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**THE ARTICLE III BOX:  
THE POWER OF “CONGRESS” TO ATTACK THE  
“JURISDICTION” OF “FEDERAL COURTS”**

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78 Tex. L. Rev. 1405, 2000

I. Introduction

This paper is about a specialty of federal courts theory, the classic question of the power of Congress to deny access to federal courts for those asserting federal claims.<sup>1</sup> Although this question continues to attract the attention of distinguished writers, I believe it is a misleading question and yields spurious answers.

One preliminary point: In this paper I will limit discussion to the lower courts insofar as they comprise courts of first instance. Although writers are chronically deflected from the lower courts by their interest in **(2000) 78 Tex. L. Rev. 1406** the Supreme Court, only a focus on the lower courts is likely to engage with any clarity the constitutional and other issues raised by politically inspired attacks on court access. In any event the question of the power of Congress

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\*. Holder of the Bates Chair and Professor of Law, The University of Texas. I am grateful to co-symposiasts Jordan Steiker, Ernie Young, and Jim Pfander, as well as to my symposium hosts, the Texas Law Review, Carol Simpson, and Adrian Stewart, to Editor-in-Chief Ed Dawson, and to three of my students on the Review, Theodora Anastaplo, Paul Dean, and Lauren Rosenblatt, for their various helps.

1. For distinguished recent writing, see, for example, Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445 (1998); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) [hereinafter Amar, *The Two-Tiered Structure*]; Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990) [hereinafter Amar, *Reports of My Death*]; Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990). For examples of distinguished earlier writings, see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Lawrence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

to curb the jurisdiction of the Supreme Court is an analytically distinct question requiring separate treatment,<sup>2</sup> beyond the scope of this paper.

In what follows, I point out that both the theorists and critics of the standard model of Congress's power tend to measure that power by Article III. For this reason, proponents as well as critics see the problem as one of separation of powers—in other words, of constitutional crisis. But this alarmed perspective blurs the reality that it is the Supreme Court rather **(2000) 78 Tex. L. Rev. 1407** than Congress that is the more active agent in denials of access to courts. Moreover, the orthodox focus on federal courts has been seriously misleading. Since in most cases the consequence of stripping federal courts of power over cases raising federal questions is only to confide those cases to state courts, the more serious danger obviously lies in denials of access to all courts, state as well as federal. It follows that the question of the power of Congress over all courts is the better question. That being so, due process becomes (urgently) the prime subject of salient constitutional inquiry, rather than Article III. These points ought to have been

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2. Unlike the lower federal courts, the Supreme Court has an “essential role . . . in the constitutional plan.” Hart, *supra* note 1, at 1365. The Court functions to ensure the supremacy and uniformity of federal law. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (Story, J.). Thus the Court is established by the Constitution, unlike the lower federal courts, which are established by Congress. See U.S. CONST. art. III, § 1. Article III gives Congress power to make “Exceptions” to the Court's “appellate” jurisdiction, but, again unlike that of the lower federal courts, the Court's original jurisdiction in theory is wholly defined by the Constitution. See *id.* § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-75 (1803). Because the Supreme Court therefore is not a court of general original jurisdiction over federal claims, but mainly an appellate court with jurisdiction to review federal questions, by hypothesis access to the Supreme Court as an original forum for cases not within its described original jurisdiction is a subject over which Congress has zero power. *Id.* It also is sometimes forgotten that the Court's appellate cases are in a peculiar procedural stance and cannot be considered redistributable in some general way to courts of first instance. See Louise Weinberg, *Our Marbury* (unpublished draft, on file with the author). Congress's power over the appellate jurisdiction of the Court is the subject of very few cases, see, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (sustaining an act of Congress repealing jurisdiction in a case then before the Court), and requires a very different analysis from that appropriate either to the Court's original jurisdiction or to the jurisdiction of the lower federal courts. For writing addressed to the Exceptions Clause issue, see Matthew J. Franck, *Support and Defend: How Congress Can Save the Constitution from the Supreme Court*, 2 TEX. REV. L. & POL. 315 (1998); Mark Tushnet, “The King of France with Forty Thousand Men”: *Felker v. Turpin and the Supreme Court's Deliberative Processes*, 1996 S. CT REV. 163 (1996); The Supreme Court, 1995 Term, *Congressional Power to Restrict the Supreme Court's Appellate Jurisdiction*, 110 HARV. L. REV. 277 (1996); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385 (1983); Leland E. Beck, *Constitution, Congress, and Court: On the Theory, Law, and Politics of Appellate Jurisdiction of the United States Supreme Court*, 9 HASTINGS CONST. L. Q. 773 (1982); Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 913-15 (1982); William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 236 (1973); Morris D. Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter Be Limited by Congressional Power under the Former?*, 72 W. VA. L. REV. 238 (1970); Jerome T. Levy, *Congressional Power over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 INTRAMURAL L. REV. 178 (1967); Henry J. Merry, *Scope of The Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

obvious and in a sense have been obvious; the wonder is that our leading theorists nevertheless go on thinking inside the Article III box.

In making these points I identify particular problematic aspects of the current theoretical framework that render it unrealistic and simplistic. I argue that for purposes of the inquiry into the power of Congress to attack the lower courts, the category “federal courts” is not a wholly rational category. I shift the context of the assault on constitutional litigation away from the paradigm of constitutional crisis, identifying the impulse under-lying the phenomenon as a species of tort reform—“ Constitution reform” if you like. I compare Article III with due process for purposes of limiting “Constitution reform.” I argue that a broader range of cases than is provided by the separation-of-powers canon can be brought to bear on the constitutionality of legislative denials of court access. But because the Supreme Court has been the more important actor in stripping the lower courts of power, it is unlikely that the current Court could or would find strong constitutional limits on the power of Congress to do so.

In all of this, in short, I hope to show that the traditional proprietary formulation of the problem as one of “federal” courts has been unhelpful. So also has been the consequent resort to Article III for answers. We have been getting unconvincing answers because the question we have been ask-ing is somewhat unreal, somewhat too easy, and somehow wrong.

## II. Four Reasons Why the Question Seems Unreal

The question before us, the power of Congress to limit access to the federal courts of first instance, seems somewhat unreal. This power of Congress is too extensive and too familiar to make it the subject of very anxious inquiry now. “Jurisdiction,” after all, is not necessarily the rigorously narrow technical concept that experts on the subject would have it. Speaking loosely but more realistically, Congress obviously limits federal “jurisdiction” every time it limits federal remedies—every time it enacts, say, a criminal statute and provides no civil cause of action for a violation; or repeals an existing statutory cause of action; or authorizes injunction suits but not damages suits; or does anything else to shape federal remedies. We understand that Congress has to have power to do **(2000) 78 Tex. L. Rev. 1408** such things. There is a widespread perception that Congress rarely acts to limit federal judicial power. But that is not the case. It is only the Supreme Court cases on the subject that are rare.<sup>3</sup>

Yet even if we examine Congress’s jurisdiction-stripping in a broader way, we would still be dealing with a relatively unimportant phenomenon. The Supreme Court is by far the more

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3. The familiar casebook examples include *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938) (sustaining the constitutionality of § 7 of the Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 71, 29 U.S.C. § 107). Norris-LaGuardia stripped federal district courts of “jurisdiction” to issue injunctions in labor disputes. *See id.* at §§ 101-107, n.b. § 4. Also on this list of rarities is *Yakus v. United States*, 321 U.S. 414 (1944) (sustaining in a criminal prosecution the constitutionality of the Emergency Price Control Act of 1942 § 204(d), ch. 26, 56 Stat. 23, 50 U.S.C. §§ 901-906 (expired 1947), which confided to a special administrative court all challenges to price control regulations). *See also* *Lockerty v. Phillips*, 319 U.S. 182, 189 (1943) (same, in an action to enjoin enforcement of the regulations).

active source of door-closing rules in constitutional and other federal cases. It is the Supreme Court, not Congress, that has been limiting federal “jurisdiction.”<sup>4</sup> There is no disagreement about this, nor is it some surprising new development. At least since the demise of the Warren Court, the Supreme Court has been a veritable fount of door-closing and access-limiting rules.<sup>5</sup> To speak loosely but realistically, the Court limits federal “jurisdiction” every time it fashions new barriers to federal adjudication or new limits to federal causes of action, or new constraints on federal remedial power.<sup>6</sup> A course **(2000) 78 Tex. L. Rev. 1409** in Federal Courts today is largely a course in Supreme Court cases con-straining federal judicial powers—adjudicatory, remedial, lawmaking. That the Court takes the more active part undercuts the relevance of such separation-of-powers arguments as might be used to address the problem of curbs on federal jurisdiction. I do not suggest that the Court will declare unconstitutional the “course” it is “pursuing.”<sup>7</sup> But I do suggest that the Court’s door-closing jurisprudence must, however imperfectly,<sup>8</sup> be relevant to any consideration of Congress’s door-closing powers.<sup>9</sup>

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4. See, e.g., Jackson, *supra* note 1, at 2453 (also noting that Congress has simply been “weighing in on behalf of the Supreme Court in its efforts to curtail the perceived activism of the lower federal courts”).

5. For this development in the Burger Court, see Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977), surveying then-current trans-substantive limits on access to federal courts.

6. To select a very few examples, consider *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (holding that Congress has no Article I power to abrogate a state’s Eleventh Amendment immunity from suit in federal court; also disapproving use of an officer suit instead when Congress has supplied a “detailed remedial scheme,” *id.* at 74); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (unifying the Court’s heterogeneous “abstention” doctrines, *id.* at 716-17, with the net effect of making the federal-question jurisdiction of the federal district courts discretionary with them; holding that whereas even dismissal is within the discretion of the trial court in actions for prospective or declaratory relief, because in those cases relief is always discretionary, *id.* at 717, “only” stay is within their discretion in actions at law for damages, *id.* at 719-20); *Dalton v. Specter*, 511 U.S. 462, 472-74 (1994) (holding that not all statutory claims against an official, there the President, are constitutional claims); *Federal Deposit Ins. Co. v. Meyer*, 510 U.S. 471 (1994) (holding that federal agencies may not be sued for damages for their constitutional torts, either under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1972), *id.* at 486, or under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1994), *id.* at 477); *Nixon v. United States*, 506 U.S. 224, 238 (1993) (reinvigorating the “political questions” doctrine thought to be moribund after *Powell v. McCormack*, 395 U.S. 486 (1969) and *Baker v. Carr*, 369 U.S. 186 (1962)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (stripping Congress of previously presumed power to confer standing to sue on individuals who otherwise would not satisfy the requirements of Article III, *id.* at 577; holding the Court’s recently elaborated requirements for standing—injury-in-fact, “but-for” causation, and redressability—to be constitutionally required, *id.* at 560); *Will v. Michigan*, 491 U.S. 58, 65 (1989) (holding that a state is not a defendant “person” within the meaning of the Civil Rights Act of 1871, 42 U.S.C. § 1983).

7. Cf. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938) (holding unconstitutional “the course pursued” by federal courts under the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

8. The power of the Court is greater than that of Congress to determine what standards of adjudication are required for a given constitutional claim. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding in a challenge to the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. §§ 2000bb *et seq.*, that Congress lacks power under § 5 of the Fourteenth Amendment to place a heavier burden upon a state defendant than the burden the Court has held sufficient in cases challenging failures of the state to grant religious exemptions). Moreover, the Court has more power than Congress to determine the finality of decided cases. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (holding that Congress may not exercise its substantive commerce powers to reopen federal judgments). The power of the Court is also greater than that of Congress to determine what adjudication a given constitutional claim requires. See *National Private Truck Council, Inc. v. Oklahoma Tax*

The question in hand is rendered even more unreal, notwithstanding the legislation that inspired this Symposium,<sup>10</sup> by the fact that Congress seems more interested in *expanding* than in contracting “jurisdiction”—again, speaking loosely. Congress enlarges the docket of the federal district courts every time it federalizes a crime. Obviously the dockets of **(2000) 78 Tex. L. Rev. 1410** both sets of courts, and of the Supreme Court as well, swell whenever Congress enacts yet another new law giving rise to new federal rights. And, interestingly, it is here that the Supreme Court is tracing out new ground for judicial review—in striking down not diminutions, but expansions of federal judicial power. I refer, of course, to the Court’s rediscovery of federalism as a constraint on the federalization of crimes, first seen in the *Lopez* case<sup>11</sup> and extending to this Term’s “rape”<sup>12</sup> and “arson”<sup>13</sup> cases.

And our question seems unreal for yet another, more telling, reason. Because we focus, naturally, on the proprietary category of “federal courts,” we habitually take scant account of the

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Comm’n, 515 U.S. 582, 592 (1995) (holding that a state court need not adjudicate the state’s violation of the Commerce Clause under the Civil Rights Act of 1971, 42 U.S.C. § 1983, although a federal court would, if the state furnishes an adequate remedy for the constitutional tort “under state law”); *cf.* *Dennis v. Higgins*, 489 U.S. 439, 451 (1991) (holding cognizable actions for damages for violations of the dormant Commerce Clause under § 1983). In addition, the Court’s power is greater than that of Congress to determine what remedies the Constitution independently requires for a given violation. *See, e.g.,* *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 (1990) (holding that due process requires “meaningful backward-looking relief” in a state-court action for state taxes collected in violation of the Commerce Clause).

9. The connection between judicial and legislative powerlessness is probably most familiarly made by Justice Brandeis in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938), holding that federal courts are without power to displace otherwise applicable state legal rules with other state-like rules available only in federal courts: “The federal courts assumed, in the broad field of ‘general law,’ the power to declare rules of decision which Congress was confessedly without power to enact as statutes.” *Id.*

10. *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles of U.S.C. (Supp. IV 1998)); *cf.* *Felker v. Turpin*, 518 U.S. 651, 661-64 (1996) (sustaining in a death penalty case AEDPA’s preclusion of an appeal from a denial of leave to file a “successive petition” for a writ of habeas corpus; reasoning that the Supreme Court retains direct statutory habeas power). *See also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-546, 3009-607, 8 U.S.C. § 1252 (Supp. IV 1998) (codified in scattered titles of U.S.C. (Supp. IV 1998)) (precluding judicial review of a decision to deport even a legal resident, if at any time she has been convicted of a felony); *cf.* *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999) (sustaining the constitutionality of IIRIRA’s preclusion of review of an INS decision to deport).

11. *United States v. Lopez*, 514 U.S. 549, 551, 567 (1995) (holding that Congress lacks power under the Commerce Clause to criminalize the possession of guns near schools). My views on *Lopez* are in a symposium contribution, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295 (1997).

12. *United States v. Morrison*, 120 S. Ct. 1740 (2000) (holding that Congress lacks sufficient power under either the Commerce Clause or § 5 of the Fourteenth Amendment to criminalize violence against women).

13. *Jones v. United States*, 120 S.Ct. 1904, 1908 (2000) (unanimously construing the federal arson statute, Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1102, 84 Stat. 952, 18 U.S.C. § 844(1), as not encompassing arson to a single-family dwelling in order to avoid the constitutional question presented by *Lopez, supra*).

state courts. Yet as long as there is access to state courts for enforcement of federally-created rights, much of our concern about legislation denying access to federal courts must inevitably seem overblown. And this suggests, further, that the more interesting question is the one we rarely reach, the question of denials of access to *all* courts. The further implication of the state courts for analysis is that Article III cannot be our exclusive constitutional referent. We could be asking Article III questions when what is wanted are due process answers.

### III. Why the Question Is Too Easy: The Standard Model and Its Discontents

But even taken seriously, this question of the power of Congress to limit federal jurisdiction seems too easy to occupy us for long today. The classic statements of the position<sup>14</sup> still describe the standard model.<sup>15</sup> The position is simply that the power of Congress to control access, at least to the federal trial courts<sup>16</sup>—within the constraints of the Bill of Rights and other extrinsic constitutional limits—is plenary.<sup>17</sup> That which (2000) 78 *Tex. L. Rev.* 1411 Congress hath power to give,<sup>18</sup> Congress hath power to take away.<sup>19</sup> In theory, whether we like it or not, Congress has the raw power to put the lower federal courts wholly out of business. This would be an imprudent thing to do, but most of us believe that the sheer legislative power is there to do it. The prospect of an apocalyptic shut-down of the lower federal judiciary might be disturbing, but according to the standard model we are not supposed to be disturbed. Under the Supremacy Clause the states have an obligation to try federal cases.<sup>20</sup> As Henry Hart memorably concluded

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14. See Gunther, *supra* note 1; Hart, *supra* note 1.

15. See, e.g., Harrison, *supra* note 1, at 206 (“the orthodox, or traditional, interpretation”).

16. See *supra* note 3 and accompanying text.

17. See Hart, *supra* note 1, at 1363-64 (“Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court.”).

18. See U.S. CONST. art. III, § 1, (allocating to Congress the power of establishing lower federal courts); *id.* art. I, § 8, cl. 9 (giving Congress power to establish tribunals inferior to the Supreme Court).

19. Justice Story’s view to the contrary has not prevailed. Story took the position that Article III’s “shall be vested” language imposes a “mandatory” obligation upon Congress to create lower federal courts. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816) (“manifestly designed to be mandatory”); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 588 (Carolina Academic Press 1987) (1833) (same).

20. The states may dismiss federal claims if they would evenhandedly dismiss analogous state-law claims. To avoid the effect of federal supremacy, the grounds for such dismissals must be procedural or otherwise detached from the merits. See *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 5 (1950) (holding that states may dismiss federal claims on grounds of forum non conveniens); *Douglas v. New York, N.H. & Hartford R.R.*, 279 U.S. 377, 387- 88 (1929) (holding that the state’s forum non conveniens statute provided the state court with “an otherwise valid excuse” to dismiss a federal claim). But a state may not apply its rules so as to discriminate against those relying on federal law. See *Howlett v. Rose*, 496 U.S. 356, 372 (1990); *Testa v. Katt*, 330 U.S. 386, 394 (1947). See generally LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER (1994 and 1998 Supp.) (reviewing and discussing the position); Louise Weinberg, *The Federal/State Conflict of Laws: Actual Conflicts*, 70 TEXAS L. REV. 1743, 1778-84 (1992) (same). I have raised the question whether even nondiscriminatory procedural rules ought to excuse the states from their Supremacy Clause

in his celebrated *Dialogue*, it is precisely because Congress can do away with the lower federal courts that the state courts are the ultimate guardians of the rule of law in this country.<sup>21</sup>

Recently theorists reluctant to accept the implications of the standard model have reopened the debate. Also relying on Article III,<sup>22</sup> these (2000) 78 *Tex. L. Rev.* 1412 writers characteristically claim that some feature of the text of Article III requires Congress to vest the national judicial power in some federal court. Professor Sager made the seemingly plausible textualist point that once federal courts do exist, the tenure and salary provisions of Article III require that they go on existing;<sup>23</sup> but of course it might be enough simply for Congress to go on paying the salaries.<sup>24</sup> Professor Clinton goes much further, calling to mind Joseph Story's view that all the judicial power must be vested.<sup>25</sup> Clinton argues that it is the "shall be vested"

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obligation to adjudicate federal questions. See Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 *BYU L. REV.* 731, 789 n.189 (1995) [hereinafter Weinberg, *The Power of Congress*]. For the new exception to these rules, see *infra* notes 99-123 and accompanying text.

21. See Hart, *supra* note 1, at 1401 (stating that the state courts are the "primary guarantors" of constitutional rights).

22. Article III of the Constitution of the United States provides:

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III.

23. See Sager, *supra* note 1, at 61.

24. Whether or not in the extreme instance of a total shut-down of preexisting courts even the salaries of Article III judges would have to continue is not clear to me. The point of Article III life tenure is an independent judiciary, and if we do not have a judiciary at all life tenure becomes pointless. Very probably the judges' reliance on life tenure might bind the country to go on paying them, but if so that would be because of principles of contract, rather than of constitutional law. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803), (Paterson, J.), which sustains repeal of legislation creating federal circuit courts after judges had been appointed to them, does not shed light on this question. That ruling was based on the Supreme Court Justices' own continued practice of circuit riding under previous law, and contains no discussion of the tenure provisions of Article III.

language of Article III that requires Congress to vest all of the federal judicial power.<sup>26</sup> He also relies on originalist arguments and a close study of the scanty Supreme Court jurisprudence in proposing that when Congress makes “Exceptions,”<sup>27</sup> to the Supreme Court’s appellate jurisdiction, jurisdiction over the excepted federal questions must be vested in a lower federal court.<sup>28</sup> It is a difficulty for such a conclusion that little in our subsequent history or tradition supports it.<sup>29</sup> Until after the Civil War and Reconstruction, Congress permitted the Supreme Court to exercise only a part of its Article III power over federal questions,<sup>30</sup> at the same time **(2000) 78 Tex. L. Rev. 1413** declining to vest in the lower federal courts a general jurisdiction over cases arising under federal law. The federal trial courts did not have general federal-question jurisdiction until 1875.<sup>31</sup> This history is not conclusive, of course, but it weighs heavily against Professor Clinton’s interpretation and in favor of the standard model.

Professor Amar also has offered a much discussed contribution to Article III theory. Relying heavily on the Framers’ use of “all” in Article III, Professor Amar argues that jurisdiction must be vested in some federal court over the “Cases” enumerated in Article III, all of which the Constitution precedes with the word “all,” but not over the “Controversies,”<sup>32</sup> none of which share that feature. Perhaps the Framers did mean something by that distinction.<sup>33</sup> But, again, little in our history or tradition supports Professor Amar’s thesis. The first Congress reserved to the states significant exclusive jurisdiction over cases in the “all Cases” category; as

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25. See *supra* note 19.

26. See Clinton, *supra* note 1, at 753, n.22.

27. The reference is to the “Exceptions and Regulations” Clause of Article III: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2.

28. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1518 (1986).

29. See Meltzer, *supra* note 1, at 1570, 1586 (also noting the absence of subsequent historical support for Professor Clinton’s view).

30. The chief example is the feature of the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85, which, throughout the 19th century, limited Supreme Court review of state judgments to cases in which the party relying on federal law lost below. This dispensation remained substantially the same until the Judiciary Act of 1916, ch. 448, § 2, 39 Stat. 726, 726-27, which provided for discretionary review of cases going the other way.

31. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470; see also the abortive jurisdictional grant of 1801, Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

32. See Amar, *The Two-Tiered Structure*, *supra* note 1, at 1507-08.

33. *But see* William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction*, 7 CONST. COMMENTARY 89, 91-93 (1990) (arguing that the distinction appears to be without significance and was not made at the Constitutional Convention or in the ratification debates); *id.* at 90 (noting an alternative view, *infra* note 36, that to the Framers “Cases” may have been criminal as well as civil, while “Controversies” may have been civil only).



we have already recalled, the First Judiciary Act gave no general federal-question jurisdiction to federal trial courts.<sup>34</sup> And we recall, too, that this was at a time when the Supreme Court's appellate jurisdiction over federal questions was sharply curtailed.<sup>35</sup> Yet, under Article III, the judicial power of the United States extends to "all Cases" arising under federal law. This history weighs against Professor Amar's conclusion.<sup>36</sup> The standard model remains the working hypothesis.

Both the theorists and critics of the standard model look to Article III as the measure of the power of Congress. This traditional emphasis leads federal-courts theorists to treat the problem of jurisdiction-stripping as one of separation of powers. That may seem an obvious thing to do when we **(2000) 78 Tex. L. Rev. 1414** are asking a question about the power of Congress over federal courts. And it lends the question the glamour of constitutional crisis.<sup>37</sup> But arguments from the separation of powers have very little to do with the Rehnquist Court's own war on the power of the lower federal courts, or its war on constitutional and other federal claims in all courts.<sup>38</sup> To be sure, little in the Constitution can control the Supreme Court's zeal for door-closing. It is not often that the Court has declared "the course pursued" by itself as unconstitutional.<sup>39</sup> But at the very least what the Court itself is doing should be relevant to the question of Congress's power to do similar things. It is unrealistic if not misleading to ignore the Supreme Court's greater potency and energy in the door-closing game. And when Congress merely codifies or even expands upon judicially fashion-ed curbs on jurisdiction, it becomes somewhat unconvincing to argue that the act of Congress is unconstitutional.

To be sure, minute scrutiny of Article III continues to yield ingenious suggestions.<sup>40</sup> Yet, however excellent, such work in the end does not convince us that the standard model is wrong.

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34. See *supra* note 31 and accompanying text.

35. See *supra* note 30.

36. See Meltzer, *supra* note 1, at 1577-85 (criticizing Professor Amar on this ground). For Amar's reply to Meltzer, see Amar, *Reports of My Death*, *supra* note 1, at 1577-85. For the very different speculation that to the Framers, "Cases" were both civil and criminal, while "Controversies" were only civil, see Harrison, *supra* note 1, at 210; William A. Fletcher, *Letter to the Editor, An Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 131, 133 (1990); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 604-09 (1994).

37. Sager, *supra* note 1, provides an excellent example:

[T]he Court is facing one of the most serious threats ever directed toward the independent authority of the federal judiciary. At this writing, more than a score of bills are pending in Congress that would strip all or some of the federal courts of jurisdiction to hear various constitutional claims against state or local conduct. . .

*Id.* at 17-18.

38. See *supra* note 6.

39. *But see supra* note 7.

40. See in this Symposium, for example, James Pfander, *Jurisdiction Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEXAS L. REV. 1431, 1451-68 (2000), attempting to frame an argument

Perhaps that is because the characteristic emphasis on Article III is problematic; and, in turn, that may be because the focus on “federal courts” that also goes with this territory is problematic too. For purposes of considering the problem of jurisdiction-stripping, as I will explain below,<sup>41</sup> “federal courts” is simply an insufficiently rational category.

Increasingly writers are looking at the old question in a pragmatic as well as a theoretical way. There is a greater tendency now to focus on the actual jurisdictional curbs Congress occasionally does attempt in specific classes of cases, rather than on the hypothesis of some improbable total shut-down. Almost always regarding such selective door-closing as imper-missibly substantive in intention, particularly where constitutional claims are at stake,<sup>42</sup> these writers have combed the whole Constitution for (2000) 78 Tex. L. Rev. 1415 whatever helps it might offer.<sup>43</sup> But even these analyses may seem somewhat metaphysical to readers who cannot shake a sturdy inner conviction that Congress must be able to select and shape federal remedies, even federal constitutional remedies.<sup>44</sup>

More importantly, these pragmatists, like the Article III theorists, tend to say very little about the state courts.<sup>45</sup> Yet as long as there is access to state courts for enforcement of federal law, the question with which they are so preoccupied cannot have much bite. The more serious question is whether Congress can deny litigants, in selected cases, access to federal and state courts both. Could Congress close the doors of one set of courts to a federal claim to which the

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for the continuance of lower federal courts from the “inferiority” requirement of Article III and the Tribunals Clause, U.S. CONST. art. I, § 8, cl. 9.

41. See *infra* notes 49-63 and accompanying text.

42. This perception is shared by most if not all writers on this problem. See, e.g., Sager, *supra* note 1, at 18 (“The source of this wave of proposed legislation is no mystery. These bills are the product of deep hostility—in some quarters of Congress and the nation—to federal judicial precedent in the areas of abortion rights, school prayers, and public school desegregation through mandatory busing.”).

43. Outstanding in this class of contributions is Tribe, *supra* note 1.

44. But see *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (holding that Congress has no Fourteenth Amendment § 5 power to shape a statutory remedy disproportionate to the extent of known violations of a constitutional right). In *Boerne*, it also seemed important that the Supreme Court had recently spoken to the contrary on the constitutional remedy, see *id.* at 512-13, but in later cases the Court construes the § 5 power narrowly under the *Boerne* standard whether or not it has recently spoken to the issue the legislation addresses. See, e.g., *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 647 (1999) (holding that Congress has insufficient § 5 power to abrogate the Eleventh Amendment immunity of a state in an action for patent infringement because the widespread state infringement perceived by Congress is unlikely to include constitutional violations).

45. In an interesting recent paper, for example, Professors Wells and Larson, arguing for a non-originalist approach to problems of federal jurisdiction, regret that insufficient attention is paid to Congress’s power to close all federal courts to certain claims—both the lower courts and the Supreme Court. But, thinking inside the usual Article III box, they do not consider the power of Congress to close all courts, state and federal, to the same claims. See Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 86 (1995).

other set of courts is also closed?<sup>46</sup> Could Congress, for example, bar federal actions in equity in cases against federal officials—even though, as is widely believed, state courts have no injunctive power in federal officer suits?<sup>47</sup> Could **(2000) 78 Tex. L. Rev. 1416** Congress make jurisdiction exclusively federal, when federal courts, under prevailing doctrine, would decline it? If the dual-court question is the salient question, it follows that in either or both sets of courts the Due Process Clause of the Fifth Amendment, and not Article III, is the meaningful limit on Congress's jurisdiction-stripping power.

The question of legislative power over court access is indeed raised sharply today by the recent legislation on immigration and habeas corpus which has furnished the immediate occasion for this Symposium.<sup>48</sup> It would be a mistake, however, to try to derive a general theory from such examples. Judicial review of federal agency action, and federal habeas corpus, are both specialties of federal courts. A state has significant parallel power over post-conviction remedies for its own prisoners, but for federal prisoners, and non-citizens, the cases affected by this legislation are all but exclusively federal. In such cases the category “federal courts” is a more rational category than it can be in the general case.

#### IV. Why the Category “Federal Courts” Is Not a Wholly Rational Category

The question before us is traditionally framed as a question of Congress's power to circumscribe the jurisdiction of “federal courts.” An inquiry into the power of Congress over “federal courts” makes up a nice section in a casebook or a treatise on federal courts. It provides a special angle for intensive study of Article III. But the category “federal courts” is not a wholly rational category; and the consequent Article III focus is not a wholly rational focus. I say this because the assumptions on which the category and the focus are based are not dependably rational assumptions.

Writers not unreasonably tend to start with the presumption that Congress has substantive intentions when it acts to curb federal jurisdiction. So let us imagine a Congress eager to stifle suits challenging public school prayer. And let us imagine that this Congress enacts a statute

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46. Consider in this connection the recent case of *Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999) (holding that Congress is without Article I power to abrogate a state's sovereign immunity in the state's own courts in suits in which the state would have had Eleventh Amendment immunity in federal courts).

47. *Cf.* *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411-12 (1871) (holding that a state court sitting in habeas corpus may not release a member of the U.S. military who has been taken into custody by federal authorities); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 604-05 (1821) (holding that a state may not issue a writ of mandamus to a federal official). For insight into the wisdom or unwisdom of such denials of power to state courts, see the disingenuously nationalistic *Ableman v. Booth*, 62 U.S. (21 How.) 506, 523 (1858) (Taney, C. J.), refusing to authorize the Wisconsin courts to release from federal custody a journalist involved in slave rescues in Wisconsin. It was part of antebellum national appeasement policy to enforce the harsh Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462. Rescuing a slave from kidnapping by hired “slave-catchers” was a violation of the Act. The Wisconsin Supreme Court had rightly declared the Act unconstitutional. The story is told in Louise Weinberg, *Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1355-58 (1997).

48. *See supra* note 10.

which provides that no federal court shall have jurisdiction in any case challenging the constitutionality of a religious exercise under the auspices of a public school. Now let us ask: What must this Congress's assumptions have been?

The Congress in our hypothetical may have believed that it had no power over the jurisdiction of state courts. This belief is understandable, given our habit of consulting the text of Article III or perhaps the Tribunals Clause<sup>49</sup> as sources of legislative power. But in fact Congress has massive substantive powers to effectuate national policy, and any of these **(2000) 78 Tex. L. Rev. 1417** could ground statutory limits on jurisdiction in both sets or either set of courts. Just as Congress can confer jurisdiction on "any court of competent jurisdiction,"<sup>50</sup> state or federal, in any class of cases falling within its Article I or Fourteenth Amendment powers, Congress can provide that no court, state or federal, shall have jurisdiction to hear any such case. This past Term the Court sustained the constitutionality of just such a provision.<sup>51</sup> Such door-closing legislation, being an exercise of delegated powers, is effective in both sets of courts under the Supremacy Clause. Congress could limit existing state-court jurisdiction in myriad other ways. Congress could delete an existing civil cause of action, choosing to rely for enforcement of national policy upon criminal prosecutions, or upon injunction suits by the Attorney General. It could attach a statute of limitation to a cause of action, explicitly making the new period of limitation binding in all courts. Congress could repeal jurisdiction it has previously granted to any court of competent jurisdiction. Congress could make jurisdiction over the subject matter exclusively federal. These sketchy suggestions are hardly exhaustive.<sup>52</sup>

At least eight other possible assumptions might be attributed to our imaginary Congress, all of which would seem even more doubtful than its assumption of its own powerlessness over state courts. Perhaps our imaginary Congress thought state courts would be more favorable to school prayer than federal; or that litigation challenging school prayer is invariably federal- court litigation; or that state courts are more free to disregard Supreme Court authority than federal; or that there is less chance of Supreme Court review of state-court judgments than of federal.

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49. See U.S. CONST. art. I, § 8, cl. 9.

50. For such a grant see, for example, the classic case of *Testa v. Katt*, 330 U.S. 386, 387 (1947).

51. See *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 492 (1999) (sustaining the constitutionality of a provision, 8 U.S.C. § 1252(g), of the Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546, denying immigrants access to any court to review a decision to deport). Section 1252(g) provides:

(g) Exclusive Jurisdiction.

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

8 U.S.C. § 1252(g) (Supp. IV 1998).

52. For more complete discussion see Weinberg, *The Power of Congress*, *supra* note 20.

Although any of these things can happen in a given case, there is nothing in the dual court system to support the view that such malfunctions describe the structure. More plausibly, Congress might have identified a “procedural” interest in limiting cases burdening the federal docket. Yet even that explanation of the legislation seems problematic. Why school prayer cases and not other cases even more burdensome to the federal judiciary? Even **(2000) 78 Tex. L. Rev. 1418** a procedural interest in federal docket clearing might not furnish a wholly satisfactory basis for door-closing legislation, when the costs to the enforcement of national substantive policies are taken into account. Perhaps Congress was acting in the interest of comity, of a deferential federalism. Congress might very well have thought it best that a matter as “local” as school prayer be left to state courts in the first instance.<sup>53</sup> But here, too, the possibility remains that the state court will strike down the act of Congress. In whatever way we try to justify the legislation in our minds, any substantive policy concern of this Congress could only be part, at best, of the motivational mix behind the jurisdictional curb. To be sure, a legislature need not do everything at once. A Congress bent on limiting school prayer litigation might be permitted to confine the new limits, for the time being, to federal courts. We must allow a substantial exception to the point I am making for a prudent hesitancy. But, that acknowledged, we are left with this: We cannot rationally understand jurisdiction-stripping legislation confined to federal courts—when state courts have concurrent power—without qualifying our premise of a legislature motivated by a substantive bias.

This thought experiment is intended to show that generally only a trans-substantive “procedural” or “structural” interest is likely to furnish a rational basis for legislation imposing new limits on the preexisting jurisdiction of federal courts. An underlying hostility to a substantive claim could not, without more, account for legislation selectively closing only federal courts to that claim. As the Supreme Court has pointed out,

The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.<sup>54</sup>

The underlying irrationality of attacks on jurisdiction that is only “federal” has been evident to the Court. More than once the Supreme Court, after a struggle, has wound up holding not only statutory but also constitutional **(2000) 78 Tex. L. Rev. 1419** ouster of “federal” jurisdiction applicable in both sets of courts. You will recall, for example, that that is now the situation for the Federal Arbitration Act,<sup>55</sup> and it is now the situation for the Eleventh Amendment.<sup>56</sup>

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53. This kind of *politesse* is not always welcomed in the Supreme Court. In *Livadas v. Bradshaw*, 512 U.S. 107, 126-32 (1994), the Court struck down as a violation of federal supremacy a state statute that was carefully designed to avoid interference with federal governance of organized workers. The Court took this as conditioning access to local benefits on not belonging to a union; but the right to such membership is protected by federal labor law.

54. *Howlett v. Rose*, 496 U.S. 356, 367 (1990) (quoting *Clafin v. Houseman*, 93 U.S. 136-37, 137 (1876)). See also *Tafflin v. Levitt*, 493 U.S. 455, 469-70 (1990) (Scalia, J., concurring) (quoting *Clafin*, 93 U.S. at 136-37).

There are two additional exceptions to the rule that Congress acts irrationally in barring access only to federal courts for disliked claims. Congress might have perceived the mischief as being largely confined to federal courts. For example, before 1932 federal courts could issue anti-strike injunctions for which the United States Army would be the ultimate enforcer—in other words, strike-breaker.<sup>57</sup> Hence the Norris-LaGuardia Act, taking federal courts out of that business.<sup>58</sup> The other exception has to do with the case in which Congress takes away jurisdiction that has been exclusively federal. It is a nontrivial exception, particularly when the claims in question are constitutional ones. A federal claim against a government official in equity—in the form of a so-called “officer suit,” our typical mode of constitutional adjudication—if against a *federal* official, is thought to be within the exclusive jurisdiction of federal courts, in the sense that state courts are thought to be without injunctive power over federal officials.<sup>59</sup> Nor can state courts mandamus a federal official.<sup>60</sup> And of course federal officer removal is freely available for complaints of official misconduct.<sup>61</sup> Beyond this, a state injunction will not be permitted to stay proceedings in a federal court, even though the enjoined state defendant, the plaintiff in federal court, typically is a private party.<sup>62</sup> Finally, state habeas corpus will not lie on behalf of a petitioner in federal (2000) 78 Tex. L. Rev. 1420 custody.<sup>63</sup> But if it is rational in such cases for a jurisdiction-stripping Congress to limit the jurisdiction only of federal courts, that is the exception that proves the rule. The stripping of federal jurisdiction becomes rational precisely because the state courts are already shut down.

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55. See *Southland Corp. v. Keating*, 465 U.S. 1, 11-17 (1984) (holding that the Federal Arbitration Act, though intended to govern only in federal courts, is binding in all courts for all contracts in interstate commerce).

56. See *Alden v. Maine*, 119 S. Ct. 2240, 2254 (1999) (holding that the background understandings that undergird the Eleventh Amendment, which is construed to give states immunity from suit in federal courts, similarly constitutionalize the sovereign immunity of states in their own courts).

57. See, for example, the famous case of *In re Debs*, 158 U.S. 564 (1895), involving a petition for habeas corpus on behalf of a labor leader jailed for violation of an anti-strike injunction in a case in which the United States Army was called in. *Id.* at 579.

58. See Norris-LaGuardia Act of 1932, 47 Stat. 70 (codified at 29 U.S.C. § 104 (1994)) (stripping federal district courts of “jurisdiction” over collective bargaining disputes in actions seeking injunctive relief). See generally FELIX FRANKFURTER & NATHAN GREEN, *THE LABOR INJUNCTION* 17-63 (1930) (discussing management’s chronic resort in the late 19th and early 20th centuries to injunction suits to break strikes).

59. See *supra* note 47.

60. See *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821).

61. Cf. *Mesa v. California*, 489 U.S. 121 (1988) (holding that federal officer removal under 28 U.S.C. § 1442(a)(1) is limited to cases in which the officers raise a federal defense, *id.* at 131-33, or, perhaps, a special need for the protection of a federal forum, *id.* at 137-38).

62. See *Donovan v. Dallas*, 377 U.S. 408, 413-14 (1964).

63. See *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 411-12 (1871).

If it is not wholly rational for a Congress that does not like a class of cases to try to block litigation of those cases only in federal courts, it cannot be wholly rational for commentators presuming a substantive intention in Congress to confine analysis of jurisdiction-stripping legislation only to federal courts. Traditional theoretical analysis, then, can have value only in the instances in which *we have not been interested*: the instances in which the intentions of Congress are not substantive. And even for those uninteresting instances, there will be some trans-substantive policies that do not seem readily confinable to federal courts. The tort-reforming impulse, most notably, in the end surely extends to all courts. We may be dealing today, in fact, with a trans-substantive phenomenon which, in both the Supreme Court and Congress, is akin to tort reform. One might think of it as “Constitution reform.” That is, assaults on judicial power in constitutional (and other federal) cases may be motivated at least in part by the same contemporary biases against litigation that motivate tort reform.

## V. “Tort Reform” and “Constitution Reform”

One would have to be sleeping the sleep of Rip Van Winkle to be unaware that courthouse doors have been closing (or narrowing) ever since the decline of the Warren Court.<sup>64</sup> Lawsuits, lawyers, and even judges have become objects of distaste. Litigation has fallen from its brief political favor. These days, claimants are seen as greedy, or perhaps victimized by greedy lawyers.<sup>65</sup> Claims are meritless or frivolous.<sup>66</sup> Dockets are crowded.<sup>67</sup> Lawsuits are seen as driving worthy defendant enterprises into bankruptcy. Lawsuits raise the price of doing business—the price of insurance—*prices*.<sup>68</sup> Judges are seen as unguided, **(2000) 78 Tex. L. Rev. 1421** unprincipled, and activist.<sup>69</sup> Verdicts are preposterous.<sup>70</sup> Courts are

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64. See *supra* notes 5,6.

65. See MARK PERLMUTTER, *WHY LAWYERS (AND THE REST OF US) LIE AND ENGAGE IN OTHER REPUGNANT BEHAVIOR* 69-75 (1998); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 895-903 (1999).

66. Cf. FED. R. CIV. P. 11. See Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2587 (1998) (“Few have written articles searching for ways to reduce the incidence or burdens of meritless and sometimes abusive lawsuits under those statutory schemes. My casual discussions with a range of federal judges leave[ ] me with the unmistakable belief that their view of the operation of these regimes is less lyrical than is the view typically expressed by scholars.”).

67. See, on the debate whether lawyers have caused a “litigation explosion,” Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994).

68. See, e.g., Note, *Common Sense Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1773 (1996).

69. See J. Thomas Greene, *Activist Judicial Philosophies on Trial*, Talk before the Federal Bar Association Annual Litigation Practice Seminar (Nov. 6, 1997), in 178 F.R.D. 200 (1997).

70. See, e.g., Nancy S. Marder, *Juries and Damages: A Commentary*, 48 DEPAUL L. REV. 427 (1998); Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 CREIGHTON L. REV. 683, 715-22 (1995).

counter-majoritarian.<sup>71</sup> The bloom is even off the rose of constitutional litigation. Today injunctions in constitutional cases are seen more and more as government by decree. The business of judges in structural constitutional litigation today is to wind down consent decrees.<sup>72</sup> Academics are convinced that courts cannot achieve social change because their rulings produce counter-reactions.<sup>73</sup> Court-ordered expenditures are seen as draining urban centers of resources urgently required elsewhere.<sup>74</sup> And public interest litigation today is as likely to be perceived as meritless, as is the more general run of tort litigation. With so many sharing these now-familiar views, it is hardly surprising that state legislatures continue to enact so-called tort reforms. It is hardly surprising that Congress from time to time catches this fever. But it has also been true, although perhaps less to be expected, that courts are evincing what can only be described as a hostility to themselves. The Supreme Court has been busy closing or narrowing access to courts, federal and state, with an emphasis on constitutional claims, for the last thirty years, and shows no sign of letting up.<sup>75</sup> And judges generally seem more eager than ever to dismiss.

This hostility of the courts to themselves, and this hostility of the Supreme Court to litigation generally<sup>76</sup>—a kind of judicial self-loathing—means that when Congress occasionally bestirs itself to narrow access to courts on its own, it has tended merely to codify<sup>77</sup> or at least to build **(2000) 78 Tex. L. Rev. 1422** heavily on work that has already been done by the courts.<sup>78</sup>

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71. See Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46 (1989) (observing that academic scholarship has been dominated by the counter-majoritarian difficulty for decades). The term, of course, originates with ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (2nd ed. 1986), which raises a supposed “counter-majoritarian difficulty” with respect to judicial review.

72. See, e.g., *Freeman v. Pitts*, 503 U.S. 467 (1991); *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991).

73. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991).

74. See *Missouri v. Jenkins*, 515 U.S. 70, 79-80 (1995) (Kennedy, J., concurring) (“Perhaps it is good educational policy to provide a school district with . . . a 2,000-square-foot planetarium; . . . a 25-acre farm . . . ; a model United Nations wired for language translation; . . . movie editing and screening rooms; . . . 1,875-square-foot elementary school animal rooms for use in a zoo project; . . . and numerous other facilities. But . . . it may be that a mere 12-acre petting farm, or other corresponding reductions in court-ordered spending, might satisfy constitutional requirements, while preserving scarce public funds for legislative allocation to other public needs, such as paving streets, feeding the poor, building prisons, or housing the homeless. . . .”).

75. See *supra* note 6.

76. *Accord*, Jackson, *supra* note 1, at 2453.

77. Good recent discussions of this familiar phenomenon include Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2627 (1998); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 84 (1997).

78. The egregious current example of codification of the Supreme Court’s own restrictive jurisdictional rulings is probably § 2254(d)(1) of the amended habeas corpus statute. The statute now bars federal habeas jurisdiction to review a state court’s application of federal law unless the state court unreasonably applied law that was clearly established, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d)(1) (Supp. IV 1998). Compare *Teague v. Lane*, 489 U.S. 288, 310 (1989) (holding that novel procedural claims may



And this means in turn that when courts are asked to pass on the constitutionality of such legislation they may have no convincing way of striking down the legislation (in the unlikely event that they would want to). This analysis further suggests that the Constitution is going to be less and less useful to those challenging “Constitution reform” legislation.

The customary analyses of the power of Congress over federal courts fail to capture this reality. Current theory can barely touch the concerns that impel the theorists to plunge into the problem of denials of court access in the first place. We need to discipline ourselves to address the larger question: the power of Congress—as measured in part by what the Supreme Court itself is doing—to deny access, in a particular class of cases, to any court at all.

## VI. Constitutional Limits: Article III versus Due Process

It will be understood that an inevitable part of my critique of recent theory on Congress’s power over court access is a critique of Article III as its chief constitutional referent. What emerges from this critique, instead, is the saliency of due process.<sup>79</sup> By this I do not mean the substantive due process I have on another occasion found more helpful than Article III when the question is the power of Congress to *expand* the jurisdiction of federal courts.<sup>80</sup> Rather, I am reverting to the older concept of due process as the process that is due.

**(2000) 78 Tex. L. Rev. 1423** Consider in this context the two major variants in the allocation of jurisdiction over a particular class of claims: cases in which federal jurisdiction is exclusive, and cases in which federal jurisdiction is concurrent. In the former variant, in which federal jurisdiction is exclusive, whatever the relevance of Article III, Congress cannot strip federal courts of power without raising the issue of due process. That is because when Congress shuts down jurisdiction that has been exclusive, it eliminates jurisdiction in both sets of courts. In the latter variant, in which federal jurisdiction is concurrent, whatever the relevance of Article III, Congress accomplishes very little when it strips federal courts of power, because the state

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not be raised on federal habeas corpus). The statute also more remotely echoes *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), which held that state officials are immune from suit in federal civil rights cases unless they violate clearly established federal law, and, in a sense, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (Kennedy, J.). *Rodriguez* held that lower federal courts must woodenly apply Supreme Court precedent: “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. . . .” *Id.* The new statute could free the state courts from any obligation to comply with *emerging* federal law. Whether or not the Supreme Court is bound by new statutory restrictions on its jurisdiction over original habeas petitions, the Court has said that the new restrictions will “certainly inform our consideration of original habeas petitions.” *Felker v. Turpin*, 518 U.S. 651, 663 (1996) (Rehnquist, C. J.).

79. In constitutional cases, I assume the relevance of the particular constitutional right claimed to any analysis of the necessity of a remedy.

80. See Weinberg, *The Power of Congress*, *supra* note 20, at 736-37 (considering the power of Congress to expand the jurisdiction of *both* sets of courts in order to find better theory for cases in which Congress expands the jurisdiction of federal courts).

courts, under the Supremacy Clause, must hear the federal claim. Thus, however you look at the dual-court system, Article III seems to have very little practical value in thinking about it.

In fact, Congress has complete power over the lower federal courts, as the standard model teaches us. The key to this puzzle is that Article III, as a practical matter, is a real limit only on the power of Congress to *add* to federal jurisdiction,<sup>81</sup> not on the power of Congress to *subtract* from federal jurisdiction. Indeed, this is as true for confrontations between Congress and the Supreme Court<sup>82</sup> as it is for confrontations between Congress and the lower federal courts.

Nothing in the *Marathon Pipeline* case<sup>83</sup> is to the contrary. What was struck down in *Marathon Pipeline* was Congress's 1984 assignment to untenured bankruptcy judges of non-diverse state-law claims related to the bankruptcies. Justice Brennan, who wrote the plurality opinion in that case, took the odd position that state claims require politically independent judges. But he acknowledged that it was too late to say that public and other federal claims could not be confided to administrative courts.<sup>84</sup> *Marathon Pipeline* would seem to have saliency only in cases in which a federal administrative judge purports to wrap up alternative state-law theories when wrapping up federal claims. State claims, apparently, if under federal adjudication, have to be saved for Article III courts in order to avoid the separation-of-powers problems perceived by the *Marathon Pipeline* court. But *Marathon Pipeline* is simply silent on the jurisdiction due *federal* claims.

As to that, as the *Marathon* Court conceded, it is much too late in the day to argue that Congress cannot create administrative courts—so-called **(2000) 78 Tex. L. Rev. 1424** “Article I” courts (also referred to as “legislative courts”), give them statutory authority to hear federal claims, and preclude judicial review. At one time there may have been an understanding that due process requires an eventual hearing in some judicial tribunal, but today's Supreme Court permits Congress to confide a federal claim to a fair administrative tribunal, subject only to a presumption against doing so which can be overcome, typically by a clear statement in the statute.<sup>85</sup> The presumption seems particularly strong in cases in which Congress purports to preclude judicial review of constitutional claims. Indeed, the Court today seems to assume that judicial review must be available for constitutional claims.<sup>86</sup> Because federal courts are the

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81. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-76 (1803).

82. See *id.*

83. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 71-72, 84 (1982) (plurality opinion) (striking down the jurisdiction of Article I bankruptcy courts over state-law claims on the odd thinking that state-law claims need to be tried to Article III courts).

84. See *id.* at 81.

85. The position is discussed in, for example, *Webster v. Doe*, 486 U.S. 592, 602-05 (1988).

86. See, e.g., *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (“Our disposition avoids the ‘serious constitutional question’ that would arise if we construed [this statute] to deny a judicial forum for constitutional claims. . . .” (citations omitted)); Gunther, *supra* note 1, at 921 n.133 (“[A]ll agree that Congress cannot bar all remedies for enforcing federal constitutional rights”); Hart, *supra* note 1, at 1378-79. *But see* *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 486-87 (1999) (sustaining the

natural repository of powers of review over the work of federal agencies and officials,<sup>87</sup> it has seemed natural to suppose that, apart from whatever adjudicatory requirement may flow from a given constitutional claim itself, or from the Due Process Clause of the Fifth Amendment, something in Article III as well might require federal judicial review. That is particularly so since in such cases the separation-of-powers argument articulated in *Marathon Pipeline* becomes obviously relevant. In such cases it has seemed natural to conclude that there is scope for Article III control over Congress's powers to strip federal courts of jurisdiction. One problem with that thinking is that there is no good reason why a claimant with a merely statutory claim against a federal official<sup>88</sup> should have less access to an apolitical forum than a claimant with a constitutional claim. If the need is for a judiciary free of political control, it is hard to see why statute-based officer suits should be excluded from the supposed protections of Article III. But, more fundamentally, because state judicial power over federal agencies and officials is severely limited,<sup>89</sup> federal jurisdiction to review their work is all but exclusive. That means that due process is likely to be at stake when access to federal courts for judicial review of federal government action is at stake. This consideration seems intuitively more compelling than anything in the metaphysics of Article III.

**(2000) 78 Tex. L. Rev. 1425** Notwithstanding such arguments, some of our finest theorists continue to work inside the Article III box. Recently, in a particularly impressive discussion of the power of Congress to withdraw jurisdiction from the federal courts, Professor Meltzer has tried to make a case for the traditional emphasis on Article III rather than the Due Process Clause.<sup>90</sup> Professor Meltzer makes the point that to eliminate federal jurisdiction could not violate due process when the result would simply be to confine a constitutional claim to the state courts.<sup>91</sup> That is true, of course. But it begs the question. If nothing serious happens when we confine a constitutional claim to state courts, the important question becomes, precisely, whether anything serious happens when we eliminate a constitutional claim from the jurisdiction of state as well as federal courts. And that being so, the key question becomes, precisely, whether Article III can protect the jurisdiction of state as well as federal courts. And, of course, it cannot. Professor Meltzer's argument, that the existence of state courts makes it unimportant what happens in federal, is a classic argument, but it ought not to deflect us from recognizing that what happens to both sets of courts is the issue. Professor Meltzer makes an interesting further point<sup>92</sup> that it is Article III, rather than due process, that requires judicial review of an otherwise

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constitutionality of statutory preclusion of review of an INS decision to deport). I am unclear that this result would follow where the deportee can raise a constitutional question.

87. *See supra* note 47.

88. *See Dalton v. Spencer*, 511 U.S. 462 (1994) (holding that not all statutory claims against an officer, there the president, are constitutional claims).

89. *See supra* notes 47, 59-63 and accompanying text.

90. *See Meltzer, supra* note 66, at 2537, 2569-72.

91. *See id.* at 2569-70.

92. *See id.* at 2570.

fair agency adjudication.<sup>93</sup> He reasons that the federal judiciary is independent of political control,<sup>94</sup> while the agency typically is not. But of course political control of a tribunal also presents a question of due process, and would present it in both sets of courts, in cases in which the states do have concurrent jurisdiction.

Theorists are right in trying to argue that there must be access to *some* court, on *some* theory, at least for a constitutional claim. It is right and good to continue to suppose that the Supremacy Clause and/or the Due Process Clause must pry open the doors of some court in this country to a constitutional claim, if we are to remain a nation of laws. Denials of access to courts for selected claims suggest arguments grounded in equal protection principles as well. We should hang on to our confidence that there must be some constitutional limit on the power of Congress to close all courts to particular cases it does not like, and on our concomitant confidence that there must be some constitutional limit on the power of the states to close their own doors when the doors of federal courts are already **(2000) 78 Tex. L. Rev. 1426** shut.<sup>95</sup> Whether we can persuade the current Court to see these things our way is another matter. My point is only that Article III can do very little for any of these hopes and endeavors.

Among the influences reinforcing the natural tendency of federal-courts theorists to concentrate their inquiries upon Article III must surely be the equally natural tendency to focus on the Supreme Court. When Congress's jurisdiction-stripping target is the Supreme Court, Article III must be at its most relevant. The "Madisonian Compromise"<sup>96</sup> of Article III establishes the Supreme Court in a way that it does not establish other federal courts,<sup>97</sup> and limits Congress's power over the jurisdiction of the Supreme Court in a way that it does not for other

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93. *See id.*, citing Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 84 (1982) (relying on the separation-of-powers argument in striking down, under Article III, the jurisdiction of Article I bankruptcy courts over state-law claims).

94. *See id.*

95. *See* National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 588-89 (1995) (Thomas, J.) ("Nor can a desire for 'intrastate uniformity' permit state courts to refuse to award relief merely because a federal court could not grant such relief. As petitioners note, it was not until 1875 that Congress provided any kind of general federal-question jurisdiction to the lower federal courts. . . . Because of the Supremacy Clause, state courts could not have refused to hear cases arising under federal law merely to ensure 'uniformity' between state and federal courts located within a particular state."). *But see* Alden v. Maine, 527 U.S. 706 (1999) (holding that sovereign immunity is a constitutional privilege of a state in its own courts, parallel to its Eleventh Amendment immunity in federal courts).

96. *See* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (1995); Redish & Woods, *supra* note 1.

97. In no case, of course, may Congress expand the jurisdiction of the Supreme Court, or any other federal court, beyond the limits of Article III. *See* U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-76 (1803). The power of Congress to add to the jurisdiction of federal courts is analyzed in Weinberg, *The Power of Congress*, *supra* note 20.

federal courts.<sup>98</sup> The beautiful power of Article III for jurisdictional theory in the case of the Supreme Court may well have been an impediment to a refined analysis of the question addressed here. Nor can the Supreme Court carry most of the weight of the Article III argument, although writers continue to press it into this service, in cases in which access has been cut off completely—to all courts—state, federal, even administrative. In such cases there might be nothing for the Supreme Court to review, if Congress has prohibited access even for constitutional challenges.

## VII. Constitutional Limits: Current Supreme Court Thinking on Access to Judicial Remedies

If one simply looks at the past Term of the Supreme Court, it is striking how large a proportion of the Court's rulings impose new curbs or constraints on federal remedies. While these rulings are not always, or even often, couched in strictly "jurisdictional" terms, they cannot readily be distinguished, in either intention or effect, from analogous acts of **(2000) 78 Tex. L. Rev. 1427** Congress. A good share of these federal common-law curbs narrow or even eliminate constitutional remedies, raising the question whether constitutional remedies are constitutionally required. The answer to that would seem to lie in the substantive constitutional right sought to be enforced, and alternatively or cumulatively, in fundamental policies of due process. The problem is that once the Court has itself barred the way, the constitutional limits on the bar would seem to be snuffed out.

The egregious case today undoubtedly is *Alden v. Maine*.<sup>99</sup> In *Alden*, the Court held that Congress cannot submit an unconsenting state to suit in its own courts.<sup>100</sup> This effectively blocks access to suit against a state in both sets of courts,<sup>101</sup> because the state already has Eleventh Amendment immunity in federal courts.<sup>102</sup> It is true that *Alden* was not a case involving a constitutional claim. *Alden* measures only Congress's Article I power, not its power under section 5 of the Fourteenth Amendment. But constitutional claims against a state were

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98. Article III gives Congress no explicit power over the original jurisdiction of the Supreme Court. However, Congress may make "Exceptions and Regulations" to the Court's appellate jurisdiction. See U.S. CONST. art. III, § 2.

99. 119 S. Ct. 2240 (1999).

100. See *id.* at 2255-57. But see *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 39 (1990) (reasoning that a state's refusal to refund an unconstitutional tax collected by compulsion would violate the Fourteenth Amendment). Sovereign immunity would seem inapplicable as against a wrongful taking of property. On this point see the famous case of *United States v. Lee*, 106 U.S. 196, 222-23 (1882) (holding that the sovereign immunity of the United States would not block the Lee family's claim of wrongful confiscation of Arlington for unpaid taxes actually tendered by Lee's widow). The *Alden* Court purported to distinguish the tax cases because there, the state's obligation to provide a means of getting the money back "arises from the Constitution itself." *Alden*, 119 S. Ct. at 2259. But see *infra* notes 112-14 and accompanying text.

101. See *Alden*, 119 S. Ct. at 2259 (rejecting the due process argument).

102. See *Hans v. Louisiana*, 134 U.S. 1, 10-15 (1890) (holding that a state may not be sued in federal court even in a case arising under federal law).

already foreclosed in both sets of courts by the doctrine of *Will v. Michigan*.<sup>103</sup> In *Will*, the Court read the Civil Rights Act as not including the states within the statutory reference to a defendant “person.”<sup>104</sup> Thus, the states, as states, have, in effect, statutory “immunity” from suit under the Civil Rights Act of 1871—the vehicle for general constitutional adjudication against a state. The *Alden* Court pitches its holding on an inferred constitutional mandate, and thus goes beyond *Will* in putting state immunity beyond Congress’s power to override without formal resort to the difficult Article V amendment process. The Court justifies this, as it explains in *Alden*, on the thinking that the traditional officer suit<sup>105</sup> remains available to take the place of **(2000) 78 Tex. L. Rev. 1428** suits against a state. But, on the facts of *Alden*, that is simply untrue. There could be no officer suit in *Alden*. Under the Court’s jurisprudence, an officer suit is *not* available for the “meaningful, backward-looking relief”<sup>106</sup> sought in *Alden* itself.<sup>107</sup> I am referring to the rule of *Edelman v. Jordan*.<sup>108</sup> The author of the opinion in *Edelman* was (then) Justice Rehnquist. *Edelman* limited the officer-suit remedy to injunctions against future harms. Justice Rehnquist reasoned that injunctions for payments of money due, even without damages, are like damages.<sup>109</sup> Justice Kennedy, writing for the Court in *Alden*, as if prodded by an unrelated citation to *Edelman*, points out that a money judgment for past harms remains available against an officer in her personal capacity for her own wrongdoing.<sup>110</sup> But nobody supposes that a defendant civil servant could pay the kind of money judgment, even without damages, that was called for in *Alden*—a judgment for arrearages in overtime pay to a large bloc of state employees. Unless the Court is assuming that a state which has been defending on the ground of its own immunity will nevertheless come forward to pay a huge judgment against one of its officials, this “alternative remedy” is as illusory as the supposed officer suit. The alleged alternative remedy does not exist.

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103. 491 U.S. 58, 64 (1989) (holding that a state is not a defendant “person” within the meaning of the Civil Rights Act of 1871, 42 U.S.C. § 1983).

104. *Id.*

105. *See Alden*, 119 S. Ct. at 2267 (problematically assuming the availability of alternative officer suits). The *locus classicus* of the American officer suit is *Ex parte Young*, 209 U.S. 123, 155-56, 159-60 (1908) (holding that an injunction action would lie to stop unconstitutional conduct by a state official). For precursors of the modern officer suit see, for example, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and *Lee*, 106 U.S. 196.

106. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 (1990).

107. The *Alden* plaintiffs sought overtime pay for hours already worked. The minimum overtime wage is set by the Fair Labor Standards Act at time and a half. See 29 U.S.C. § 207(a)(1) (1994). The state was failing to comply with this minimum.

108. 415 U.S. 651 (1974).

109. *See id.* at 665 (“The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles [a] monetary award against the state itself. . .”).

110. *See Alden*, 119 S. Ct. at 2267. *Cf. Monroe v. Pape*, 365 U.S. 167 (1961) (holding that in a § 1983 civil rights case a police officer may be sued personally for actions taken in his official capacity).

But what about “meaningful, backward-looking relief”?<sup>111</sup> Wasn’t *some* process due? The *Alden* Court did not seriously consider the argument from due process. The Court shrugged off the due process case of *Reich v. Collins*,<sup>112</sup> in which it was made clear that a state cannot simply take the plaintiff’s money while playing a shell game with remedies.<sup>113</sup> For Justice Kennedy, in cases like *Reich* “[t]he obligation [to refund an unconstitutional tax] arises from the Constitution itself; *Reich* does not speak to the power of Congress to subject States to suits in their own (2000) 78 Tex. L. Rev. 1429 courts.”<sup>114</sup> The trouble with Justice Kennedy’s supposed distinction is that it is a distinction, as we used to say, without a difference. The obligation of due process always arises from the Constitution itself. There is no meaningful distinction in that respect between an unconstitutional withholding of tax and an illegal withholding of tax; and therefore there is no meaningful distinction between those wrongs and an illegal withholding of overtime pay. In all three cases, the state is simply taking the money without due process of law—a problem of constitutional dimension.

It is an irony that, according to Justice Kennedy, just as the officer suit is based on the expectation that the state itself is immune, state immunity is based on the expectation that an officer suit will lie.<sup>115</sup> Contrary to *Alden*, when an officer suit will *not* lie, immunity has been, notably, disregarded.<sup>116</sup> As Chief Justice John Marshall said two centuries ago, “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”<sup>117</sup>

In the wake of *Alden*, in *Florida Prepaid*,<sup>118</sup> a case coming up from the federal courts, the Supreme Court, relying on the Eleventh Amendment, denied a patentee a remedy against an infringing state.<sup>119</sup> This, even though, as the Court specifically held, Congress had clearly

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111. *McKesson*, 496 U.S. at 31 (holding that due process requires “meaningful backward-looking relief” in a state-court action for state taxes collected in violation of the Commerce Clause).

112. 513 U.S. 106 (1994) (holding that, consistent with due process, a state may not hold itself out as furnishing post-deprivation relief for taxes wrongfully collected, and then withdraw the remedy on the ground that pre-deprivation relief is available, the taxpayer having paid the tax in reliance on the post-deprivation remedy); discussed in *Alden*, 119 S. Ct. at 2259.

113. *See Reich*, 513 U.S. at 110.

114. *Alden*, 119 S. Ct. at 2259.

115. *See id.* at 2263 (“Had we not understood the States to retain a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine.”).

116. The classic case is *United States v. Lee*, 106 U.S. 196 (1882) (holding that the sovereign immunity of the United States would not block a claim of wrongful confiscation of the Lee family’s seat, Arlington).

117. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

118. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

abrogated the state's Eleventh Amendment immunity.<sup>120</sup> But the Court had already held that the Commerce Clause was not a source of legislative power to abrogate state immunity—that had happened in the *Seminole Tribe* case<sup>121</sup> of the previous Term. Congress could not make a state liable for patent infringement under its Article I powers. But what about Congress's Fourteenth Amendment power? It was alleged in *Florida Prepaid* that the defendant state, by infringing the plaintiff's patent, was depriving the plaintiff of a vested property right. One might have supposed that section 5 of the Fourteenth Amendment gives Congress all the power it needs to abrogate state immunity from such a constitutional claim. The Court did **(2000) 78 Tex. L. Rev. 1430** acknowledge that a patent might be property, but managed nevertheless to ignore the state's aggrandizement of this property. Chief Justice Rehnquist, for the *Florida Prepaid* Court, doubted that a constitutional problem of any scale existed,<sup>122</sup> and therefore concluded that Congress had had insufficient basis for exercising its section 5 power. This was an application of the stringent tests of the section 5 power recently announced in the important case of *City of Boerne v. Flores*.<sup>123</sup>

*Alden* and its progeny are strong support for the view I have taken here—that a “power of Congress”-“separation of powers”-“constitutional crisis” perspective on today's denials of court access, while not uninteresting, is peripheral to what is happening. In these cases we are seeing the Court, not Congress, closing the doors. In these cases it is not only the federal courts to which access is denied, but state courts as well. And in these cases it is Congress, not the Court, that is trying to open courthouse doors.

*Alden* is merely a late chapter in a very long story. The Court has been in a thirty-year retreat from the high ground once staked out.<sup>124</sup> But *Alden* and its progeny are sobering enough. We see in them that the Rehnquist Court is not only narrowing access to justice, but is diminishing, both procedurally and substantively, the very meaning of due process. The Supreme Court seems a determined spendthrift, bent on squandering what is left of the greatest treasure in the legacy bequeathed us by the founding generation: a judicially enforceable Constitution.

## VIII. Conclusion

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119. *See id.* at 647.

120. *See id.* at 635.

121. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996).

122. *See Florida Prepaid*, 527 U.S. at 645-56. *But see, e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 894 (1992) (plurality opinion) (stating that “[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant”). Moreover, even supposing the Chief Justice's somewhat outdated sources are correct, a paucity of litigation as easily suggests that legislation has been effectively deterrent as that it addresses an unreal problem.

123. *See* 521 U.S. 507, 529 (1997) (holding that an act of Congress under its § 5 power must be congruent with and proportional to a found pattern or likelihood of constitutional violation).

124. *See supra* notes 5,6.



We have been examining the adequacy of Article III-based theory to deal with the court-stripping powers of Congress.

Although there are no effective limits on the powers of the Supreme Court to accomplish similar denials of court access, cases in which the Court has addressed the availability of a judicial forum are obviously relevant to an examination of Congress's court-stripping powers. On reflection, Article III turns out to be an inadequate constitutional referent for consideration of Congress's powers. Although due process is by no means the only constitutional referent, its relevance is apparent. Cases (2000) 78 Tex. L. Rev. 1431 barring a forum to plaintiffs with standing and a good claim of federal right are obviously wrongly decided. This further implies—again, obviously—that acts of Congress mandating such outcomes are attempting to deny process that is due. Nothing in Article III can help us to see this. Article III requires one Supreme Court. It describes the sources and limits of national judicial power. But, as the standard theoretical model teaches,<sup>125</sup> however unpalatable this conclusion may be, nothing in Article III can control acts of Congress denying access to federal courts of first instance.

Constitutional limitations on denials of court access can of course be gleaned from the nature of the rights affected, and will buttress due process arguments, as will equal protection theories based on the selection of claimants against whom the doors of all forums are closed. Even these constitutional arguments will be weak, however, in the present atmosphere of enthusiasm for "Constitution reform."

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125. See *supra* notes 14-21 and accompanying text.

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