properly construed.

So much for the extant literature. The previously unexamined question this Article addresses is the source of congressional power to strip *state* courts of their jurisdiction. State courts are creatures of state constitutions and state law, not Article III. So, even if we set aside all theories of external limits, why can Congress strip state courts of any of their jurisdiction?

To understand the nature of the question, consider an analogy. Suppose Congress enacted a statute forbidding all flag burning. Such a law would violate the First Amendment,⁴² which is an external limit. But it might also be deemed unconstitutional on the ground that nothing in Article I, Section Eight nor any other part of the Constitution confers on Congress the affirmative power to regulate flag burning.

Or, depending on how it were worded, the flag-burning prohibition might fall within congressional power after all. A law that forbade the burning of flags that had moved in interstate commerce would fall within Congress's affirmative power (although it would still violate the First Amendment), but a blanket prohibition without any such "jurisdictional element" would be vulnerable to a challenge of the sort that felled the Gun

40. An Act to Establish the Judicial Courts of the United States, ch. 20, § 25, 1 Stat. 73, 85–86 (1789).

41. See Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, § 1257, 102 Stat. 662, 662 (1988) (giving the Court the discretionary power to review decisions by state high courts by writs of certiorari).

42. See *United States v. Eichman*, 496 U.S. 310, 318 (1990) (invalidating a federal ban on flag burning); *Texas v. Johnson*, 491 U.S. 397, 416–20 (1989) (invalidating a state ban on flag burning as applied to politically motivated flag burning).

Free School Zones Act in *United States v. Lopez*⁴³ and the civil remedy provision of the Violence Against Women Act in *United States v. Morrison*.⁴⁴

Likewise, a law stripping state and federal courts of jurisdiction to hear some category of cases might violate an external limit of the sort explored in *Battaglia* and the commentary on *Battaglia*, but even if an external-limit challenge fails—and even if one accepts the default view with respect to congressional power over the jurisdiction of the federal courts—for the law to be valid there must be affirmative power to strip state courts of their jurisdiction.

Does Congress have the affirmative power to strip state courts of jurisdiction they could otherwise exercise? The next Part answers that question.

III. A Typology of Congressional Control Over State Court Cases

This Part asks what power(s) Congress exercises when it divests state courts of jurisdiction. As summarized above in the Introduction, the answer differs based on whether Congress also strips federal courts of jurisdiction over the same class of questions or cases.

A. *Exclusive Federal Jurisdiction*

The Supreme Court has long applied a presumption that the vesting of jurisdiction over a class of claims in federal court leaves state courts with concurrent jurisdiction over the same class of claims.⁴⁵ Congress has concluded that in the mine-run of federal question cases, a right to file in federal court,⁴⁶ coupled with a defendant's right to remove to federal court if the plaintiff files in state court,⁴⁷ suffices to protect federal interests. One could disagree with that judgment on the ground that it denies defendants to state law actions the power to remove to federal court where the federal issue arises only by way of defense (because the removal statute only permits removal where the complaint satisfies the well-pleaded complaint rule).

43. 514 U.S. 549, 561–62 (1995).

44. 529 U.S. 598, 611–19 (2000).

45. See *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990) (citing *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25–28 (1820) (describing presumption as a product of “our federal system,” in which “the States possess sovereignty concurrent with that of the Federal Government”); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477–78 (1981) (acknowledging that state courts maintain concurrent jurisdiction absent a provision to the contrary); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507–08 (1962) (“[C]oncurrent jurisdiction has been a common phenomenon in our judicial history”); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517 (1898) (explaining that, had Congress intended to strip state courts of concurrent jurisdiction, it would have done so clearly); *Clafin v. Houseman*, 93 U.S. 130, 136–37 (1876) (holding that “State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it”).

46. 28 U.S.C. § 1331 (2012).

47. 28 U.S.C. § 1441(a) (2012).

However, no one doubts that Congress could, if it chose, broaden removal in order to accommodate this and various other objections.

Given the possibility of expanding the class of removable cases in order to afford a federal forum for the resolution of federal questions (or for that matter, state law questions in diversity cases), Congress can provide a federal forum for any case that falls within the permissible scope of the jurisdiction of the lower federal courts whenever any party prefers federal court. That possibility then raises the question of what legitimate interest Congress advances by divesting state courts of jurisdiction over cases in which all parties prefer state court. How can a law stripping state courts of jurisdiction be necessary and proper to vesting jurisdiction in lower federal courts if no interested party desires to have the case heard in federal court?

Nothing in the text of the Constitution expressly answers this question. Indeed, at least with respect to federal questions, one might think that the text of the Supremacy Clause counts against congressional power to vest exclusive jurisdiction in federal courts. After all, in *Testa v. Katt*,⁴⁸ the Supreme Court held that the Supremacy Clause is not merely a priority rule that state courts must observe in determining the validity of state laws, but imposes an affirmative obligation on state courts to exercise jurisdiction over federal cases on a nondiscriminatory basis.⁴⁹ If the Supremacy Clause itself obligates state courts to exercise jurisdiction over federal claims, how can Congress override that obligation?

We might respond by construing the obligation imposed by *Testa* and related cases as a mere default rule that applies only absent congressional action: just as the case law presumes that state courts have concurrent jurisdiction with federal courts absent action by Congress, so we might say that the state courts have an obligation to entertain federal claims but only absent action by Congress. The *Testa* obligation, in this account, would be similar to the obligation of the states under the Dormant Commerce Clause: rooted in the Constitution but excusable by Congress.⁵⁰

48. 330 U.S. 386 (1947).

49. *Id.* at 393–94; *see also* *Haywood v. Drown*, 556 U.S. 729, 740–42 (2009) (invalidating a refusal by a state court to hear a federal cause of action, even when the refusal was based on a nondiscriminatory jurisdictional rule). *But see* Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2059–61 (arguing that *Haywood* disregarded a longstanding limit under which Congress could only require state courts of competent jurisdiction—as established by state law—to entertain federal claims).

50. The Dormant Commerce Clause forbids states from enacting laws that discriminate against or unduly burden interstate commerce, but because the doctrine is a judicial inference from Congress's Article I, Section Eight power, Congress may authorize state laws that, absent such authorization, would violate the Dormant Commerce Clause. *See* *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981) (“Congress may ‘confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.’” (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980))); *see also* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1480–85 (2007) (defending the principle that Congress may lift the restrictions of the Dormant Commerce Clause).

Although *Testa* thus does not stand in the way of the conclusion that Congress has the power to confer exclusive federal jurisdiction on the federal courts in some class of federal question cases, we still have not encountered a plausible justification for Congress's doing so. Yet the shape of such a justification is plain enough. Even if the *parties* might all prefer that some case be adjudicated in state court, Congress might reasonably conclude that systemic interests in the development of federal law by Article III judges justify exclusive federal court jurisdiction. After all, as noted in the Introduction, cases involving the application or the validity of federal statutes implicate not only Congress's power to ordain and establish lower federal courts, but also whatever affirmative powers authorize the adoption of the relevant statutes.⁵¹ At least with respect to those cases—which account for the lion's share of exclusive federal jurisdiction—Congress could plausibly decide that exclusive federal jurisdiction better serves the statutory policy than concurrent state and federal court jurisdiction, regardless of the parties' wishes in any particular dispute.

More broadly, whether involving federal statutes or not, adjudication resolves disputes, but it also creates a public good, namely legal doctrine.⁵² Congress could decide that dialogue between state and federal courts provides the best means of creating that public good in some or most cases (as it has decided) but that it prefers exclusive federal court adjudication in some special categories of cases (as it has also decided). Perhaps Congress believes that federal court judges have greater expertise than state court judges in some relatively technical area (such as intellectual property cases). Or perhaps Congress believes that bias against some conception of the national interest—even though acceptable to all of the parties in some particular cases—justifies sending a category of cases exclusively to federal court.

Whatever the precise justification, there is no real doubt that the Madisonian Compromise entitles Congress to vest exclusive original jurisdiction in federal courts—and thus to divest state courts of jurisdiction—in some cases in which state courts would be obligated to exercise jurisdiction absent congressional action.⁵³

51. See *supra* text accompanying note 3.

52. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–90 (1984) (contrasting the public role of the judicial system with more private forms of dispute resolution).

53. I pass over interesting questions of the scope of this power. Exclusive jurisdiction over some subclass of federal question cases seems uncontroversial. An attempt by Congress to vest exclusive jurisdiction in the federal courts to hear diversity cases—especially if coupled with a requirement of mere minimal diversity—would be potentially problematic on federalism grounds. Notably, Congress has never attempted anything of the sort. Even when it has vastly expanded diversity jurisdiction, it has still allowed for state court jurisdiction where all parties prefer a state forum. For example, the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 1711, 119 Stat. 4, 4–5 (2005), amended the U.S. Code to allow, *inter alia*, removal of high-dollar-value class actions arising under state law where there is minimal diversity, see 28 U.S.C. § 1332(d)(2) (2012), but at least one

B. *Federal Statutory Claims*

When Congress creates statutory rights and duties, it sometimes creates corresponding judicial remedies, either through private rights of action or by authorizing the executive branch to bring civil or criminal enforcement actions. However, Congress need not make any particular right or duty enforceable through any judicial mechanism. Congress can, if it chooses, provide for exclusively administrative enforcement subject only to whatever modicum of judicial review the Constitution requires.⁵⁴ The failure to provide for a full judicial remedy—in the sense of a freestanding cause of action cognizable in state or federal court, as opposed to judicial review of an administrative remedy—can be understood as a kind of jurisdiction stripping. It is an exercise, or perhaps more accurately, a withholding of the exercise, of whatever affirmative power authorizes Congress to enact the statute with only administrative remedies.

Congress also can be said to engage in jurisdiction stripping if it enacts a law that has no remedies at all. Congress undoubtedly has the power to enact legislation that creates no substantive rights or duties, as when it declares this, that, or the other national commemorative day, week, or month.⁵⁵ But Congress can also enact hortatory laws that seem to create

defendant must still seek removal for the case to wind up in federal court. For an insightful critique of some of the more expansive views of congressional power over state court jurisdiction, see Blackman, *supra* note 49, at 2104–07. For present purposes, it suffices to note that even Professor Blackman believes that “existing grants of exclusive jurisdiction are long-standing, uncontroversial, and well-accepted . . .” *Id.* at 2125.

54. Over three-and-a-half decades ago, then-Justice Rehnquist wondered whether the Court’s case law governing the power of Congress to assign adjudicatory responsibility to non-Article III bodies, and by extension, to preclude judicial review of their rulings, were mere “landmarks on a judicial ‘darkling plain’ where ignorant armies have clashed by night,” *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., joined by O’Connor, J., concurring in the judgment) (alluding to but not citing MATTHEW ARNOLD, *Dover Beach* (1851), POETRY FOUNDATION, <https://www.poetryfoundation.org/poems/43588/dover-beach> [<https://perma.cc/H53N-M5M7>]), and the subsequent precedents have done little to clarify the constitutional guideposts. See *Stern v. Marshall*, 564 U.S. 462, 487–501 (2011) (following, but not expanding, the *Northern Pipeline* analysis in holding that bankruptcy courts do not have constitutional authority to adjudicate a debtor’s state law counterclaim); *Granfinanciera v. Nordberg*, 492 U.S. 33, 55–56 (1989) (applying *Northern Pipeline* in determining that a bankruptcy trustee’s statutory right to recover a fraudulent conveyance is a private right); *Commodities Future Trading Comm’n v. Schor*, 478 U.S. 833, 857 (1986) (recognizing the lack of broad principles applicable to Article III inquiries and adopting a fact-intensive balancing analysis); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584–88 (1985) (“The enduring lesson of *Crowell* [*v. Benson*, 285 U.S. 22 (1932)] is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”). We need not struggle with these mysteries here because, as the text immediately following this footnote explains, Congress undoubtedly has the power to enact statutes that are purely hortatory.

55. See, e.g., Zach Bergson, *Congress Recognizes Wide-Ranging Issues in ‘Day of,’ ‘Week of,’ ‘Month of’ Resolutions*, THE HILL (June 20, 2012), <http://thehill.com/capital-living/cover-stories/233687-congress-recognizes-wide-ranging-issues-in-day-of-week-of-month-of-resolutions> [<https://perma.cc/K2HJ-K63J>] (“In the 99th Congress (1985-86), the height of commemorative proposals, lawmakers sponsored 275 of these resolutions — approximately 41 percent of public

substantive rights and duties but provide no mechanism—not even a purely administrative mechanism—for their enforcement.⁵⁶

Why would Congress enact a law that purports to recognize some right or duty but provides no remedy for violations? One answer is that such a law could be said to affect *moral* rights and duties, which in turn could have substantial consequences. Many people believe that they have a duty to obey the law regardless of any sanctions for failing to do so; they are not, to use a phrase made famous by Oliver Wendell Holmes, Jr. in *The Path of the Law*, “bad m[e]n” whose only concern is to avoid legal sanctions.⁵⁷ The declaration by Congress of legally unenforceable rights and duties can affect the conduct of such “good” men and women.

In any event, however effective or ineffective any particular law with no enforcement mechanism might be, such a law falls within the affirmative power of Congress because Congress does not need any affirmative power *not* to legislate. Thus, Congress has all of the affirmative power it needs (which is to say none) to “strip jurisdiction” from state and federal courts by enacting laws that purport to create rights and duties but have no enforcement mechanism.

Now suppose that Congress enacts a statute that purports to create rights and duties and that also purports to create causes of action (and, where appropriate, defenses) that enable litigants to invoke these rights and duties in court but also strips state and federal courts of jurisdiction to entertain such

laws during that session.”).

56. For example, § 11081 of the tax legislation that Congress enacted in late 2017 effectively eliminated any penalty for a taxpayer’s failure to obtain minimally adequate health insurance coverage beginning in 2019 by substituting a tax rate of zero percent for the prior rate of 2.5 percent and substituting a fixed sum of \$0 for the prior \$695. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). Yet the obligation to obtain such coverage, codified at 26 U.S.C. § 5000A, remains technically in effect because the 2017 law did not repeal it. Granted, at no point did Congress simultaneously vote for both the so-called individual mandate and the no-penalty option. It is doubtful that any member of Congress wished for this particular combination. Rather, this oddity resulted from the fact that proceeding via “reconciliation” in order to circumvent the need for sixty votes in the Senate for cloture limited the kind of legislation that could be enacted. See 2 U.S.C. § 641 (2013). The example nonetheless illustrates the conceptual possibility of a substantive obligation with no enforcement mechanism. It will continue to serve that illustrative purpose at the conceptual level, regardless of the fate of a pending lawsuit by twenty states arguing that when Congress effectively eliminated the tax, it rendered the mandate unconstitutional, because the mandate was valid only as an exercise of congressional power to tax. See Complaint, *Texas v. United States*, No. 4:18-cv-00167-0 (N.D. Tex. filed Feb. 26, 2018), [https://www.texasattorneygeneral.gov/sites/default/files/files/press/Texas_Wisconsin_et_al_v_U.S._et_al_-_ACA_Complaint_\(02-26-18\).pdf](https://www.texasattorneygeneral.gov/sites/default/files/files/press/Texas_Wisconsin_et_al_v_U.S._et_al_-_ACA_Complaint_(02-26-18).pdf). Even read for all it is worth, that lawsuit poses no threat to Congress’s power to enact hortatory legislation when acting within the scope of its enumerated powers.

57. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (contending that “a bad man has as much reason as a good one for wishing to avoid an encounter with the public force . . . [because a] man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can”).

cases. Put aside for the moment the question why Congress would want to do such an odd thing. Does the affirmative power to not create any rights and duties in the first place carry with it the power to create nominally judicially enforceable rights and duties but to strip courts of jurisdiction to hear cases involving these rights and duties?

To answer that question in the affirmative, we need to accept two propositions. First, we need to accept that not creating a legal right or duty—which, as we have just seen, Congress has the undoubted affirmative power to “do” (with the quotation marks reflecting the fact that not doing something is an odd kind of doing)—is the functional equivalent of purporting to create a right or duty while providing no mechanism for enforcing that right or duty. And second, we need to accept that this, in turn, is the functional equivalent of purporting to create rights and duties as well as judicial enforcement mechanisms (such as a private right of action), but then neutering those enforcement mechanisms by withholding jurisdiction from any state or federal judicial forum.

Moral duties and unenforceable legal duties aside, in this context jurisdiction stripping with respect to statutory rights and duties appears to be *functionally* equivalent to not enacting a statute in the first place. But to say that is not necessarily to resolve the matter entirely. After all, the law sometimes elevates form over function. There might be some reason to think that congressional power not to enact legislation recognizing a right X or duty Y is not *legally* equivalent to the congressional power to create a seeming right X or duty Y but then to withhold any remedy. Or maybe there is some reason to think that the nonenactment of legislation recognizing a right X or duty Y is not legally equivalent to legislation recognizing a seeming right X or duty Y and conferring a judicial remedy for violations of X or Y but withholding jurisdiction from any court to provide that remedy. What sorts of reasons might lead one to conclude that these measures, though functionally equivalent, are not legally equivalent?

The most promising line of attack would be rooted in, or proceed by close analogy to, procedural due process. If a law creates a property or liberty interest, then the government may not deprive someone of that property or liberty interest without fair procedures.⁵⁸ Individual justices have sometimes argued that “where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.”⁵⁹ Under this approach, a law seeming to create substantive rights or duties but simultaneously denying a remedy or jurisdiction would be unobjectionable.

58. See *Mathews v. Eldridge*, 424 U.S. 319, 332–35 (1976) (discussing the procedures required to terminate social security disability benefits).

59. *Arnett v. Kennedy*, 416 U.S. 134, 153–54 (1974) (plurality opinion).

Yet case law rejects the bitter-with-the-sweet view, at least in some contexts.⁶⁰

Accordingly, we have the conceptual tools to construct a constitutional rule under which the greater power of Congress not to create a substantive entitlement in the first place would not necessarily include the ostensibly lesser power to purport to create substantive entitlements but defeat them by failing to provide for enforcement mechanisms or jurisdiction. Indeed, one might even think that procedural due process itself forbids Congress from creating substantive rights that rise to the level of liberty or property but then withholding a remedy or jurisdiction.

Such a putative constitutional rule—whether conceived as an application of procedural due process itself or as a limitation modeled on the procedural due process doctrine but rooted elsewhere—would serve at least two purposes. First, it would vindicate a personal interest of those individuals who reasonably relied on congressional creation of a seeming right (or a duty respecting that right imposed on others) in their conduct. To be sure, one might say that no one could reasonably rely on a purported right that comes without an adequate enforcement mechanism, but this sort of meta-observation, if taken seriously, would defeat all reliance-based claims. The law protects reliance (where it does) partly because of a background normative judgment that people ought to be able to rely on the law.

That idea bears some relation to the second reason why the Constitution might be understood to forbid Congress from establishing seeming rights that are then defeated through the absence of any effective enforcement mechanism or jurisdiction: such a constitutional limit would give effect to a principle that government ought to be honest. A legislature ought not to appear to give rights (or assign duties) with one hand while taking them away with the other. Dissenting from the decision upholding the power of Congress to adopt the so-called individual mandate in the Affordable Care Act, four justices relied on something like this general principle, arguing, *inter alia*, that the obligation to purchase health insurance could not be sustained under the Taxing Power because the statute did not call the mandate a tax.⁶¹

60. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Where state law creates a substantive entitlement, the Court explained:

Each of our due process cases has recognized, either explicitly or implicitly, that because “minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.”

Id. (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)) (brackets in original).

61. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 661–68 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (arguing that the government should be estopped from invoking congressional power to tax, because statutory text and structure indicate that the challenged provision is a mandate with a penalty, not a tax).

But to state the obvious, that was a dissent. A majority in the *Affordable Care Act Case* invoked the principle that what a law actually does matters more than labels.⁶²

More directly to the present point, although I have just sketched plausible *normative* grounds for concluding that Congress's greater power not to create rights and duties in the first place does not include the lesser powers to create purported rights and duties while withholding causes of action or jurisdiction to enforce them, no such conclusion appears justified as a *description* of the current law. Indeed, any effort to construct such a greater-does-not-include-the-lesser rule in this context swims against a very strong tide.

Consider the question of when an act of Congress gives rise to a private right of action to enforce the act. Although there was a time when the doctrine regarded courts as junior partners of Congress tasked with filling in enforcement gaps,⁶³ that time has passed. The current case law more or less requires a clear statement in the law to create a private right of action.⁶⁴ And even those justices who do not go so far in presuming that acts of Congress do not give rise to judicial remedies absent a textual declaration to that effect acknowledge that Congress has the power to create what appear to be rights and duties without thereby creating causes of action.

The cases denying implied rights of action do not involve the manipulation of jurisdiction, of course, but *Marbury v. Madison*⁶⁵ itself appears to affirm the power of Congress to create rights with one hand that it defeats with the other by withholding jurisdiction. The Court treated President Adams's signing of Marbury's commission, as a District of Columbia justice of the peace in accordance with a February 1801 law, as creating a right in Marbury to receive the commission.⁶⁶ Invoking the Blackstonian maxim "that every right, when withheld, must have a remedy," the Court concluded that Marbury was entitled to sue for a writ of mandamus in a court with proper jurisdiction,⁶⁷ however, because, in the Court's view, § 13 of the Judiciary Act of 1789 conferred original jurisdiction on the

62. See *id.* at 562, 564–70 (rejecting the dissent's argument that Congress's framing of the payment required for not purchasing insurance as a "penalty" rather than as a tax determined the issue as inconsistent with established precedent).

63. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 431–34 (1964) (recognizing the existence of an implied right of action under § 14(a) of 15 U.S.C. § 78(n) as necessary in order to effectuate the legislation's purpose).

64. See *Alexander v. Sandoval*, 532 U.S. 275, 287–88 (2001) (treating text as mostly dispositive of whether to find a private right to enforce a statute). For a useful summary of the path of the Court's approach to implied rights of action, see generally *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854–58 (2017) (describing the evolution of *Bivens* actions to enforce constitutional rights by reference to evolution of doctrine governing implied rights of action under statutes).

65. 5 U.S. (1 Cranch) 137 (1803).

66. *Id.* at 167–68.

67. *Id.* at 163.

Supreme Court in violation of Article III, Marbury could not obtain the relief he sought. I recap this story—that should be familiar to anyone who has sat through the first week of a constitutional law course—to note what does not appear to concern Chief Justice John Marshall at all: when the case was decided, there might not have been *any* court in which Marbury could have sued James Madison (or anyone else) for his commission.

No lower federal court would have had jurisdiction because the federal district courts were not given original jurisdiction in federal question cases until 1875.⁶⁸ And Marbury could not sue Madison in state court because, on supremacy grounds, state courts lack the authority to issue writs of mandamus against federal officers.⁶⁹

To be fair, Marshall might have assumed that Marbury could sue in state court (presumably in either Maryland or Virginia) because state courts sometimes granted writs of habeas corpus and other forms of injunctive relief against federal officers in the pre-Civil War period.⁷⁰ Only after *Tarble's Case*⁷¹ in 1872 was that avenue clearly foreclosed.⁷² But it is hard to see why, if Marshall thought the assumption that state courts could hear Marbury's petition was critical to the outcome of the case, he said nothing at all about alternative venues. As written, the opinion in *Marbury* strongly suggests that Congress can confer a right that entitles the right holder to a remedy, even as it fails to provide any court with jurisdiction to vindicate that right.

To recap the argument of this subpart: (1) Congressional power not to create rights and duties in the first place includes the power to create statutory rights and duties that cannot be enforced in court, either because Congress does not create a cause of action or because no court has jurisdiction to entertain an otherwise proper cause of action; (2) one might object on procedural due process or similar grounds that Congress should not be permitted to purport to confer rights that it defeats by failing to authorize a judicial remedy or jurisdiction in any court; but (3) no such objection, whatever its normative merits, finds support in the case law, which appears to take for granted the basic proposition of (1). It thus follows that Congress

68. Act of Mar. 3, 1875, ch. 137 § 1, 18 Stat. 470, 470 (1875).

69. See *McClung v. Silliman*, 19 U.S. (1 Wheat.) 598, 604 (1821) (treating as essentially unthinkable, on the authority of *Marbury*, the notion that state courts have power to issue writs of mandamus against federal officers). But see *N. Pac. Ry. Co. v. North Dakota ex rel. Langer*, 250 U.S. 135, 141–42, 151–52 (1919) (reaching the merits on the same issue before ultimately denying the writ).

70. See Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 270–81 (2007) (chronicling nineteenth century state court cases that decided habeas petitions brought by persons detained by the federal government); Charles Warren, *Federal & State Court Interference*, 43 HARV. L. REV. 345, 353 (1930) (claiming that for roughly eighty years, state courts issued writs of habeas corpus in federal detention cases).

71. 80 U.S. (13 Wall.) 397 (1871).

72. See *id.* at 410–11 (holding that claims for habeas relief are within the purview of “the courts or judicial officers of the United States, and those courts or officers alone”).

has the affirmative power to strip both state and federal courts of jurisdiction to hear federal statutory claims.

C. *Constitutional Challenges to Federal Laws*

In § 2 of the Portal-to-Portal Act, Congress forbade both state and federal courts from exercising jurisdiction to entertain challenges to the substantive provisions of the Act. What power did Congress exercise when it enacted § 2? The most straightforward answer—which I shall tentatively defend in this subpart—is that the same power that authorized the Act’s substantive provisions also authorized § 2. And as the Second Circuit recognized matter-of-factly in *Battaglia v. General Motors Corp.*, the substantive provisions of “[t]he Portal-to-Portal Act, like the Fair Labor Standards Act,” which it amended, were “passed as an exercise of the power to regulate commerce” among the states.⁷³

Suppose that § 2 had stripped state but not federal courts of their jurisdiction to hear constitutional challenges to the substantive provisions of the Portal-to-Portal Act. We might then conceptualize the enactment as falling into what I have called category A: the law stripping state courts of jurisdiction to hear any category of federal claims would be understood as necessary and proper to carrying out congressional power, under the Madisonian Compromise, to vest exclusive jurisdiction in federal courts.

But that would not be the only way to understand such a law. Where, as in my hypothetical variation on § 2 of the Portal-to-Portal Act, Congress eliminates jurisdiction over state court actions that seek to invalidate a substantive congressional enactment, we might also ascribe to Congress another purpose: Congress seeks to prevent state courts from interfering with the substantive provisions of the Act. If that is the goal of Congress, then, in addition to whatever power it has to carry out the Madisonian Compromise, it could also fairly be said to be exercising the Commerce Clause power. The law stripping state courts of their power to hear challenges to substantive provisions that exercise the Commerce Clause power is thus necessary and proper to the exercise of the Commerce Clause power.

I take the foregoing logic to be unassailable where—as in my hypothetical variation on § 2 of the Portal-to-Portal Act—Congress authorizes (or leaves in place the general authorization for) jurisdiction in federal court. After all, Congress could have various legitimate reasons for not wanting state courts to invalidate acts of Congress, such as concerns about expertise, speed of implementation, or even state hostility to federal policy. But if the power to close the state courthouse door is necessary and proper to the exercise of the Commerce Clause power (which in turn authorizes the Act’s substantive provisions) as a means of preventing state

73. 169 F.2d 254, 259 (2d Cir. 1948).

court interference with the Act's substantive provisions when the federal courthouse door remains open, it is hard to see why Congress would lack the affirmative power to close the state courthouse door on the same theory when it also closes the door to the federal courthouse. Either preventing state court interference with the carrying out of a federal statute is an exercise of the Commerce Clause power or it is not—and we have already seen that it is. Put simply, where Congress closes *both* state and federal courts to constitutional challenges to a substantive federal statute enacted pursuant to congressional power X, it aims to prevent *all* judicial interference with the federal statute, so that the jurisdiction-stripping provision is also an exercise of power X. That, at any rate, is what I regard as the straightforward argument for congressional state-courthouse-door-closing authority, even when Congress also closes the federal courthouse door to constitutional challenges to federal statutes.

One might object that the goal of preventing judicial interference with the substantive provisions of the Act is not a “proper” means of exercising the Commerce Clause power or any other affirmative power of Congress. Why might that be? Let us consider several possibilities.

Quoting the Supreme Court's landmark ruling in *McCulloch v. Maryland*, in the *Affordable Care Act Case*, Chief Justice Roberts argued that no “great substantive and independent power[.]” can be deemed necessary and proper to the carrying out of some other, enumerated power because such great and independent powers must be granted in terms.⁷⁴ Might stripping jurisdiction over constitutional challenges to some substantive statute—from both state and federal courts in order to prevent judicial interference with that statute—be one of the “great substantive and independent power[s]” that Congress lacks because it is not expressly enumerated?⁷⁵

The short answer is no. Whatever one makes of the Chief Justice's conclusion that imposing affirmative purchase mandates is such a “great substantive and independent power[.],” there is no reason to think that stripping courts of jurisdiction is.⁷⁶ After all, if it were, then Congress would not even be able to strip state courts of jurisdiction when it vests jurisdiction in federal courts. Thus, this first potential limit fails.

A second kind of objection works by analogy to other instances of contingently valid exercises of congressional power. Stripping state courts of jurisdiction to entertain challenges to federal statutes is only proper, according to this objection, where federal courts remain open, because the propriety of such an action is contingent.

As an elaboration of this objection, consider commandeering. Congress

74. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559–61 (2012) (opinion of Roberts, C.J.) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819)).

75. *Id.* at 559.

76. *Id.*

may direct state legislatures to enact laws or state executive officials to enforce federal law, but only if Congress gives the states a choice whether to do so or to take some other action, such as decline federal funds or submit to conditional federal preemption.⁷⁷ The anti-commandeering cases, this objection goes, show that whether an action falls within congressional power can depend on some other action Congress does or does not take.

Upon inspection, however, this objection mischaracterizes the anti-commandeering doctrine. Under that doctrine, Congress has *no* power to commandeer state legislatures or executives. Thus, when Congress gives the states a choice whether to forgo federal funds or to accept federal preemption, it is not exercising a “commandeering power,” contingent or otherwise. Rather, Congress is exercising the Spending power or preempting pursuant to whatever affirmative power authorizes the preemptive federal statute. The anti-commandeering doctrine does not provide a useful analogy after all.

In rejecting the anti-commandeering analogy, I do not mean to deny the conceptual possibility of a power that is contingently valid. After all, other branches of constitutional law encompass contingency. For instance, a content-neutral law that regulates the time, place, or manner of speech is valid if, but only if, it “leave[s] open ample alternative channels for communication.”⁷⁸ A municipality with two public parks could be thought to act constitutionally if it denies a permit for a rally in Park 1 on content-neutral grounds if it simultaneously offers a permit for the rally in Park 2 (or vice-versa), but the municipality would act unconstitutionally if it made neither park available. The constitutionality of closing Park 1 to a rally depends on whether Park 2 remains open.

Are courts like parks? They *could* be. There certainly would be nothing illogical about a doctrine under which some law is deemed necessary and proper to the carrying out of an enumerated power where the government also acts (or refrains from acting) in some other way, but not so deemed where the government fails to act (or acts) in that other way. Yet, while such contingency is conceptually possible, we still would need some reason for thinking that this is the right way to understand enumerated powers when it comes to jurisdiction stripping. But the only plausible objections to jurisdiction stripping of this sort sound either in the rights of individuals to a day in court or in a general structural requirement (not connected to the limits of enumerated powers) that aims, in the words of Professors Fallon and Meltzer, “to keep government within the bounds of law.”⁷⁹

77. *Printz v. United States*, 521 U.S. 898, 925–33 (1997) (forbidding commandeering of state and local executive officials); *New York v. United States*, 505 U.S. 144, 174–77 (1992) (forbidding commandeering of state legislatures).

78. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

79. Fallon & Meltzer, *supra* note 36, at 1736.

To say that Congress has the affirmative power to strip both state and federal courts of jurisdiction to hear constitutional challenges to some substantive federal statute in order to prevent judicial interference with the policy of that statute is not to say that all or even any exercises of that power are constitutional. Such jurisdiction stripping might well violate some other constitutional norm. But it is nonetheless useful to distinguish the kind of constitutional norm at issue.

Suppose that Congress passed a law forbidding the movement across state lines of cars bearing bumper stickers critical of the President. Such a law would clearly violate the First Amendment. But would it also fall outside the enumerated power of Congress under the Commerce Clause? Conventional doctrine would say no. The problem with the law is not that it regulates a subject matter that is not interstate commerce; the problem is that it censors speech. That is a First Amendment problem, not an enumerated powers problem.

To be sure, it is possible to build the First Amendment objection into the enumerated powers analysis. Under an analogy to such an approach, a law stripping state and federal courts of jurisdiction to entertain constitutional challenges to the substance of a federal law would not be “proper” to the exercise of any power because (let us suppose) there is a constitutional right to a judicial forum to challenge a law’s constitutionality. This approach might be modeled on Professor Randy Barnett’s view that affirmative powers stop where rights begin. Barnett contends that “[a] ‘proper’ exercise of power is one that[,]” among other things, “does not violate the rights retained by the people.”⁸⁰

Yet Barnett’s approach, while offered as a restoration of the original understanding, is, in the contemporary context, a reform proposal. As the bumper-sticker example illustrates, under modern doctrine, individual rights operate as external constraints on the exercise of enumerated powers, but they are not incorporated within such powers as internal limits.

This may seem like a mere semantic point, but it is more. As I have noted, there is a substantial body of literature addressing the question whether jurisdiction stripping violates a constitutional right to a judicial forum. The present inquiry aims to answer a different question—Under what circumstances does Congress have the affirmative power to strip state courts of jurisdiction? If the only basis for concluding that Congress lacks such power in some context is that state court jurisdiction stripping violates a right to a judicial forum, then we will have simply incorporated the prior debate into the affirmative powers question.

In so doing, we will have sown unnecessary confusion, because the affirmative power inquiry, as I have described it, focuses on different

80. RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 274 (2004).

considerations from the inquiry into whether there is a right to a judicial forum. A court that would conclude that there is a constitutional right to a judicial forum will invalidate an act that strips jurisdiction in violation thereof, regardless of what that court concludes with respect to affirmative power. If such a court then incorporates its conclusion that a jurisdiction-stripping measure violates a constitutional right into the affirmative power analysis (per something like Barnett's general approach to rights), that will make no difference to the bottom line. The inquiry that can make a difference asks whether Congress lacks affirmative power to engage in jurisdiction stripping in some context in which, by hypothesis, doing so would violate no rights.

Accordingly, at least for the purposes about which we care, the straightforward answer with which this subpart began holds: when Congress strips state and federal courts of jurisdiction to entertain constitutional challenges to the substantive provisions of some federal act, it exercises whatever affirmative power authorizes the enactment of those substantive provisions.

Before moving to our last category, I want to underscore that the analysis of this subpart does not entail that provisions like § 2 of the Portal-to-Portal Act are constitutional. Acceptance of the foregoing line of reasoning only means that a successful argument for the unconstitutionality of such enactments should rest on something other than a lack of affirmative power.

One might think that due process (or some other constitutional principle) creates a constitutional right to some judicial forum to entertain constitutional challenges to federal law. That was the conclusion that the Second Circuit reached in dicta, at least with respect to due process and takings claims.⁸¹

Or one might think that constitutional structure (in the sense that Professor Charles Black used the term, to refer to the relations of the institutions recognized and created by the Constitution)⁸² limits the otherwise valid exercise by Congress of any of its powers in a way that aggrandizes those powers.⁸³ This view might be understood as extending Henry Hart's claim that Congress may not exercise its power under the Exceptions Clause of Article III (about which more will be said in Part IV) in such a way as to undermine the "essential role" of the Supreme Court to courts of first

81. See *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) ("[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.").

82. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7, 67 (1969).

83. Cf. Fallon & Meltzer, *supra* note 36, at 1736 (proposing that the Constitution should be understood to contain a relatively "absolute principle [that] demands a general structure of constitutional remedies adequate to keep government within the bounds of law").

instance. The view I am imagining restricts otherwise valid exercises of the power to make laws necessary and proper to ordaining and establishing lower federal courts, as well as otherwise valid exercises of the Commerce Clause (or other Article I, Section Eight) power with respect to state courts. We might awkwardly call this a limit rooted in the “essential role of lower courts.”

Or one might think that when Congress allows for judicial enforcement of a federal statute, it must accept judicial review of that same statute as a necessary ingredient of the courts’ law-application role. Citing *Marbury*, the Supreme Court said something very much like this when it invalidated on First Amendment grounds a law that restricted the ability of publicly funded lawyers to challenge the constitutionality of welfare laws that were otherwise the subject of litigation. Speaking for the Court and citing *Marbury*, in *Legal Services Corp. v. Velazquez*,⁸⁴ Justice Kennedy wrote that “Congress cannot wrest the law from the Constitution which is its source.”⁸⁵ That principle might allow Congress to strip state and federal courts of jurisdiction to hear freestanding constitutional challenges to federal law, while obligating Congress to leave such courts open to entertaining and acting upon arguments against the constitutionality of any laws that are otherwise properly before them.⁸⁶

In mentioning these potential limits, I do not mean to take a position on the strength of the arguments for or against any of them. Rather, I simply wish to underscore the limited scope of the conclusion of this subpart: there might be good reasons to conclude that Congress may not simultaneously strip state and federal courts of jurisdiction to entertain constitutional challenges to federal laws in some or even in all contexts, but those reasons support what would best be conceptualized as external limits on Congress’s affirmative powers. All things considered, Congress has the affirmative power to simultaneously strip state and federal courts of jurisdiction to entertain constitutional challenges to federal laws.

84. 531 U.S. 533 (2001).

85. *Id.* at 545 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

86. Throughout this Article, I use the term constitutional “challenge” to encompass both constitutional claims by plaintiffs and constitutional defenses by defendants because Congress has no greater or lesser *affirmative power* to strip courts of jurisdiction over constitutional claims than it has over constitutional defenses. However, if one finds the *Velazquez*-based argument set forth in the text persuasive, that might supply a reason to think that, quite apart from limits on Congress’s affirmative power, stripping state (or, for that matter, federal) courts of jurisdiction to hear a federal constitutional defense, while not otherwise tinkering with the courts’ jurisdiction to hear some category of cases, would be problematic in a way that jurisdiction stripping with respect to constitutional claims is not.

D. Constitutional Challenges to State Laws

Suppose Congress enacts a statute stripping both state and federal courts of jurisdiction to entertain federal constitutional challenges to *state* laws in some category of cases—challenges to abortion restrictions, say.⁸⁷ With respect to the federal courts, such a statute exercises (or, more precisely, refrains from exercising) the Article III power to ordain and establish lower federal courts. But what power could Congress be exercising in stripping state courts of jurisdiction in such cases? The short answer is none.

We can see why that is so by examining the powers available to Congress. As potentially relevant here, Congress has powers to organize the courts under Article III and substantive regulatory powers, mostly listed in Article I, Section Eight.

We can dispense with the latter category first. Unlike the jurisdiction-stripping laws discussed above in subparts III(B) and III(C), a law stripping state courts of jurisdiction to hear federal constitutional challenges to state laws could not be said to carry into effect any substantive regulatory power, because it does not accompany any substantive federal regulatory enactment. When Congress attaches conditions to the exercise of its Spending power but bars state and federal court jurisdiction to entertain lawsuits alleging that a recipient of federal funds failed to comply with one or more of those conditions, we can conceptualize the jurisdiction-stripping provision as itself connected to the exercise (or rather, the partial withholding of the exercise) of the Spending power. When Congress regulates pursuant to the Commerce Clause but bars state and federal court jurisdiction to challenge the substantive regulatory provisions, we can conceptualize the jurisdiction-stripping provision as likewise connected to the exercise of the Commerce power. However, when Congress simply bars federal constitutional challenges to state laws, there is no substantive law even in the vicinity, so to

87. In recent decades, members of Congress have shown special interest in stripping courts of jurisdiction in cases involving divisive social issues. *See generally, e.g.*, Pledge Protection Act of 2007, H.R. 699, 110th Cong. (2007) (amending Title 28 with respect to jurisdiction over cases regarding the Pledge of Allegiance); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004) (removing federal jurisdiction over certain claims by state officers regarding religion); Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004) (limiting jurisdiction over questions under the Defense of Marriage Act); Life-Protecting Judicial Limitation Act of 2003, H.R. 1546, 108th Cong. (2003) (eliminating federal court jurisdiction over any “abortion-related case”); H.R. 761, 97th Cong. (1981) (eliminating federal court jurisdiction over forced school attendance); Voluntary Prayer in Public Schools and Buildings Act, H.R. 4756, 97th Cong. (1981) (limiting jurisdiction in cases involving voluntary prayer in public schools or buildings); 101 CONG. REC. S8700 (daily ed. June 26, 1990) (statement of Sen. Helms) (proposing amendment to later unenacted bill limiting jurisdiction in cases regarding flag burning). Although bills such as those just listed (none of which was ultimately enacted) typically would leave state courts open, it is not difficult to imagine that the same forces that produce bills stripping federal courts of jurisdiction would sometimes produce bills stripping all courts of jurisdiction. For a review of proposed jurisdiction-stripping legislation introduced during and opposed by presidential administrations from the second President Roosevelt through the second President Bush, see generally Grove, *supra* note 2.

speak, and so we cannot plausibly describe the jurisdiction-stripping provision as connected to any substantive power.

At first blush, it would appear that the power to ordain and establish the lower federal courts cannot be the basis for stripping state courts of jurisdiction to entertain federal constitutional challenges to state laws. And indeed, I shall ultimately reach the conclusion that it does not confer any such power. However, before coming to that conclusion, I must address a superficially appealing argument by analogy to a point I made in the previous subpart.

In subpart III(C), I reasoned that because Congress undoubtedly could close state courts to federal constitutional challenges to some class of federal statutes if it left the federal courts open, it can likewise do so even when it closes the federal courts—at least, so far as an affirmative power like the Commerce power is concerned. Well, it might be asked, Why doesn't the same logic apply to federal constitutional challenges to state laws? After all, Congress undoubtedly could close state courts to federal constitutional challenges to some class of state statutes if it left the federal courts open. So, wouldn't the same logic I applied above indicate that Congress can also close the state courts as to these cases even when it closes the federal courts?

In a word, no. In subpart III(C), my argument rested entirely on the fact that Congress was exercising a power *in addition to* the power to ordain and establish lower federal courts when it closed state courts to prevent state court interference with a federal substantive enactment—namely, whatever power Congress was exercising in the substantive enactment. However, in either context—whether Congress is closing state courts to challenges to federal laws or to state laws—its power to ordain and establish lower federal courts only has any bearing when Congress leaves federal courts open. Why? Because closing state courts to some category of claims can only plausibly be seen as necessary and proper to ordaining and establishing lower federal courts when the state-court-closing measure is part of a scheme to vest exclusive jurisdiction in federal courts. If Congress closes *both* state and federal courts, then the act that does so cannot plausibly be tied to its power to ordain and establish the lower federal courts.

Thus, neither the power to ordain and establish lower federal courts nor any of Congress's substantive powers found in Article I, Section Eight or elsewhere provides Congress with the affirmative power to close state as well as federal courts to federal constitutional challenges to state laws. In short, Congress lacks such a power.

* * *

Some readers may find the juxtaposition of the conclusions in subparts III(C) and III(D) odd or even perverse. After all, as a normative matter it could be argued that Congress should have *less* power to strip courts of jurisdiction to hear constitutional challenges to federal laws than to state laws, because when Congress strips courts of power to review the validity of

federal laws, it engages in a form of self-dealing. And yet, I have concluded that Congress has the affirmative power to strip state and federal courts of jurisdiction to hear constitutional challenges to its own laws while it lacks that power with respect to state laws.

That result is less anomalous than it might at first appear for three reasons. First, to repeat a point with which readers by now may have grown weary, to the extent that one thinks that there is a pressing need for constitutional review of federal, as well as state statutes, that need may factor into an argument for some other kind of limit on jurisdiction stripping. The conclusion that Congress has the affirmative power to strip state and federal courts of such power does not imply that the exercise of such power survives constitutional scrutiny under other theories.

Second, although Congress has almost never passed legislation stripping both state and federal courts of jurisdiction over a class of constitutional claims,⁸⁸ it has frequently considered bills that would limit the jurisdiction of various courts to hear constitutional challenges. In recent decades, such bills have frequently targeted hot-button social issues such as busing, abortion, flag burning, school prayer, and same-sex marriage—areas where state law has regulatory primacy.⁸⁹ Because resistance to the Court's decisions tends to vary by region, and thus by state, the greater threat to constitutional values may come from state legislatures rather than from Congress,⁹⁰ a conclusion broadly consistent with James Madison's fears about the relative threat of tyranny in small versus large polities expressed in *The Federalist No. 10*.⁹¹

88. The Portal-to-Portal Act is a notable exception. So is § 7 of the Military Commissions Act of 2006, which was held to violate the Suspension Clause in *Boumediene v. Bush*, 553 U.S. 723, 733 (2008). The text of that provision was sufficiently encompassing to bar jurisdiction in state as well as federal courts. When *Boumediene* was decided, the statutory text provided, as it does now:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Id. at 736. See 28 U.S.C. § 2241(e)(1) (2012). Because state courts lack the power to grant writs of habeas corpus to federal prisoners, see *Tarble's Case*, 80 U.S. 397, 411–12 (1871), even if the statute were construed as only stripping federal courts of jurisdiction, the result would be to leave no court—state or federal—with jurisdiction in the specified class of cases.

89. See *supra* note 87 and accompanying text (giving examples of bills that would strip courts of jurisdiction in cases involving divisive social issues).

90. Cf. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1000–01 (2004) (noting “that the constitutional prohibition on racial discrimination has had a greater impact on state governments” than on the federal government, while noting also that with respect to this particular issue “regional differences have diminished with time”).

91. THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). Madison explained:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

Thus, in order to maintain the supremacy of federal constitutional law, the need for judicial review of state laws may be greater than the need for judicial review of federal laws.

Third, the need for constitutional review may be greater in cases challenging state rather than federal laws because of the interest in uniformity. Echoing the decisive rationale for Justice Story's opinion for the Court in *Martin v. Hunter's Lessee*,⁹² Justice Holmes famously remarked: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."⁹³

To be sure, Holmes was discussing judicial review by the Supreme Court, not by state courts or lower federal courts, and without review by a single body such as the Supreme Court, uniformity cannot be readily maintained because different state courts could provide different interpretations of the Constitution. Thus, the conclusion that Congress lacks the affirmative power to strip all courts of jurisdiction over constitutional challenges to state laws does not, standing alone, ensure uniformity.

However, the limit identified here need not stand alone. As the next Part explores, the proposition that Congress lacks affirmative power to strip both state and lower federal courts of jurisdiction to hear constitutional challenges to state laws has potential implications for the Supreme Court's own jurisdiction because it interacts with other possible limits on congressional power to strip jurisdiction.

IV. Practical Implications

Part III concluded that Congress lacks the affirmative power to strip state courts of jurisdiction over federal constitutional challenges to state laws when it also closes federal courts to such challenges. That conclusion is important because it does not rest on any of the controversial theories that have hitherto been proposed as limits on the power of Congress to restrict the jurisdiction of state and federal courts. It stands even if one accepts the default view that neither Article III nor any other provision of the Constitution limits the power of Congress to strip federal courts of jurisdiction.

This Part asks how much the limit I have identified really matters, given the possibility that state courts in states that defy federal constitutional norms would themselves be hostile to those constitutional norms. The answer is *at least a little and potentially quite a bit*. After describing a few instances of

Id.

92. 14 U.S. (1 Wheat.) 304, 347–48 (1816).

93. OLIVER WENDELL HOLMES, *Law and the Court: Speech at a Dinner of the Harvard Law School Association of New York on February 15, 1913*, in COLLECTED LEGAL PAPERS 291, 295–96 (1920).

heroic actions by state court judges in subpart IV(A), I explain in subparts IV(B) and IV(C) how the limitation on affirmative power interacts with the less controversial of the two main families of such other theories—those that build on Hart’s view that Congress may not exercise its power under the Exceptions Clause in a way that undermines the Supreme Court’s “essential role.”

A. *State Court Hostility to Federal Constitutional Rights*

As noted above, in modern times, members of Congress have introduced jurisdiction-stripping legislation most frequently when the subject matter concerned what might loosely be called “social” issues—such as busing, abortion, flag burning, school prayer, and same-sex marriage.⁹⁴ Public opinion on such questions shows polarization along a number of dimensions, including geography.⁹⁵ While much of the geographic polarization reflects different attitudes in urban, suburban, and rural areas,⁹⁶ there are also regional differences that are reflected in state legislatures.⁹⁷ And although attitudes of state court judges do not necessarily mirror popular attitudes in their respective states precisely, other things being equal, we can expect a correlation. For example, the South Dakota legislature is more likely than the Vermont legislature to enact abortion restrictions,⁹⁸ and the South Dakota Supreme Court is more likely to uphold any given abortion restriction than the Vermont Supreme Court would be.⁹⁹

94. See *supra* note 87 and accompanying text (giving examples of bills proposed in Congress that would have stripped courts of jurisdiction in cases involving divisive social issues).

95. See generally *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/M3JF-TZ7Z>] (describing a general increase in polarization between the two major American political parties); James A. Thompson & Jesse Sussell, *Is Geographic Clustering Driving Political Polarization?*, WASH. POST (Mar. 2, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/02/is-geographic-clustering-driving-political-polarization/?utm_term=.e51659bed9cb [<https://perma.cc/K3ME-AWJR>] (identifying “geographic clustering” as a primary cause of this polarization).

96. See Dante J. Scala & Kenneth M. Johnson, *Political Polarization Along the Rural-Urban Continuum? The Geography of the Presidential Vote, 2000–2016*, 672 ANNALS AM. ACAD. POL. & SOC. SCI. 162, 168 (2017) (documenting varying political attitudes in urban and rural communities in the United States).

97. See generally *State of the States*, GALLUP: NEWS, <http://news.gallup.com/poll/125066/state-states.aspx> [<https://perma.cc/J7CL-L2MU>] (providing extensive data regarding average political beliefs by state).

98. See *State Governments*, NARAL PRO-CHOICE AM., <https://www.prochoiceamerica.org/laws-policy/state-government/> [<https://perma.cc/9M74-EBYY>] (providing comparative data regarding abortion legislation for all fifty states, and rating Vermont’s legislature as strongly supportive of abortion rights and South Dakota’s as strongly opposed).

99. Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J. L. ECON. & ORG. 472, 487–88, 490 (2015) (comparing various state court ideological compositions, including charts depicting the South Dakota Supreme Court as historically conservative and the Vermont Supreme Court as traditionally liberal).

Accordingly, the lack of affirmative congressional power to close state courts to federal constitutional challenges to state laws does not leave plaintiffs who would bring such challenges with much reassurance that they will succeed—even if they have good claims on the merits. To continue the foregoing example, suppose Congress strips state and federal courts of the authority to hear challenges to abortion restrictions. South Dakota responds by enacting a law that would be invalidated by the federal courts applying existing precedent, but that, by hypothesis, they lack jurisdiction to consider. Under the analysis set forth in Part III, the jurisdiction-stripping law is invalid as applied to the state courts, and thus the plaintiffs are able to bring their challenge there. However, because the state judges in South Dakota are substantially less sympathetic to abortion rights than their federal counterparts, they uphold the law.

The scenario just described is entirely plausible, even likely in the sort of circumstances that would produce the enactment of jurisdiction-stripping legislation, but it is not inevitable—at least not in every case. Even state court judges who can be removed by state electoral politics have, on occasion, stood up for principle as they saw it, even on hot-button social issues.

Relying on a combination of state and federal grounds, a liberal majority of the California Supreme Court reversed nearly every death sentence for close to a decade between the late 1970s and the mid-1980s, despite growing popular support in the state for capital punishment during that period.¹⁰⁰ In 2009, the Iowa Supreme Court unanimously rendered a decision making the Hawkeye State only the third in the country to grant legal recognition to same-sex marriage,¹⁰¹ notwithstanding the fact that a clear majority of Iowans opposed same-sex marriage at the time.¹⁰²

It is easy to read the experiences of the California and Iowa Supreme Courts as cautionary tales. After all, largely in response to their respective rulings on the death penalty and same-sex marriage, the key justices of each court lost their seats when they faced the voters.¹⁰³ But it is not clear that their

100. See Scott G. Harper & David P. Hubbard, *The Evidence for Death*, 78 CALIF. L. REV. 973, 978–80 (1990) (recounting growing public opposition to the California Supreme Court’s rulings rejecting most death sentences in the 1970s and 1980s).

101. *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009). Massachusetts was the first, also by judicial decision. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003). New Hampshire was the second, by legislation. *Equal Access to Marriage*, N.H. REV. STAT. ANN. tit. XLIII. Domestic Relations, § 457:1–a (2018) (effective date Jan. 1, 2010).

102. *Iowa Polls Show Shifting Attitudes on Same-Sex Marriage*, DES MOINES REG. (Apr. 28, 2015, 7:18 PM), <http://www.desmoinesregister.com/story/news/politics/iowa-poll/2015/04/28/gay-marriage-iowa-poll-supreme-court/26543751/> [<https://perma.cc/8R2P-LMEQ>] (reporting 2008 statewide poll that found 62% of respondents opposed and only 32% of respondents in favor of legal same-sex marriage).

103. Robert Lindsey, *The Elections: The Story in Some Key States; Deukmejian and Cranston Win as 3 Judges Are Ousted*, N.Y. TIMES (Nov. 6, 1986), <http://www.nytimes.com/1986/11/06/us/elections-story-some-key-states-deukmejian-cranston-win-3-judges-are-ousted.html> [<https://perma.cc/NXW7-EJXV>]; A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*,

willingness to act in a countermajoritarian manner should thus be judged as a failure.

The California Supreme Court's skeptical attitude towards the death penalty has largely persisted long after the state's voters relieved its initial champions of their responsibilities. In the nearly four decades since the 1978 ascension and subsequent removal of the court's anti-death penalty majority, California has executed exactly thirteen prisoners.¹⁰⁴ By comparison, during that same period, Texas, with a smaller population, has executed over five hundred.¹⁰⁵ Of course, to death penalty opponents, even thirteen executions is thirteen too many, but it is worth recalling that the anti-death penalty majority on the California Supreme Court never invalidated the death penalty *per se*.¹⁰⁶

Meanwhile, although a majority of the Iowa justices who found a state constitutional right to same-sex marriage were ousted from the state high court, the precedent persisted. Same-sex marriage remained legal in Iowa, and the ruling making it so was later listed in an appendix in the U.S. Supreme Court's decision finding a federal constitutional right to same-sex marriage—invoked by the majority as evidence of growing support for the institution.¹⁰⁷ In both California and Iowa, the individual justices who stood up for principle (as they saw it) no doubt suffered professional consequences for taking a stand, but the principles survived.

Sometimes the U.S. Supreme Court “follows th’ iliction returns”¹⁰⁸ but not always. Likewise, even state court judges who face the prospect of direct accountability to the electorate do not always decide cases in accordance with popular opinion, even on hot-button social issues. Accordingly, assuming *arguendo* that the limit on affirmative congressional power is the only limit the Constitution places on jurisdiction stripping, that limit is worth something, because state judges will occasionally buck popular opinion in their state.

That said, there can be little doubt that a constitutional right that can

N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/04/us/politics/04judges.html> [<https://perma.cc/YAV4-F7GP>].

104. *Inmates Executed, 1978 to Present*, CAL. DEP'T CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html [<https://perma.cc/2KW7-49DW>] (last updated Oct. 2, 2015).

105. *Death Row Since 1974*, TEX. EXECUTION INFO. CTR., <http://www.txexecutions.org/statistics.asp> [<https://perma.cc/HM5V-PVRH>].

106. *See* *People v. Easley*, 654 P.2d 1272, 1292 (Cal. 1982), *vacated and rev'd on other grounds*, 671 P.2d 813 (1983) (upholding a capital conviction and, in a portion of the opinion that was not subsequently vacated, explicitly rejecting the argument that the death penalty was categorically unconstitutional).

107. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (“[T]he highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions.”); *id.* app. A at 2610 (listing *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)).

108. FINLEY P. DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

only be enforced against a state alleged to be violating it in the courts of that very state is *less* valuable than a right that can be enforced in some federal court as well. The next two subparts explain how a relatively modest limit on congressional jurisdiction-stripping authority, in addition to the limit on affirmative power, combines with that affirmative-power limit to ensure access to the Supreme Court to challenge the constitutionality of state legislation.

B. Story-Based Theories Versus Hart-Based Theories

The leading academic theories positing limits on the power of Congress to enact jurisdiction-stripping legislation can be grouped into two broad families, which I shall associate with Justice Joseph Story and Professor Henry Hart, respectively. Story's theory—articulated in *Martin v. Hunter's Lessee* by Story and refined into a number of variations by modern scholars, most notably Professor Akhil Amar¹⁰⁹—is grounded in the text of Article III. Hart's theory—as well as its various permutations—aims for consistency with the text but does not purport to be derived from it. My aim here is not to show that either or both are correct or incorrect. Rather, I want to show that Hart-based “essential role” theories are more modest than Story-based theories. For the sake of simplicity, if not perfect accuracy, I shall refer to each family of theories by reference to its respective founder, glossing over important differences of nuance among the followers of each school of thought.

1. Story's View.—Story-based theories emphasize the text of Article III, Section Two, which states that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under” federal law.¹¹⁰ To oversimplify, Story-based theories construe this language to mean that some federal court must have jurisdiction to entertain every case arising under federal law.¹¹¹ Such theories thus operate as internal limits on the scope of congressional power under a combination of the Madisonian Compromise (of Article III, Section One) and the Exceptions Clause (of Article III,

109. See generally Amar, *A Neo-Federalist View*, *supra* note 22, at 206 (building on elements of a view most closely associated with Justice Story to argue that Article III requires some federal court to be open to federal question cases, but agreeing with Hart that the Framers “did not intend to require the creation of lower federal courts”); Amar, *The Two-Tiered Structure*, *supra* note 22, at 1501 (asserting that while Justice Story's theory is “not without flaws,” it “deserves especially close attention”).

110. U.S. CONST., art. III, § 2. Article III, Section Two also uses the “all Cases” language with respect “to all Cases affecting Ambassadors, other public Ministers and Consuls” and “to all Cases of admiralty and maritime Jurisdiction,” but these need not concern us here.

111. See, e.g., Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 479 (1989) (“Congress may except such cases from the Supreme Court's appellate docket only if Congress simultaneously authorizes some other Article III court(s) to hear, at least on appeal, all excepted cases.”).

Section Two). Congress can limit the jurisdiction of the lower federal courts, and it can limit the jurisdiction of the Supreme Court; however, according to Story-based theories, it cannot simultaneously limit both sets of courts if the result would be that no federal court has jurisdiction over some subset of cases arising under federal law.

Story-based theories do not rest on text alone, but neither do criticisms of the view.¹¹² The most compelling criticism may be that, whatever the merits of a Story-based “all means all” theory if one were writing on a blank slate, in all of U.S. history it has never been the law. The Judiciary Act of 1789 did not, except in a few special circumstances, vest federal question jurisdiction in the lower federal courts, nor did it provide access to the Supreme Court in cases in which the party relying on federal law prevailed in state court.¹¹³ When Congress did vest federal question jurisdiction in federal trial courts in 1875, it included an amount-in-controversy minimum that left numerous cases out.¹¹⁴ Congress did not eliminate the jurisdictional minimum until 1980.¹¹⁵

Even today, numerous cases that arise under federal law for Article III purposes do not fall within the original jurisdiction of the federal district courts because the federal question arises as a defense or in response to a defense and, thus, fails to satisfy the well-pleaded complaint rule.¹¹⁶ Moreover, even if one entertains the dubious assumption that the small possibility of review by the Supreme Court on a writ of certiorari suffices to discharge the ostensible duty of Congress to vest federal court jurisdiction over “all” federal question cases, that *still* leaves the modern jurisdictional framework noncompliant with the Story-based approach.

To see why, suppose a case in which a federal question arises by way of defense, so that it falls outside the original jurisdiction of the federal district courts. Suppose further that the highest court of the state rules in favor of the defendant on alternative grounds: both the federal defense and a state law defense prevail. The Supreme Court cannot hear this case provided that the

112. For a useful summary of the debate, see RICHARD H. FALLON, JR. ET AL, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 319–22 (7th ed., 2015) [hereinafter HART AND WECHSLER] (discussing Sager, *supra* note 15); Amar, *A Neo-Federalist View*, *supra* note 22, at 229–45; Amar, *The Two-Tiered Structure*, *supra* note 22, at 1501–44; Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1633–34 (1990) (summarizing Professor Amar’s theory, which adopts some Story-based views, and criticizing it on both textual and historical grounds).

113. Act to Establish the Judicial Courts of the United States, ch. 20, § 25, 1 Stat. 73, 85–87 (1789).

114. Act of Mar. 3, 1875, ch. 137 § 1, 18 Stat. 470, 470 (1875).

115. Federal Question Jurisdictional Amendments Act of 1980, 96 Pub. L. No. 96-486, § 1, 94 Stat. 2369 (1980).

116. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (holding that jurisdiction is only conferred if “the plaintiff’s statement of his own cause of action shows that it is based upon those laws or that Constitution”).

state law ground is adequate and independent, as it frequently will be.¹¹⁷ We thus have a case—really a large class of cases—that arises under federal law but over which no federal court can ever exercise jurisdiction. Accordingly, at no time from the founding through the present has the jurisdictional framework reflected Story’s view.

What, then, did the framers and ratifiers mean by preceding some heads of jurisdiction in Article III with the word “all”? Judge William Fletcher makes a powerful argument that by selectively using the word “all,” Article III distinguishes between those categories of cases over which Congress may choose to grant some federal court *exclusive* jurisdiction and those categories over which Congress may only confer *concurrent* jurisdiction.¹¹⁸ With characteristic modesty, Fletcher acknowledges that he has not “found the single right answer to the meaning of ‘all’ in Article III,” but his reading does seem to “make[] the most sense of the available historical materials.”¹¹⁹

It is, of course, possible to imagine that an approach to understanding the Constitution that was never heretofore accepted could come to be seen as correct. After all, before the Supreme Court recognized a constitutional right to same-sex marriage,¹²⁰ the Constitution had never been construed to include such a right (except by lower courts in the brief period leading up to the Supreme Court decision). Thus, if Story-based approaches to Article III were defended as giving effect to an evolving understanding of the role of federal courts in American constitutional democracy, the centuries-old practice to the contrary might be overcome. However, Story-based approaches tend to be defended as a recovery of the original (or at least early) understanding.¹²¹ If there is a good Living-Constitutionalist defense of Story-based theories, it lacks a champion.

I do not wish to leave readers with the impression that Story-based theories are necessarily wrong. I have given only an abbreviated account of a very large and sophisticated literature. My point here is simply that Story-based theories are highly controversial.

117. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

118. See William A. Fletcher, *Congressional Power over the Jurisdiction of the Federal Courts: The Meaning of the Word “All” in Article III*, 59 DUKE L.J. 929, 952 (2010).

119. *Id.*

120. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (holding that the Due Process and Equal Protection clauses of the Fourteenth Amendment protect the right of same-sex couples to marry).

121. See Fallon, *supra* note 2, at 1058–59 (criticizing much of the academic literature, including Story-based theories, as resting almost exclusively on a tendentious reconstruction of the original understanding).

2. *Hart's View*.—In his landmark *Dialogue*, Hart argued that congressional power to make exceptions to and regulations of the Supreme Court's appellate jurisdiction carries with it an internal limit: "exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."¹²² Hart acknowledged the vagueness of this limit, but thought that an indeterminate limit was preferable to no limit at all, because the latter would authorize "reading the Constitution as authorizing its own destruction[.]"¹²³ In any event, Hart also thought that "essential role" was no more vague than the tests the courts have adopted to implement other constitutional provisions.¹²⁴

So, what is the Supreme Court's essential role? The Court itself has not had occasion to say. A leading expositor of Hart's theory canvassed the text, structure, history, and precedent to reach the conclusion that any congressional restrictions on the Supreme Court's appellate jurisdiction must preserve its "essential constitutional functions of maintaining the uniformity and supremacy of federal law."¹²⁵

This view is hardly *uncontroversial*. Like the view of Story and his followers, it bucks history.¹²⁶ However, by narrowing the essential role view we can make it *substantially less controversial*. As Professor Lawrence Sager has argued, "the essential function claim is strongest when narrowed to Supreme Court review of state court decisions that repudiate federal constitutional claims of right."¹²⁷ Sager's argument for such a core to the Court's jurisdiction is rooted chiefly in the history and purpose of the Supreme Court's appellate jurisdiction,¹²⁸ but it is also striking that this narrowest, strongest version of the Hartian essential role view is not embarrassed by post-enactment history.

The Judiciary Act of 1789 allowed for Supreme Court review (by writ of error) in just those cases in which state courts rejected a federal claim or defense. Moreover, in modern times, the adequate-and-independent-state-

122. Hart, *supra* note 15.

123. *Id.*

124. *See id.* ("Ask yourself whether it is any more [indeterminate] than the tests which the Court has evolved to meet other hard situations."). Here I have equated the view of the character "A" in Hart's *Dialogue* with Hart's own view. *See* HART AND WECHSLER, *supra* note 112, at 330–33 (making the same assumption).

125. Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201 (1960).

126. *See* HART AND WECHSLER, *supra* note 112, at 315 (describing jurisdictional gaps as inconsistent with "essential functions" view); *see also id.* at 315–16 (discussing criticisms by Gunther, *supra* note 1, at 896–97, and Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005–06 (1965) (arguing that Story's view is inconsistent with "the plan of the Constitution for the courts" and citing *Marbury* as early precedent to that effect)).

127. Sager, *supra* note 15, at 44.

128. *See id.* at 45–56 (inferring from the structure and history of the Constitution a "firm commitment to federal judicial supervision of the states").

law-ground doctrine is also consistent with the Sager's version of Hart's view. If a state court rules against a party relying on federal law, then there is no state-law-ground bar to Supreme Court review. True, the Court cannot review asserted overprotection of a federal claim or defense where state law provides an adequate and independent state law ground, but such cases fall outside the core.

Notably, Sager's core category ensures neither supremacy nor uniformity in its entirety, but it ensures the intersection of the two. It does not ensure supremacy because—consistent with Holmes's observation—the core includes the *Martin* power but not the *Marbury* power.¹²⁹ Nor does the core category ensure uniformity because it leaves states free to over-enforce federal constitutional norms. However, the greater threat to uniformity has always been selective state under-enforcement of federal norms, because the provision of additional layers of protection can already be accomplished via state law.¹³⁰

Before turning to the interaction of the strongest form of Hart's theory with the analysis of affirmative power in Part III, we might pause to identify one further advantage of Hart-based theories over Story-based theories. Insofar as Story-based theories require the creation of lower federal courts, they run squarely into the Madisonian Compromise. By contrast, Hart-based theories construe only the Exceptions Clause. In positing that Congress may not eliminate *all* of the Supreme Court's appellate jurisdiction, they draw support from the very concept of an "exception."

Thus, Hart-based theories are easier to square with the text of Article III than Story-based theories. And as we have seen, Sager's core—reserving to the Supreme Court against interference by Congress the power to review state court decisions that repudiate federal constitutional claims—also squares well with the history of the federal courts' actual jurisdiction.

C. *The Interaction of Affirmative Power and Hart-Based Theories*

We can now examine how the limit on affirmative congressional power to strip state courts of jurisdiction interacts with the extant theories articulating other limits on jurisdiction stripping.

129. Sager himself marshaled additional arguments to conclude that, although weaker, the case for including the *Marbury* power within the Court's "essential functions" is nonetheless persuasive. *See id.* at 56–68 (reviewing the judicial independence requirements of Article III in conjunction with the "essential function" view to conclude that "[s]ome effective form of federal judicial review under article III must be available for claims of constitutional right").

130. Put differently, the solo dissent of Justice Stevens in *Michigan v. Long*, 463 U.S. 1032 (1983), was wrong as an interpretation of the Supreme Court's statutory jurisdiction but right in identifying the Court's priorities. *See id.* at 1065–72 (Stevens, J., dissenting) (criticizing the Court's decision to exercise jurisdiction over state courts' decisions that are unclear about whether they rest on federal grounds rather than on independent and adequate state grounds and concluding that "in reviewing the decisions of state courts, the primary role of [the] Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard" (emphasis in original)).

As noted above in subpart IV(A), if one accepts the default view that Congress has plenary power under the Madisonian Compromise and the Exceptions Clause, then the limit identified in subpart III(D) is the *only* limit (save for true external limits of the sort that restrict the criteria Congress may include in any law, including jurisdictional provisions, such as a law selectively closing courthouse doors based on race or sex). As noted above in subpart IV(A), that would mean that persons challenging state laws on federal constitutional grounds would need to rely entirely on state courts to vindicate their claims and defenses. In such circumstances, state courts would not be worthless—because state judges sometimes resist political pressure—but one could not consistently count on the same solicitude for federal constitutional claims and defenses that broader court access would provide.

At the other pole, if one were to adopt one of the theories articulating broad limits on congressional jurisdiction-stripping authority, then my observations in Part III, while of academic interest, would have little practical import. Those theories already treat laws closing both state and federal courts to constitutional challenges to state laws (and much more) as unconstitutional on other grounds. The determination that such laws are also outside of affirmative congressional power would simply add an additional, alternative basis for a conclusion already reached.

However, suppose one rejects both extremes in favor of a modest limit that comports with the history and structure of Article III. Suppose, that is, (1) that one thinks Congress has plenary power under the Madisonian Compromise, but that Professor Hart is correct that Congress may not use its power under the Exceptions Clause so as to destroy the Supreme Court's "central role" in our constitutional system and (2) that one thinks that the essential function of the Supreme Court is the maintenance of the supremacy and uniformity of federal constitutional law, and that Justice Holmes and Professor Sager are right that the power to review state court decisions rejecting federal constitutional challenges to state laws is the core of that essential function of the Supreme Court. If so, then the conclusion of Part III regarding affirmative power perfectly complements this most plausible and modest limit on congressional power under the Exceptions Clause.

To see how the pieces fit together, consider the relevant provisions that ensure that the Supreme Court has the authority to invalidate state laws that conflict with the federal Constitution.

(1) In order to perform its essential function of maintaining the uniformity and supremacy of federal constitutional law, the Supreme Court must have the power to hear cases in which a state court rejects a constitutional challenge to a state law.¹³¹

131. The Supreme Court cannot perform this function via its own original jurisdiction because Congress may not add to its original jurisdiction. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–75 (1803).

(2) By virtue of the Supremacy Clause (as construed in *Testa v. Katt*¹³²), state courts of general jurisdiction are obligated to entertain federal constitutional questions (and federal questions more broadly).

(3) That obligation is defeasible where Congress vests exclusive jurisdiction in federal courts, but where Congress closes the federal courts to state constitutional claims (exercising its power to do so under the Madisonian Compromise), it lacks the affirmative power to close the state courts as well.

(4) Thus, there will always be a pathway by which a party relying on the federal Constitution to challenge a state law has access to federal court.¹³³ Either Congress authorizes original jurisdiction in federal court or state courts must be open, and if the state court rejects the federal constitutional challenge, access to the U.S. Supreme Court must be available.¹³⁴

V. Conclusion

Despite the voluminous, high-quality literature on the scope of Congress's power to strip courts of jurisdiction, no sustained scholarly attention has previously been paid to the question of what affirmative power Congress exercises when it strips state courts of jurisdiction. This Article has attempted to fill that gap by distinguishing four categories of jurisdiction-stripping provisions. For three of these, one or more of the powers to ordain and establish lower federal courts and the substantive regulatory powers set forth mostly in Article I, Section Eight suffice. However, Congress lacks affirmative power to simultaneously close both state and federal courts to federal constitutional challenges to state laws.

Standing alone, that conclusion is important, even on the assumption that congressional power under both the Madisonian Compromise and the Exceptions Clause is plenary—what I have called the default view. For although a state court in the state that enacted an arguably unconstitutional law may be less sympathetic to the challenge than would be a federal court, state court judges bound by the Supremacy Clause to uphold the Constitution can and often do stand up to political pressure.

132. 330 U.S. 386, 389–90, 394 (1947).

133. No alternative pathway guarantees the Supreme Court a supply of cases. To be sure, the Supreme Court has original jurisdiction over various cases “in which a State shall be Party,” U.S. CONST. art. III, § 2, cl. 2, but most challenges to the constitutionality of state laws will not involve the state as a party. Private suits seeking to restrain unconstitutional state action will be brought against state officials rather than the state itself due to the state’s sovereign immunity, *see Alabama v. Pugh*, 438 U.S. 781, 781–82 (1978) (per curiam) (disallowing claims against the state itself for injunctive relief, even while allowing similar claims against state officials), and many challenges to the constitutionality of state laws may arise in litigation involving only private parties. Thus, the Supreme Court’s original jurisdiction does not provide an adequate basis for it to perform its essential function of adjudicating constitutional challenges to state laws.

134. Note that for these purposes, the possibility of a writ of certiorari counts as access even if the Supreme Court denies the petition for the writ in any particular case.

Moreover, the conclusion regarding affirmative power does not stand alone. The strongest argument against treating congressional power over the jurisdiction of the federal courts as plenary asserts that Congress may not interfere with the essential functions of the Supreme Court—the core of which consists of reviewing state court decisions rejecting constitutional claims and defenses. Thus, read alongside the extant jurisdiction-stripping literature, the analysis contained in this Article makes possible a role for the Supreme Court that Justice Holmes and many others have deemed essential to the survival of the Union.

In conclusion, consider an almost astonishing aspect of the framework set forth above. The argument for the limit to affirmative congressional power in Part III proceeded completely independently of the arguments that figure in the extant literature on other sorts of limits on jurisdiction stripping discussed in Part IV. It just works out as a fortuitous coincidence that the best account of the scope of Congress's affirmative power so neatly complements the least controversial of the theories articulating limits on the power of Congress under Article III to restrict the jurisdiction of the federal courts, including the Supreme Court.

The complementarity of these independent arguments might point to a single underlying cause: namely, the original understanding. However, I have not undertaken the historical study that would be necessary to reach a conclusion about whether, as a matter of the subjective intentions and expectations of the framers and ratifiers, or as a matter of the original public meaning of the words of the relevant constitutional provisions, there even existed a determinate understanding about how those provisions would interact. I am skeptical that it did,¹³⁵ but in any event, the complementarity of the pieces of the arguments discussed in this Article counts in favor of each of the pieces, regardless of whether it reflects a deliberate design of the framers and ratifiers. Textual interpretation—including constitutional interpretation—properly aims for coherence.¹³⁶ Accordingly, whatever can be said about the original understanding of congressional power to strip state courts of jurisdiction or the Exceptions Clause, the fact that a sound construction of each complements the other makes these respective constructions mutually reinforcing.

135. See HART & WECHSLER, *supra* note 112, at 322 (noting “widespread acknowledgement that the materials from the founding period are quite limited and cryptic with regard to disputed issues about the meaning of Article III”).

136. On the virtues of “coherentist” accounts, see generally PHILLIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) (describing constitutional interpretation as consisting of various interpretive modalities); RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) (applying his theory that judges aim for results that best fit with precedent and principles of political morality); and Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1237–51 (1987) (offering a descriptive-normative-hybrid account of constitutional practice that aims to reconcile different forms of arguments, supplemented by a hierarchy for cases of irreconcilable conflict).