A CRITICAL REASSESSMENT OF THE CASE LAW BEARING ON CONGRESS'S POWER TO RESTRICT THE JURISDICTION OF THE LOWER FEDERAL COURTS

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INTRODUCTION

Federal constitutional rights are not subject to direct repeal by any legislature.1 Nevertheless, commentators traditionally have recognized a less direct type of congressional power to seriously frustrate, if not completely destroy, such rights through control of the jurisdiction of the lower federal courts.2 This Article reexamines the precedents

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1. See U.S. CONST. art. VI ("This Constitution . . . shall be the supreme Law of the Land."). This holds true for the protections directly required by the Constitution as interpreted by the Supreme Court. However, some Court-declared rules, derived from rights required by the Constitution, are most likely part of a federal constitutional common law devised by the Court to implement the more direct constitutional commands. Henry P. Monaghan, The Supreme Court 1974 Term Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 2-3, 15-17, 33 (1975). A possible example of such a rule is the one announced in Bivens v. Six Unknown Named Narcotics Agents, 403 U.S. 388 (1971) (recognizing an action for damages against federal officers who conduct an illegal search, a cause of action stemming from, but not necessarily created by, the Fourth Amendment). Monaghan, supra, at 19-23, 33-34. Congress may well have power to preempt such constitutional common law by devising alternative effective measures to implement the constitutional text in question. Id. at 3, 23-30. If Congress substantively can extinguish a particular federal constitutional common law right by substituting an effective alternative, it may also have more than its usual power to do the same by means of jurisdictional exclusion coupled with an adequate alternative enforcement mechanism. This Article will pursue federal constitutional common law rights no farther. When it questions whether Congress can frustrate constitutional rights by excluding their enforcement from the lower federal courts, it considers full blown rights, arising directly from the Constitution, e.g., most First Amendment rights, Due Process rights, and Equal Protection rights.

2. See, e.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953); Paul M. Bator, Congressional Power over the Jurisdiction of the Federal Courts, 27 VILL. L. REV. 1030, 1082-35 (1982). From one perspective, complete control of lower federal court jurisdiction allows Congress a means to frustrate constitutional rights recognized by the federal courts. It remains, however, a tool of limited utility. This is so because it seems likely that, if the lower federal courts as a whole are closed to a constitutional claim, then the state courts must remain open to hear it. This would be true even if Congress has attempted to close them off as well. See infra notes 75-77 and accompanying text.
bearing on the constitutionality of "court-stripping" laws,\(^3\) those laws by which Congress asserts its power to restrict the lower federal courts' jurisdiction to enforce specified constitutional rights. It concludes that the relevant Supreme Court cases offer less support for complete congressional power than courts and commentators have assumed. This conclusion, in turn, provides support for recent scholarship that questions the traditional view on textual and other grounds, but which, up to now, has relegated analysis of precedent to a relatively minor role.

Until the 1970s, scholars read Supreme Court opinions and related commentary as granting Congress the power to court strip virtually without limit.\(^4\) The most often cited Supreme Court opinions on the subject contain language suggesting nearly unlimited congressional power to exclude cases of any sort from the jurisdiction of the lower federal courts.\(^5\) The late Paul Bator summed up this traditional view:

> The position that the Constitution obligates Congress to create lower federal courts, or (having created them) to vest

3. This Article will refer to federal statutes which attempt to remove lower federal court jurisdiction over a disfavored class of constitutional claims by their popular name, "court-stripping" legislation. See, e.g., Max Baucus & Kenneth R. Kay, The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress, 27 VILL. L. REV. 988, 989-90 (1981-82); Raoul Berger, Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic, 44 OHIO ST. L.J. 611 (1983); Maurice Rosenberg, Chief Judge Wilfred Feinberg: A Twenty-Fifth Year Tribute, 86 COLUM. L. REV. 1505, 1513 (1986); Lawrence G. Sager, Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17, 17 (1981).

4. See infra Part I. From this perspective, Congress's power extends so far as to permit the exclusion of many constitutional claims from federal court enforcement. See infra notes 51-74 and accompanying text. Before the early 1970s, the only contrary suggestions appeared in a few lower federal court cases. See, e.g., Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), cert. denied, 335 U.S. 887 (1948). More recent scholarly discussion, however, has challenged the breadth of Congress's powers to court strip. See infra Part II.B.

Even the traditional scholars who take the most generous view of Congress's power to control the jurisdiction of the lower federal courts generally recognize some limits. For example, almost all commentators would presumably agree that claims of African American plaintiffs could not be excluded from the jurisdiction of the lower federal courts solely on grounds of their race. See Bator, supra note 2, at 1034; Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 NW. U. L. REV. 1, 6 n.27 (1990) (finding nearly universal agreement as to the invalidity of jurisdictional exclusion of cases brought by members of traditionally suspect classes); see also Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 STAN. L. REV. 895, 916-22 (1984) (embracing the broad view of Congress's jurisdictional powers as extending to constitutional rights cases, but recognizing some limits to this power based on the Fifth Amendment's equal protection component).

5. See cases discussed infra notes 38-79 and accompanying text. A particularly strong statement appears in Lockerty v. Phillips, 319 U.S. 182, 187 (1943); see infra text accompanying note 72.
them with some or all of the jurisdiction authorized by Article III, has been repudiated by an unbroken line of authoritative judicial and legislative precedents.

. . . In light of this clear—and consistent—line of authority in the Supreme Court, occasional lower-court dicta which espouse the opposite view do not have authoritative weight. 6

Not all of the Court's statements, affirming broad congressional powers, have been viewed simply as dicta. Scholarly commentary appears to recognize one Supreme Court case, Lauf v. E.G. Shinner & Co., 7 as holding that Congress's jurisdictional powers permit selective exclusion of constitutional rights from lower federal court jurisdictions. 8 Commentators suggest that, in Lauf, the Court upheld the application of a jurisdictional limitation that excluded an appellant's constitutional claims from the federal trial court below. 9 The commentators' traditional view is that there is no Supreme Court case with a contrary holding. In other words, the traditional view is that the Court has never struck down a court-stripping law. 10 Below I contest this depiction of a uniform body of case law with the counter example, Armstrong v. United States, 11 a case in which the Supreme Court did negate such a law. 12

Starting in 1974, the Supreme Court seemed to reverse field. Statements in several cases since that time have questioned the validity of court stripping. 13 Apparently ignoring the traditional view of the

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7. 303 U.S. 323 (1938).
8. See infra notes 9, 39, 53-74 and accompanying text.
9. This reading of Lauf is suggested in a combined reading of Hart's dialectical article, Hart, supra note 2, at 1363, and a passage that appears in all three editions of his superb casebook. See Henry M. Hart & Herbert Wechsler, The Federal Courts and the Federal System 295 (1st ed. 1953) [hereinafter Hart & Wechsler 1st]; Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 316-17 (2d ed. 1973) [hereinafter Hart & Wechsler 2d]; Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 370 (3d ed. 1988) [hereinafter Hart & Wechsler 3d]. For the text of these passages, see infra note 195. See infra Part IV.B., for my argument to the contrary. There I assert that Lauf may well contain no holding permitting cases to be excluded from the jurisdiction of the lower federal courts for the purpose of denying enforcement to specified constitutional rights.
10. See infra notes 58-79 and accompanying text.
11. 80 U.S. (13 Wall.) 154 (1872).
12. See infra notes 22-24 and Parts III, IV (disputing the traditional view of the cases).
case law record described above, majority opinions began to suggest that at least some court-stripping laws would indeed raise grave constitutional questions. In so doing, the Court offered no reappraisal of the cases that were traditionally read as supporting unlimited congressional power.

Nearly simultaneously with the Court's apparent reappraisal of Congress's power to court strip, substantial scholarship also began to question that power. Like the Court's post-1974 opinions on the subject, this new scholarship has focused almost no attention on the U.S.C. § 1395ff or § 1395ii to bar judicial review of Medicare program regulations, acknowledging that to find otherwise would raise a serious constitutional question and citing to commentators on the court-stripping debate); Webster v. Doe, 486 U.S. 592, 603 (1988) (holding that while § 102(c) of the National Security Act gives the CIA director very broad discretion to terminate employees, it does not “exclude review of constitutional claims,” and acknowledging that if construed otherwise, it would raise serious constitutional questions).

14. See infra note 100.

15. Nineteen seventy-four is an unusually clear watershed for scholarly and Supreme Court reconsideration of congressional powers over the lower federal courts' jurisdiction. In that year, in Johnson 415 U.S. at 361, the Supreme Court first questioned the traditional view of unlimited Congressional power to court strip. In that year as well, serious scholarly reconsideration of those powers began with Theodore Eisenberg's theoretical argument against court stripping. Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 YALE L.J. 488, 504-33 (1974).


Before 1974, just one revisionist article appeared. See Frank Thompson, Jr. & Daniel H. Pollitt, Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on "Busing" Orders, 50 N.C. L. REV. 809, 836-41 (1972) (arguing that Congress cannot restrict the jurisdiction of the lower federal courts when doing so would deny to individuals rights guaranteed by the Fifth Amendment). This paucity of scholarship existed despite some proposed and some enacted federal legislation at the time that sought to bar the federal courts from enforcing certain constitutional rights. See infra notes 25-27 and accompanying text.

As for pre-1974 Supreme Court cases suggesting limits, Justice Story's opinion for the Court in Martin v. Hunter's Lessee, 14 U.S. 141, 149-67, 1 Wheat. 304, 323-62 (1816), is the only one recognized in either the traditional or new scholarship. That opinion questioned complete congressional control in dictum. See id. at 327-34. Story's dictum has largely been dismissed by the scholarship, including the new scholarship arguing for limits on Congress's court-stripping powers. But see Amar, supra, at 205, 210-19, 272 n.222 (recognizing Story's valuable, if flawed, contribution to what Amar sees as a correct reading).
case law which seemed to support the traditional view, and instead focused on the text of the Constitution and its history. In other words, this new scholarship took an adverse case law record as a well-established obstacle, not to be challenged head on, but rather to be overcome by other relevant arguments.

For more than a decade, the Court's apparently revisionist statements provoked neither significant comment in the law journals nor dissent on the Court. Then, in 1988, dissenting in *Webster v. Doe*, Justice Scalia leveled an attack on the Court's revisionist statements by stressing the Constitution's text and the case law which he read as legitimating nearly complete congressional power to withdraw any categories of cases from lower federal court jurisdiction. Is Justice Scalia correct? I believe that he is not.

For my argument that there are anti-court-stripping cases neglected by the modern Court and commentators, including a Supreme Court case holding a court-stripping measure unconstitutional, see *infra* notes 22-24 and accompanying text, and *infra* Part III.

16. Surprisingly, the Supreme Court's new apparent openness to limits on Congress's jurisdictional powers seems to have had little influence on the new scholarship. Among those articles listed in note 15, *supra*, only Lawrence Sager's mentions *Johnson v. Robison*. See Sager, *supra* note 3, at 76 n.183. This is particularly surprising in the case of Tribe, whose thesis for limiting exclusion of constitutional claims from the lower federal courts is bolstered by the Court's opinion in *Johnson*. See *infra* notes 125-128 and accompanying text. The lack of reference to *Johnson* by Amar and Clinton is less surprising because their theses involve the assertion that certain claims must be cognizable either in the federal trial courts or in the Supreme Court on appeal from the state courts. See *infra* notes 128-131 and accompanying text.


19. *Id.* at 611-15 (Scalia, J., dissenting) (discussing the text of Article III and quoting from Sheldon v. Sill, 49 U.S. 453, 461, 8 How. 441, 449 (1850)). Justice O'Connor also dissented in *Webster*, but was unwilling to determine the general validity of court stripping. She found Congress's jurisdictional powers particularly potent in cases involving CIA personnel decisions and, thus, adequate to support the statutory exclusion that was before the Court in *Webster*. *Id.* at 605-06 (O'Connor, J., dissenting). She stressed that CIA employment affected presidential powers involving foreign relations: "Whatever may be the exact scope of Congress's power to close the lower federal courts to constitutional claims in other contexts, I have no doubt about its authority to do so here." *Id.* at 605 (O'Connor, J., dissenting).
Justice Scalia is wrong, because the Supreme Court precedent supporting the traditional view—that articulated by Henry Hart and Paul Bator and recently pressed by Scalia himself—is much weaker than it seems. Admittedly, the case law record does contain powerful dicta supporting nearly unlimited congressional power. But the traditionally cited cases do not support broad congressional powers to the degree that such scholarship suggests. Indeed, a case can be made that the only Supreme Court holding that speaks to Congress's court-stripping powers is one that supports the existence of limits on congressional power. In *Armstrong v. United States*, a post-Civil War case discussed at length below, the Court struck down a court-stripping measure. But this case seems to have been unknown to twentieth century judges and scholars until discussed in an article I wrote a decade ago. The case has received only slight consideration since then.

The issue of congressional control of lower federal court jurisdiction is an important one: According to one commentator, since the 1940s Congress has introduced well over 100 proposals limiting constitutional rights by depriving the lower federal courts of the jurisdiction necessary to hear cases brought to enforce them. Most such proposals made during the last twenty-five years attempt to limit enforcement of the Supreme Court-declared rights to abortion, to prayer-free public schools, or to busing to achieve school desegregation.

Although none of the recent court-stripping proposals has become law, the recognition of such congressional power is not new. Beginning in the mid-1950s, court stripping has been the subject of

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20. See infra Part IV.
22. See infra Part III.
24. Hart apparently had not recognized the significance of *Armstrong* when he wrote his dialectical article surveying the cases relating to Congress's jurisdictional power to exclude constitutional claims. See supra note 2. With two exceptions—my article and the Hart and Wechsler casebook—*Armstrong* has not since been acknowledged in the debate over Congress's court-stripping powers. Hart & Wechsler simply observes that my earlier article “notes that the jurisdictional implications of [Armstrong] may be broader than the significance of Klein,” a case not dealing with court stripping. Hart & Wechsler 3d, supra note 9, at 370 n.5. See infra Part III for a detailed discussion of *Armstrong*.
25. But see Tushnet & Jaff, supra note 17, at 1927 (arguing that the political process is probably an adequate mechanism to achieve desired results).
26. Hart & Wechsler 3d, supra note 9, at 377; Sager, supra note 3, at 18 n.3.
27. Hart & Wechsler 3d, supra note 9, at 378-79.
28. Id. at 377.
intense scholarly attention. Substantial scholarship began with Henry Hart's *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic,* a widely influential article justly described as the classic work on Congress's powers over the jurisdiction of the federal courts. Hart gave great weight to the case law in ultimately concluding that Congress most probably can weaken substantive constitutional rights by denying them enforcement in the lower federal courts. In contrast, recent revisionist scholarship de-emphasizes the precedents, focusing instead on other varieties of constitutional argument.

Some readers, including judges and Justices, may find the new scholarship persuasive even though it conflicts with what is perceived to be the clear weight of precedent. Other readers, however, may require a more solid grounding in precedent, no matter how persuasive the textual, historical or structural arguments. Despite the uncertain strength of stare decisis in constitutional law, these readers may find the apparently clear case law an impediment to acceptance of the new arguments which would limit congressional power to restrict lower federal court jurisdiction.

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31. Hart, *supra* note 2, at 1388-91, 1397-98 (so concluding, but recognizing a possible exception for habeas corpus jurisdiction which might be viewed as required by the constitutional text); see also Bator, *supra* note 2, at 1031-33.
32. See *supra* note 17 and accompanying text; see also infra Part II.B.
34. Most readers, I assume, give less than dispositive weight to precedents in constitutional argument and, rather, take a position toward constitutional interpretation resembling what Richard Fallon has called "constructivist." Fallon, *supra* note 33. Constructivism advocates reading a constitutional provision, if possible, in the way that achieves a satisfying convergence of textual, structural, precedential, legislative, historical and prudential factors. *Id.* at 1194-1209, 1297-43. If this is not possible, Fallon urges weighing these factors in a hierarchical order, starting with what he perceives as the most weighty and descending to the least. These are arguments (1) from text, (2) of historical intent, (3) of theory, (4) from precedent, and (5) of value. *Id.* at 1243-46. Of these, all but theory and value are reasonably self-explanatory.

Fallon's notion of "theory" is derived from a broader look at text and intent in order to answer questions not specifically addressed by either. Where specific text answers a specific question (e.g., the minimum age for a President of the United States) the text is dispositive. *Id.* at 1244. If a specific section of text and intent behind it is not clear, it is necessary to look at larger sections of text (perhaps the whole Constitution) and the intent
My claim is that the cases discussed below cannot be taken as a clear and unbroken case law record that supports Congress's powers to court strip. Carefully examined, the cases render inconclusive what had seemed a clear case law record favoring nearly complete congressional power. As a consequence, the matter can be viewed as much more open even to those who might conclude that clear precedent would be dispositive as to the validity of Congress's court-stripping powers. Hence, suggestions of limits on Congress's jurisdictional powers appearing in Court opinions and commentary since the middle of the 1970s are not as outrageous as Justice Scalia's recent dissent in Webster or Hart's "dialogue" suggest, and they certainly merit careful consideration.

Part I below briefly surveys the well-known cases and scholarship supporting broad congressional powers to court strip. Part II briefly surveys post-1974 materials that appear to reverse course, suggesting limits on Congress's powers to exclude constitutional cases. These materials include both Supreme Court cases summarily suggesting that there may be limits on Congress and a robust new scholarship which argues for limits. Part III presents a little known Reconstruction era Supreme Court case, Armstrong v. United States, and closely connected cases in the Court of Claims. Part IV closely reexamines the traditionally cited case law, particularly Lauf v. E.G. Shinner & Co. It concludes that, contrary to suggestions in the commentary, Lauf may well contain no holding that Congress's jurisdictional powers go so far as to permit exclusion of constitutional claims.

35. 80 U.S. (13 Wall.) 154 (1872).
36. 303 U.S. 322 (1938).
I. WELL-KNOWN CASES AND SCHOLARSHIP: HART'S DIALOGUE AND ITS DISCUSSION OF THE CASE LAW

In his dialogue,37 Hart identifies seven cases as bearing strongly on the legitimacy of court stripping: *Sheldon v. Sill*,38 *Lauf v. E. G. Shinner & Co.*,39 *Lockerty v. Phillips*,40 *Wong Wing v. United States*,41 *Ng Fung Ho v. White*,42 *Lipke v. Lederer*,43 and *Battaglia v. General Motors Corp.*44 The first three are Supreme Court cases that Hart argues strongly support congressional power to disallow jurisdiction virtually at will, without regard to the importance of the rights frustrated.45 The latter four cases offer some support for limits on Congress's power to exclude constitutional cases.46 I will discuss each of these cases and Hart's treatment of them, in turn.

A. Cases Arguably Strongly Supporting Court-Stripping Powers

In *Sheldon*, the lower federal court approved a statute which, in certain circumstances, removed lower federal court jurisdiction to hear suits between two parties of diverse state citizenship.47 The statute created an exception to diversity jurisdiction for suits seeking to enforce contractual obligations originally existing between a debtor and creditor domiciled in the same state but later assigned to a plaintiff with diverse citizenship.48 In the Supreme Court, Sill, the plaintiff below, challenged the statutory exclusion on constitutional grounds. There was no doubt as to the correctness of the first part of Sill's argument: Suits such as his "between citizens of different states" are expressly included in the federal judicial power as defined in Article III. The correctness of the second part of his argument was more in doubt. Drawing on the language of Article III that "the judicial power of the United States shall be vested" in the federal courts, Sill argued that Congress must vest all of the judicial power in the federal courts. Consequently, Sill argued, Congress could not excise cases such as his.

38. 49 U.S. 453, 8 How. 441 (1850).
40. 319 U.S. 182 (1943).
41. 163 U.S. 228 (1896).
42. 259 U.S. 276 (1922).
43. 259 U.S. 557 (1922).
44. 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).
46. *Id.* at 1383 & n.67, 1387-88.
from the federal trial courts' jurisdiction. Despite this argument, the Court upheld the statute denying the lower federal courts jurisdiction, thus concluding that Congress possessed the power to withhold at least some portions of the judicial power from the federal courts.

Because *Sheldon* involved a state law contract claim, arguably its holding goes no further than to allow Congress to make technical adjustments to jurisdiction where no important federal right is at stake. Nevertheless, the announced rationale is much broader. Noting that the Constitution gives Congress power over the very existence of lower federal courts, the *Sheldon* Court seemed to conclude that the congressional power to create the courts implied a lesser included power over the jurisdiction of those courts that Congress chooses to create. The Court wrote, "Courts created by statute can have no jurisdiction but such as the statute confers." If this is correct, a statute disallowing lower federal court jurisdiction over a category of cases is per se constitutional: The courts must uphold it.

Unlike the statute upheld in *Sheldon*, the statute at issue in *Laufs v. Shinner* cannot so easily be characterized as permitting only technical adjustments to the jurisdiction of the lower federal courts. The statute attacked in *Laufs* seemed designed to remove federal court jurisdiction to issue injunctions necessary to protect employers' due process rights to liberty of contract as those rights were understood at the time. Roughly thirty years before *Laufs*, the Court had struck down, as violative of substantive due process, a federal regulation interfering with employers' due process right to make "yellow-dog contracts," i.e., contracts in which employees promises to abjure union membership. In *Truax v. Corrigan*, decided seventeen years before *Laufs*, the Supreme Court appeared to hold that employers' due process right to make

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49. *Id.* at 459-61, 8 How. at 446-48. Because this type of suit is not an appeal and because the Constitution excludes it from the Supreme Court's trial jurisdiction, U.S. Const. art. III, § 2, cl. 2, lower federal trial courts are the only sort of federal courts appropriate for the trial of such a diversity suit.


51. *Id.* at 461, 8 How. at 449. For a discussion of *Sheldon's* status as dicta with respect to court stripping, see infra note 181 and accompanying text.

52. *Id.*

53. See S. REP. No. 163, 72d Cong., 1st Sess., pt. 1, at 10, pt. 2, at 6-8 (1932); H.R. REP. No. 669, 72d Cong., 1st Sess. 669 (1932); HART & WECHSLER 3d, supra note 9, at 370.

54. See *Adair v. United States*, 208 U.S. 161 (1908) (protecting, under substantive due process analysis, employers' right to bargain for employees' promise of non-union activity); see also *Coppage v. Kansas*, 256 U.S. 1 (1915) (finding an analogous Fourteenth Amendment due process limitation on the states).

55. 257 U.S. 312 (1921).
such bargains carried with it a subsidiary due process right to have employees' promises enforced by means of injunctive relief.\textsuperscript{56}

Those earlier opinions, while seriously in question at the time of \textit{Lauf}, had not yet been overruled.\textsuperscript{57} Hart and Wechsler's original casebook seems to suggest that the \textit{Lauf} Court turned away a plaintiff asserting the constitutional right to an injunction declared in \textit{Truax} on the ground that the court-stripping provision trumped it.\textsuperscript{58} On this view, \textit{Lauf} adds holding to \textit{Sheldon}'s dicta\textsuperscript{59} that Congress can eliminate any sorts of cases—including those pressing constitutional rights—from the jurisdiction of the lower federal courts. Hart's dialogue cites \textit{Lauf} in conjunction with \textit{Sheldon} as the clinching case:

\begin{quote}
Q. Does the Constitution give people any right to proceed or be proceeded against, in the first instance, in a federal rather than a state court?

A. It's hard to see how the answer can be anything but no, in view of cases like \textit{Sheldon v. Sill} and \textit{Lauf v. E.G. Shinner & Co.} and in view of the language and history of the Constitution itself.\textsuperscript{60}
\end{quote}

Dicta in the Court's later opinion, \textit{Lockerty v. Phillips},\textsuperscript{61} provide us with clear reasoning that strengthens Hart's conclusion as to Congress's powers. In \textit{Lockerty}, the plaintiffs sought preliminary and permanent injunctive relief against a federal price control scheme alleged to violate their constitutional rights.\textsuperscript{62} According to the statute permanent injunctive relief was available only in a special Article III court, the Emergency Court of Appeals, and all courts, state and

\begin{footnotes}
\item[56] \textit{Id.} at 340-41. In a later portion of this Article, I argue that \textit{Truax} is more plausibly seen as having been based on equal protection analysis. \textit{See infra} notes 251-254 and accompanying text.
\item[57] Approximately at the time \textit{Lauf} was decided, the Court ended its practice of strictly scrutinizing the regulation of economic activity under the Due Process Clauses of the Fifth and Fourteenth Amendments and under the Equal Protection Clause of the letter. \textit{See infra} note 240 for a discussion of substantive due process.
\item[58] \textit{Hart & Wechsler 1st, supra} note 9, at 295. For a brief discussion of the right recognized in \textit{Truax} and the Norris-LaGuardia Act of March 23, 1932, 29 U.S.C. \S\S\ 101-115 (1988), which denied enforcement of the right in the federal courts, \textit{see Hart & Wechsler 3d, supra} note 9, at 370. \textit{See infra} Part IV.B. for a longer analysis of \textit{Truax} and its relationship to \textit{Lauf}.
\item[59] \textit{Sheldon v. Sill}, 49 U.S. 453, 461, 8 How. 441, 448-49 (1850).
\item[60] \textit{Hart, supra} note 2, at 1365 (footnotes omitted). For my argument that \textit{Lauf} may not be a formidable precedent, \textit{see infra} Part IV.A. & B.
\item[61] 319 U.S. 182, 187 (1943).
\item[62] \textit{Id.} at 184-85. For an indication that temporary relief was sought in the Federal District Court, \textit{see Lockerty v. Phillips}, 49 F. Supp. 513, 516 (D. N.J. 1943) (Fake, J., dissenting).
\end{footnotes}
federal, were forbidden to grant interlocutory remedies. The Supreme Court held that the federal district court could grant none of the relief that the plaintiffs requested. It based its decision on the provision of the price control scheme that purported to deny that court and all others jurisdiction to grant interlocutory relief. The Supreme Court expressly avoided deciding the plaintiffs' claim that the provision denied them such relief in any Article III court. Thus it reached no decision as to the validity of court stripping.

Nevertheless Lockerty's dicta take a generous view of congressional powers over jurisdiction and explain their existence by expanding on the arguments sketched out in Sheldon. The Court starts with the premise that Congress was not obliged to create any lower federal courts at all. This premise finds nearly certain support both in the Constitution's text and in the history of compromises made at the Constitutional Convention. Lockerty, like Sheldon, then draws the forceful, but less than certain, conclusion that Congress's greater power to confer no jurisdiction at all includes a lesser power to create lower federal courts but to confer on them as much or as little of the

63. Id. at 186-89; see also Hart & Wechsler 3d, supra note 9, at 371-72.
64. 319 U.S. at 189.
65. Id. at 184-89.
66. Id. at 189. The Court explicitly refused to rule on the constitutionality of the provision excluding the power to grant interim relief from the Emergency Court of Appeals's jurisdiction. The Court noted that the statute contained a separability provision and concluded that the exclusion of such relief from the jurisdiction of the federal district courts was constitutional.

My conjecture is that the Lockerty Court believed that, if interim injunctive relief were a constitutional necessity, the Emergency Court of Appeals was the court that should provide it. All state and federal courts, including the Emergency Court of Appeals, were statutorily forbidden to provide interim relief. However, the Emergency Court of Appeals alone was authorized to grant permanent injunctive relief. Presumably, then, if Congress could not make its blanket prohibition on interim fully effective, it would have preferred that relief be provided in the expert tribunal that possessed exclusive jurisdiction over analogous matters.

67. Id. at 187; see Sheldon v. Sill, 49 U.S. 453, 460-63, 8 How. 441, 448-50 (1850).
68. Lockerty, 319 U.S. at 187.
70. See Hart & Wechsler 3d, supra note 9, at 10-11. There were those at the Convention who favored requiring the creation of lower federal courts. Id. Their opponents favored forbidding the creation of such courts, thereby forcing Congress to rely on state courts as the exclusive trial courts for enforcement of federal rights. Id. The final text of Article III allowing, but not requiring, Congress to create such lower federal courts, was not an accident. It was a deliberate compromise of the opposing views offered by James Madison and accepted by the Convention. Id. See also Redish & Woods, supra note 15, at 52-54 (describing the events leading up to the "Madisonian Compromise").
judicial power as Congress chooses. 71 Lockerty's language is clear and forceful:

There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." 72

Thus as presented by Hart, Lauf and Lockerty are powerful in combination. In Lauf the Court seemed to have acted on a belief in a

71. Lockerty, 319 U.S. at 187-88. The conclusion is less than certain because of the doctrine of "unconstitutional conditions," which provides that, under some circumstances, a government may not grant a benefit on the condition that the beneficiary surrender a constitutional right. Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989); Gordon G. Young, Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor, 35 Buff. L. Rev. 765, 866 n.500 (1986). Thus, the Constitution sometimes forbids a government, possessing a greater power, the exercise of a lesser and, therefore, only apparently included power. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-41 (1985) (recognizing that, while a government can create certain property interests at its pleasure, it cannot create them on the condition that they can be retracted without observing the normal requirements of procedural due process).

Whether a greater power includes a lesser one depends upon whether that lesser power, exercised without the remainder, impermissibly frustrates a constitutional provision. See Sullivan, supra; Young, supra.

Sullivan provides a good example of a clearly unconstitutional condition. She imagines that Congress, which has no obligation to provide food stamps to the needy, offers food stamps but attaches to them the condition that they not be used to purchase kosher food. Sullivan, supra, at 1501. Likewise, it is possible that Congress, which originally had no obligation to create lower federal courts, might have only limited control over them once they have been established. But one would need to advance a reason for any limit, clearly easier in the food stamp hypothetical, because of a nearly consensus view of relevant religious freedom guarantees, than it is with respect to limits on Congress's powers over lower federal court jurisdiction.

The validity of the "greater includes the lesser" argument as support for nearly absolute congressional power to limit lower federal court jurisdiction depends upon the degree to which Article III interests and textual provisions for individual rights are seen as threatened or furthered by such complete control.

72. Lockerty, 319 U.S. at 187 (emphasis added) (citations omitted).
congressional power over federal trial court jurisdiction so sweeping as to take precedence over substantive constitutional rights. 73 Lockerty spells out the forceful reasoning underlying not only itself but the earlier cases of Sheldon and Lauf. Congressional power over the very existence of courts strongly implies complete power over their jurisdiction. 74

Complete congressional control of lower federal court jurisdiction seems regrettable to Hart, but not catastrophic. He makes a compelling, if not decisive argument that the rights targeted by court stripping are not trumped completely out of existence by Congress's jurisdictional powers: Rights barred from the federal courts can be taken to the state courts, which, under the Supremacy Clause, 75 must honor them. 76 Indeed, if a federal statute purports to deny state courts jurisdiction to hear constitutional claims, the statute is unconstitutional as long as no proper federal trial court has been opened to the constitutional claims. 77 As a result, when state enforcement of federal constitutional rights is most needed, it is available.

73. But see discussion infra Parts IV.A. & B.
74. Lockerty, 319 U.S. at 187.
75. U.S. Const. art. VI, cl. 2.
76. Hart, supra note 2, at 1401-02. Although it is never spelled out, Hart's implicit argument must resemble the following: The Lockerty rationale, that the power to choose whether to create lower federal courts implies the lesser power to dictate their jurisdiction, is not available to permit Congress to shut off the state courts from federal claims. This is true because Congress presumably has no power to create or destroy state courts. Congressional exclusion of federal claims from state courts, then, must be based upon the legitimate application of one of its other affirmative powers.


The purpose of such exclusive federal jurisdiction is to ensure proper enforcement of federal laws. In cases in which the federal Constitution creates a private right, the effect of exclusive federal jurisdiction is to provide claimants with a federal forum in which to enforce that right. See Martin H. Redish & John E. Muensch, Adjudication of Federal Causes of Action in State Court, 75 Mich. L. Rev. 311, 329-30 (1976). If Congress were to attempt to deny both federal and state court enforcement of a constitutional right, it would hardly be ensuring its optimal enforcement. In some cases, another acceptable reason for exclusion might be available; but rendering a constitutional right unenforceable is not a constitutionally legitimate end of any government.

77. See Hart, supra note 2, at 1401-02. Despite Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), a case which dramatically enhanced Congress's ability to regu-
Despite Hart's plausible \textit{deus ex machina} of state court enforcement for federal rights, he saw complete congressional power to close the lower federal courts to claims of constitutional rights as sufficiently troubling to warrant a careful analysis of the contrary case law and to suggest repeatedly that courts should strain against reading statutes as removing jurisdiction over constitutional claims.\textsuperscript{78} Many later commentators offer support for Hart in concluding that federal courts, generally, are superior enforcers of federal rights.\textsuperscript{79}

\section*{B. Cases Arguably Undercutting Congress's Court-Stripping Powers}

Against the record presented above in support of absolute congressional powers, Hart recognizes one Court of Appeals case containing clear dictum denying complete congressional power over lower

late matters once considered within the province of state sovereignty, it is difficult to believe that Congress has power generally to close down state courts. Even after \textit{Garcia}, there may be a sufficient core of state sovereignty left to prohibit Congress's tampering with the core structure of state government. While the Court's opinion in \textit{Garcia} severely limits that core, some passages suggest the continued existence of state sovereignty limits upon what would otherwise be valid legislation under the Commerce Clause. \textit{See id.} at 556. The Court describes the political process as the "principal and basic limit" and states that the issues before it "do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." These passages entail a recognition that there may be limits other than the "principal one," which are not yet identified or defined. A later case, \textit{New York v. United States}, 112 S. Ct. 2408 (1992), makes the existence of limits clear by striking down a provision of a Commerce Clause-based federal law. The law was seen as intruding on state sovereignty, because it was viewed as commandeering the state legislative process. \textit{Id.} at 2419-24. Furthermore, even assuming that the Court is unwilling to articulate special limits protecting state sovereignty, the principle that the federal government is a government limited to enumerated powers requires that federal legislative action occur under some affirmative grant of power to the United States. \textit{See} McCulloch v. Maryland, 17 U.S. 159, 199, 4 Wheat. 316, 405 (1819). Surely an act of Congress which interfered with the basic structure of state government in the name of federal commerce powers would be scrutinized for a real commerce connection with greater than usual care.

\textsuperscript{78} Hart, \textit{supra} note 2, at 1398-99. Hart thought courts "should use every possible resource of construction to avoid the conclusion" that a federal statute was intended to impose such restrictions. \textit{Id.}

federal court jurisdiction and several murky Supreme Court cases possibly inconsistent with such power.\textsuperscript{80}

\textit{Battaglia v. General Motors Corp.}\textsuperscript{81} is a decision of the United States Court of Appeals for the Second Circuit not reviewed by the Supreme Court. There the Court of Appeals considered a group of cases in each of which the plaintiffs claimed that a vested property right to compensation had been destroyed, unconstitutionally, by an Act of Congress.\textsuperscript{82} The court in \textit{Battaglia} confronted a statute which deprived it and all federal courts of jurisdiction to redress such claims.\textsuperscript{83} It affirmed each of the trial court’s decisions dismissing a case for want of jurisdiction.\textsuperscript{84} Before affirming, however, the \textit{Battaglia} court decided an issue it saw as going both to jurisdiction and to the merits: it concluded that the property right claimed by the plaintiffs had not vested.\textsuperscript{85} In the clearest dictum, the Court of Appeals then said that if the right had vested, the jurisdictional limitation would have been unconstitutional.\textsuperscript{86} In other words, the court concluded that Congress’s jurisdictional powers do not always override substantive constitutional rights.

Initially, Hart seems to read a separate set of cases as also recognizing significant limits on Congress: \textit{Wong Wing}, \textit{Ng Fung Ho}, and \textit{Lipke}. All of these cases involve private citizens’ challenges to executive action that arguably had been made “final” by statute and, thus, could be considered insulated from a challenge in federal court.\textsuperscript{87} In all of these cases, plaintiffs filed constitutional challenges.\textsuperscript{88} The Supreme Court allowed lower federal courts to consider the claims

\begin{itemize}
\item \textsuperscript{80} See supra notes 37-46 and accompanying text.
\item \textsuperscript{81} 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948). See also discussion in Hart, supra note 2, at 1383-84.
\item \textsuperscript{82} \textit{Battaglia}, 169 F.2d at 255-56. See The Portal to Portal Act, 29 U.S.C. § 252(a) (1988) (purporting substantively to extinguish such claims to compensation).
\item \textsuperscript{83} See 29 U.S.C. § 252(d) (purporting to remove, from both federal and state courts, jurisdiction to pass on the validity of such claims).
\item \textsuperscript{84} \textit{Battaglia}, 169 F.2d at 255-57, 262.
\item \textsuperscript{85} Id. at 257-61.
\item \textsuperscript{86} Id. at 257 (“We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment.”).
\item \textsuperscript{87} Hart, supra note 2, at 1387-88. In chronological order, these three cases and the respective statutes seeming to preclude judicial review are: (1) \textit{Wong Wing} v. United States, 163 U.S. 228 (1896) (Act of Aug. 18, 1894, ch. 301, § 1, 28 Stat. 872, 890 (repealed 1966)); (2) \textit{Ng Fung Ho} v. White, 259 U.S. 276 (1922) (The General Immigration Act of 1917, ch. 29, § 19, 38 Stat. 874, 889-90 (repealed 1952)); (3) \textit{Lipke} v. Lederer, 259 U.S. 557 (1922) (Act of May 27, 1872, ch. 218, § 2, 17 Stat. 162, 162 (current version at 26 U.S.C. § 7421(1) (1988))).
\item \textsuperscript{88} \textit{Wong Wing}, 163 U.S. at 233-34; \textit{Ng Fung Ho}, 259 U.S. at 281-82; \textit{Lipke}, 259 U.S. at 559-60.
\end{itemize}
despite the arguable preclusion of the challenges.\textsuperscript{89} However, as the

\textsuperscript{89} The jurisdiction limitation at issue in \textit{Wong Wing} was clear: "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury." \textit{Wong Wing}, 163 U.S. at 232 (quoting the Act of Aug. 18, 1894, ch. 301, § 1, 28 Stat. at 390). This provision was part of an Act which authorized appropriations for enforcement of the Chinese Exclusion Acts of 1888, ch. 1064, 25 Stat. 504 (repealed 1943). This appropriations and enforcement amendment had been previously upheld by the Supreme Court. \textit{Lem Moon Sing} v. United States, 158 U.S. 538, 549 (1895). The Act extending the Exclusion Acts of 1888 also provided for punishment at hard labor for Chinese persons found to be unlawfully in the country. Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25, 25 (repealed 1943).

While the \textit{Lem Moon Sing} Court had refused to grant a writ of habeas corpus on the basis of this jurisdictional limitation, \textit{Lem Moon Sing}, 158 U.S. at 548-50 (discussed in \textit{Wong Wing}, 163 U.S. at 232-233), the \textit{Wong Wing} Court heard and ruled on a habeas petition which challenged the conjunction of the imprisonment provision and the jurisdictional limitation. \textit{Wong Wing}, 163 U.S. at 235-38. The Court distinguished between deportation, which does not deprive the illegal immigrant of "life, liberty or property, without due process of law," \textit{id}. at 236 (quoting \textit{Fong Yue Ting} v. United States, 149 U.S. 698, 730 (1893)), and imprisonment at hard labor which, as an "infamous punishment," is reserved for those duly convicted of a crime. \textit{id}. at 237-38. The Court concluded that, to be valid, the provisions authorizing imprisonment at hard labor must comply with the protections of the Fifth and Sixth Amendments. Because the petitioners were not afforded Fifth and Sixth Amendment protections such as grand jury procedures and a judicial trial, the Court nullified the actions taken pursuant to the 1892 Act notwithstanding the jurisdictional limitation. \textit{Id}.

\textit{Ng Fung Ho} involved a challenge to a statute which provided for deportation of aliens upon executive orders, without judicial hearing or appeal. \textit{Ng Fung Ho}, 259 U.S. at 278-80. The General Immigration Act of 1917 provided in part: "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final." General Immigration Act of 1917, ch. 29, § 19, 39 Stat. 890. The Court found that no substantive constitutional question was presented with respect to two Chinese immigrants who challenged the retroactive application of § 19. \textit{Ng Fung Ho}, 259 U.S. at 279-81. Finding only a question of statutory construction presented, the Court dismissed the claim on the merits, allowed the jurisdictional limitation to stand, and affirmed the quashing of their writ of habeas corpus. \textit{Id}. at 279-81, 285. However, the Court determined that the petitioners who presented claims of U.S. citizenry presented a question of constitutional import, \textit{id}. at 281-82, and reasoned that the power of the executive to deport without judicial review extended only to persons who are aliens. \textit{Id}. at 284. The Court concluded that the claim of citizenship, especially when supported by sufficient evidence, entitled the claimant to the protection of the Due Process Clause and, thus, a judicial hearing. \textit{Id}. at 284-85.

\textit{Lipke} challenged taxes assessed against him arising out of the sale of liquor during Prohibition. \textit{Lipke}, 259 U.S. at 558-59. The tax required a finding that liquor had been sold or manufactured illegally and then levied double taxation and an additional penalty upon a seller or manufacturer. \textit{See id}. at 561. The Government maintained that Lipke's suit to restrain collection was barred by the Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475 (current version at 26 U.S.C. § 7421(a) (1988)), which read: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." \textit{Lipke}, 259 U.S. at 559-60, 560 n.1. Although recognizing the finality of the statute's language, the Court heard the case, and concluded that the challenged provision imposed a penalty and not a tax. \textit{Id}. at 561-62. By redefining the payment levied against Lipke as a penalty, the
Court in these cases never explicitly struck down a jurisdictional limitation, it is unclear whether the Court did so sub silentio or, instead, indulged in a presumption against reading a jurisdictional limitation as applying to constitutional challenges.90

At the end of his dialogue, Hart appears to draw back his earlier assertion that these cases forbid a tendentious jurisdictional provision aimed at excluding constitutional rights.91 As he describes them, the cases suggesting limits on Congress are comparatively weak. Battaglia is only a circuit court case and it provides only dictum as to Congress's powers to foreclose federal court enforcement of constitutional rights.92 Wong Wing, Ng Fung Ho, and Lipke are Supreme Court cases, but their meanings are not clear.93 The remainder of the cases—Sheldon, Lauf, and Lockerty—strongly support absolute or nearly absolute congressional power.94 Almost certainly it is for this reason that Hart concludes (presumably speaking through "A") that the record seems to support virtually complete congressional power:

Q. . . . But suppose Congress is in dead earnest about withdrawing general jurisdiction in a special class of cases arising under the Constitution. Do you mean that it could only accomplish that by repealing section 1331 [the federal question jurisdictional grant] in toto, on the theory that a mere amendment might be declared unconstitutional and the prior Section 1331 then left free to operate?

A. Well now, I'll have to stall a little. Habeas corpus aside, I'd hesitate to say that Congress couldn't effect an unconstitutional withdrawal of jurisdiction—that is, a withdrawal to effectuate unconstitutional purposes—if it really wanted to . . . .95

In sum, relying strongly on Sheldon, Lauf, and Lockerty, Hart leaves us with what seems nearly an inescapable conclusion that Congress can

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90. In each case it is possible that the Court "use[d] every possible resource of construction to avoid the conclusion" that Congress wished to leave such vital interests unprotected by precluding judicial review. See Hart, supra note 2, at 1999; see also infra notes 111-120 and accompanying text discussing the strong presumption against reading a statute to preclude review of important personal interests, particularly those founded on constitutional rights.

91. Hart, supra note 2, at 1398-99.

92. See supra notes 81-86 and accompanying text.

93. See supra notes 87-90 and accompanying text.

94. See supra notes 47-79 and accompanying text.

95. Hart, supra note 2, at 1398-99.
II. RECENT CASES AND SCHOLARSHIP

Starting in 1974, however, the Court began to suggest that congressional powers over jurisdiction may not extend so far as to permit Congress the selective exclusion of disfavored constitutional rights. Simultaneously, some commentators began to take strong and clear positions against congressional powers to court strip. Neither the post-1974 Court nor most revisionist commentators seriously reappraised the view of the case law presented by Hart. The Court simply asserted that court stripping was constitutionally questionable. The commentators based their reappraisal on theories of the meaning of constitutional rights or on a reassessment of the meaning of the text of Article III.

A. The Cases: From Johnson v. Robison to Webster v. Doe

Johnson v. Robison was the first in this line of cases suggesting Congress does not have unlimited court-stripping powers. Robison was classified a conscientious objector by the selective service system and he performed the required alternative civilian service. Later he sought educational benefits from the Veterans' Administration. He was denied them on the ground that, under the applicable statutes, those performing alternative service did not qualify. Robison brought a class action, on behalf of certain conscientious objectors.

96. Hart recognizes a possible exception for habeas corpus. Id. at 1398.
97. See infra Part II.A.
98. See supra note 15; see also infra Part II.B.
100. In chronological order the cases are: Johnson, 415 U.S. 361 (1974); Weinberger v. Salfi, 422 U.S. 749, 762 (1975) (acknowledging that if the Social Security Act was construed to preclude constitutional challenges it would raise a “serious constitutional question”); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (construing neither 42 U.S.C. § 1395ff nor § 1995ii to bar judicial review of Medicare program regulations, acknowledging that to find otherwise would raise a serious constitutional question and citing to commentators on the court-stripping debate); Webster v. Doe, 486 U.S. 592, 603 (1988) (holding that while § 102(c) of the National Security Act gives the CIA director very broad discretion to terminate employees, it does not “exclude review of constitutional claims,” and acknowledging that if construed otherwise, it would raise serious constitutional questions).
101. Johnson, 415 U.S. at 363-64.
102. Id. at 364.
who had performed alternative service, against the Administrator of Veterans' Affairs.\(^{104}\) The suit sought a declaratory judgment that the statutes, granting benefits to active duty members of the armed forces but denying them to class members, violated both the First Amendment's protection of religious freedom and the Fifth Amendment's equal protection guarantees.\(^{105}\) The Government claimed that judicial review was barred by a provision of a federal statute pertaining to veteran's benefits:

[D]ecisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no other official or court of the United States shall have power or jurisdiction to review such decision by an action in the nature mandamus or otherwise.\(^{106}\)

The federal district court held unconstitutional those provisions of the statute denying conscientious objectors equal benefits.\(^{107}\) On expedited appeal, the Supreme Court reversed the district court's decision on the substantive constitutional merits. The Supreme Court, however, found no error in the district court's having reached the merits.\(^{108}\) This was true in spite of 38 U.S.C. § 211 (a) which most naturally could be read to deprive the federal courts of jurisdiction to review decisions of the Veterans' Administration. In reading those provisions rather unnaturally so as not to bar Robison's suit, the Court relied on no single argument. It started its analysis by recognizing and applying a presumption against reading statutes to deprive litigants of judicial review in certain cases.\(^{109}\) This presumption amplified the force of all of the other arguments that the provision precluding review did not apply to Robison's claim. The Court wrote:

We consider first appellant's contention that § 211 (a) bars federal courts from deciding the constitutionality of veterans' benefits legislation. Such a construction would, of course, raise serious questions concerning the constitutionality of § 211 (a), and in such a case "it is a cardinal principle

\(^{104}\) Johnson, 415 U.S. at 364.

\(^{105}\) Id.


\(^{107}\) Johnson, 415 U.S. at 365.

\(^{108}\) Id. at 366.

\(^{109}\) Id. at 366-67.
that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided."

This is a remarkable statement and it has been repeated by majorities in several later Supreme Court cases. While it has long been a general principle of American law to read a statute somewhat elastically to avoid a difficult question of its constitutionality, before Johnson, this particular presumption was not relied on by the courts to influence the interpretation of arguable statutory limitations on the jurisdiction of the lower federal courts. The presumption comes into play where there is doubt about the constitutionality of a statutory provision and, as we have seen, before Johnson there was little doubt as to the validity of congressional court stripping.

This is not to deny that before 1974 the courts employed a presumption to favor judicial review of governmental action that seriously injured individuals. This different sort of presumption was the one put forward by Hart in his dialogue when he urged courts to resist reading statutes as removing jurisdiction over constitutional claims. But the presumption urged by Hart is based on considerations other

110. Id. (footnote omitted) (citation omitted).
111. See cases cited supra note 100.
112. United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971). For example, imagine a statute which is susceptible to several readings, many of which are troubling under first amendment analysis, but one of which is not. The presumption favoring avoiding constitutional questions would favor the interpretation which raised no difficulties even if that interpretation was somewhat strained.
113. See supra Part I.
114. See Hart, supra note 2, at 1398-99; see discussion supra note 78 and accompanying text. It is my conjecture that Hart thought that the presumption which favors reading statutes to permit judicial review was controlling in the following cases: Wong Wing v. United States, 163 U.S. 228 (1896); Ng Fung Ho v. White, 259 U.S. 276 (1922); and Lipke v. Lederer, 259 U.S. 557 (1922). Hart initially cites these cases as ones in which limits on the jurisdiction of the lower federal courts have been declared unconstitutional. Hart, supra note 2, at 1387-88; see also supra note 104 and accompanying text. He suggests that the courts in question used the general federal question grant of jurisdiction to permit consideration of whether a specific limit on their jurisdiction violated the Constitution. Hart, supra note 2, at 1387-88. But, ultimately, Hart appears to change his mind when he "hesitates to say" that Congress could not block assertion of specific constitutional claims if its intent to do so is clear. Id. at 1398-99. This leads me to believe Hart ultimately saw the Court's action in Wong Wing, Ng Fung Ho, and Lipke as not striking down the provisions appearing to limit the jurisdiction of the courts below. More likely, Hart concluded that the Court read the statutes to permit jurisdiction because constitutional rights were at stake and because the statutes were insufficiently clear that they intended to forbid the enforcement of those rights in federal trial courts. Note again that this is perfectly consistent with Hart's ultimate conclusion that if Congress had been extraordinarily clear as to its intent, it most probably could have closed the federal trial courts to any specified constitutional claims.
than risk of unconstitutionality. It is based on the general fairness of allowing such review and the reasonable corollary assumption that Congress presumptively wishes to act fairly.\footnote{115. See Hart, \textit{supra} note 2, at 1998-99.}

Additionally, this "fairness"-based presumption may be justified as providing a separation of powers counterweight to Congress's jurisdictional check on the lower federal courts. Assuming its validity, complete control of jurisdiction would be Congress's main legal check on the federal courts. The Court's political countercheck is its requirement that Congress be clear when it deploys its court-stripping powers.\footnote{116. \textit{Id.} It is important to recall that this fairness-based presumption was used during a time when the Court expressed little or no doubt as to the validity of court-stripping powers so vast as to permit exclusion of constitutional claims.} If a constitutionally valid removal of jurisdiction aimed at frustration of constitutional rights is made clear, the existence of an interbranch standoff and the high stakes involved are more easily grasped by the voters.\footnote{117. \textit{Id.}} A way to ensure that Congress explicitly states its intent to frustrate rights through jurisdictional enactments is for the Court's to presume that Congress has no such intent unless clearly stated.

Fairness and salutary clarity are the reasons given by Hart for reading any possible court-stripping statute adroitly to avoid frustration of important personal interests.\footnote{118. \textit{Id.}} In 1974, the \textit{Johnson} Court cited Hart and suggested that the presumption of reviewability is backed to a significant degree by serious doubts about the constitutionality of section 211(a) if it were to be applied to bar review in the case before it.\footnote{119. \textit{Johnson}, 415 U.S. at 366-67 n.8.} Doubts about the constitutionality of court-stripping legislation as a justification for a presumption of judicial review is never endorsed by Hart who "stall[s]," then "hesitate[s] to say" that Congress could not exclude enforcement of constitutional rights from the federal courts if it is really intent on doing so.\footnote{120. Hart, \textit{supra} note 2, at 1998-99.}

Nowhere does the \textit{Johnson} Court mention that Hart concludes that Congress most likely possesses plenary power. But, based on the materials Hart presents, his conclusion is not surprising. Not only are Hart's constitutional-textual arguments against limits on Congress powerful, but the case law, as he presents it, seems a juggernaut rolling against limits on Congress.\footnote{121. \textit{See infra} Part I.A.} At this point, based upon Hart and the well-known cases, one is tempted to ask with Justice Scalia in
Webster v. Doe: Where is the reasonable doubt of constitutionality, justifying tendentious, rather than straight-on statutory interpretation of a court-stripping provision?

B. Recent Challenges in Academic Writing to Hart’s View of Virtually Unlimited Congressional Power over Lower Federal Court Jurisdiction

As the Court seemed to open itself to the possibility of real limits on Congress’s powers, the commentators were at work, providing theories to support such limits. Starting in 1974 with Theodore Eisenberg’s article, significant dissent from Hart’s view began to appear in the law journals. However, the simultaneous onset of this new wave of scholarship with the decision of Johnson v. Robison, seems coincidental. Johnson is largely ignored by the major articles proposing new theoretical limits on Congress’s power to exclude cases from the jurisdiction of the lower federal courts.

This new body of literature is internally quite diverse both as to the nature of, and the arguments for, the limits proposed. One set of commentators argues flatly that Congress cannot close off the lower federal courts to claims of constitutional right. Of these, some argue that closing off the courts would “impermissibly burden” the right in question. Others, perhaps saying much the same thing in a different vocabulary, find court stripping to be an unconstitutional discrimination against some constitutional rights in favor of others.

A second set of commentators argue that certain cases, including constitutional cases, cannot be excluded from the jurisdiction of the lower federal courts if Congress has also excluded them from the

123. Eisenberg, supra note 15.
124. See supra notes 15-16 and accompanying text.
125. See Brillmayer & Underhill, supra note 17, at 822 (arguing that “Congress cannot discriminate against constitutional claims in drafting jurisdictional bills.”); Sager, supra note 3, at 78 (concluding that “the constitutional right targeted for attack is itself violated by the jurisdictional enactment” and finding a limit on Congress’s jurisdictional powers in the equal protection component of the Fifth Amendment); Tribe, supra note 15, at 141 (“The Supreme Court recognized decades ago that constitutional rights would be unacceptably jeopardized not only if laws could be enacted directly forbidding or penalizing their exercise, but also if laws could be enacted making their exercise the occasion for withholding or withdrawing benefits or privileges that would otherwise have been available.”).
126. See Sager, supra note 3, at 70, 78-79; Tribe, supra note 15, at 141-49.
127. Brillmayer & Underhill, supra note 15, at 821; Sager, supra note 3, at 70, 78-79 (finding a limit on Congress’s jurisdictional powers in the equal protection component of the Fifth Amendment as well as in the proposition that specific constitutional rights may not be impermissibly burdened).
Supreme Court's appellate jurisdiction. On this view, either a federal trial or a state trial with ultimate Supreme Court review would satisfy Article III. In general, these commentators argue more closely from the language and structure of Article III, than do the first group who simply assert that substantive constitutional rights tend to trump congressional power over federal jurisdiction.

These generalizations, of course, oversimplify and mask differences of opinion between commentators in the various groups. However, this description provides a useful working notion of the nature of the new scholarship opposing Hart's position.

Many of these scholarly arguments would gain force if the case law concerning congressional court-stripping powers turned out to be much more equivocal than previously portrayed and understood. Were that so, Johnson would appear less as a statutory-interpretive bluff...

128. Amar, supra note 15, at 238-59; Clinton, supra note 15, at 749-54. More precisely, Clinton, unlike Amar, takes no position on the existence of limits on Congress's powers but offers arguments which support such limits.

129. Professor Amar reads the Constitution's language—extending the judicial power to (1) "ALL cases arising under [federal law]," (2) "ALL" cases affecting ambassadors [etc.] and (3) "ALL" cases of admiralty and maritime jurisdiction—as requiring either federal trial or appellate jurisdiction in every case coming within such categories. Amar, supra note 15, at 209, 240, 255-57, 269. That is to say, if there is no federal trial jurisdiction in such cases, then some federal court must have appellate jurisdiction over the state tribunals which would then hear such cases in the first instance. With the possible de facto exception of federal habeas corpus jurisdiction, the Supreme Court alone has exercised appellate jurisdiction over the state courts. Amar suggests the possibility, however, that lesser federal tribunals might be empowered to hear such appeals. Id. at 269; see also Preble Stolz, Federal Review of State Court Decisions of Federal Questions: The Need for Appellate Capacity, 64 CAL. L. REV. 943, 945-48 (1976) (concluding that many forms of lower federal court appellate review of state court decisions would be constitutional).

130. See supra note 125 and accompanying text.

131. Because Amar reads the Constitution to permit Congress to exclude even federal constitutional claims from the jurisdiction of the lower federal courts, as long as the state courts are open and the Supreme Court can review their decisions, see supra note 129-130, the bearing of cases such as Johnson v. Robison and Lauf v. Shinner on his thesis is less obvious. Those cases deal with the question of whether a lower federal court must be open to constitutional claims. This question has no answer under Amar's analysis unless we first determine the availability of state trial courts and Supreme Court review. Presumably Amar would find Lauf's approval of a jurisdictional restriction problematic only if it blocked a constitutional right to an injunction, and then only if the injunction were unavailable in a state court proceeding reviewable by the Supreme Court. It is the received view, and a sound one, that Congress cannot close off state courts to constitutional claims if the lower federal courts also have been closed. See supra notes 76-77 and accompanying text. Thus, the state courts most likely were open in Lauf, and that is sufficient to justify its result under Amar's theory.

For the same reason I believe that Amar would find Johnson v. Robison troubling. There the Court suggested that barring a plaintiff's constitutional claim from the federal trial courts would raise serious constitutional questions. What complicates matters slightly is that Johnson involves review of federal administrative action. Congress might prefer such...
and more as a real threat to strike down court-stripping limits which frustrate constitutional rights, should occasion to do so arise. And should that occasion arise, a majority of the Court could limit Congress's powers with less of a rupture from precedent than the current understandings of the case law suggests. In this light, a majority of Justices might find in the new scholarship a congenial and more plausible array of arguments supporting limits on Congress's powers of exclusion.

III. Armstrong v. United States: A Supreme Court Decision Striking Down a Court-Stripping Measure

While the case law record as traditionally presented includes no case striking down a court-stripping measure, in fact such cases exist. One of them, Armstrong v. United States\textsuperscript{132} was decided by the Supreme Court. Armstrong was one of two important and related cases, bearing on Congress's powers over the federal courts, which emerged from the Civil War and its immediate aftermath.\textsuperscript{133} It should not be surprising that issues of Congress's powers over the federal courts emerged during Reconstruction. Constitutional decisions, particularly those involving significant separation of powers issues, often occur during times of great national stress, such as the founding, the Civil War, Reconstruction, and the New Deal.\textsuperscript{134} In this section I discuss Armstrong and the related cases, United States v. Klein\textsuperscript{135} and Witkowski v. United

\textsuperscript{132} 80 U.S. (13 Wall.) 154 (1872).

\textsuperscript{133} The other case, which does not involve court stripping, is United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

\textsuperscript{134} Shortly after the founding of the Republic, Marbury v. Madison, 5 U.S. 87, 1 Cranch 137 (1803), established the power of federal courts to review the constitutionality of acts of Congress and, possibly, the power to review acts of the Executive Branch as well. This important issue, not explicitly addressed by the Constitution, came to a head in the midst of the first partisan power struggle for control of the new government. As for the many important cases formed under the political and social pressures of the Civil War, Reconstruction, and the New Deal, see Kermit L. Hall ed., The Oxford Companion to the Supreme Court of the United States, 152-214, 711-12, 584-85 (respectively, the entries for the three periods in chronological order) (1993).

\textsuperscript{135} 80 U.S. (13 Wall.) 128 (1872). For a full discussion of Klein, see Hart & Wechsler 3d, supra note 9, at 368-69; Gerald Gunther, Cases and Materials on Constitutional
States,\textsuperscript{136} to offer a revised view of the case law record concerning Congress's jurisdictional powers.

\textit{A. The Context of the Armstrong Decision}

The Abandoned and Captured Property Act,\textsuperscript{137} enacted during the Civil War, spawned litigation that resulted in one well-recognized Supreme Court case, \textit{United States v. Klein}, limiting Congress's powers to restrict the jurisdiction of the federal courts. Traditionally read, \textit{Klein} forbids Congress from engaging in certain forms of jurisdictional tampering.\textsuperscript{138} But \textit{Klein} deals with only one unusual sort of tampering. As a result, \textit{Klein} generally has been read as saying nothing about the focus of this article: court stripping. So read, \textit{Klein} does not address the power of the Congress to withdraw a category of cases from the jurisdiction of the federal courts.\textsuperscript{139} Rather, it addresses only the distinctly narrower problem of Congress's purportedly treating the federal courts as puppets, by using a specific "jurisdictional limitation" to dictate substantively unconstitutional results in a category of cases over which the courts have been given jurisdiction.\textsuperscript{140}

The crucial distinction is one between what I call "puppeteering" and what is generally known as court stripping. The mainstream, anti-puppeteering reading of \textit{Klein} would, for example, forbid Congress from conferring on the federal district courts the power to hear federal criminal prosecutions while depriving them of "jurisdiction" to consider a defendant's First Amendment defense.\textsuperscript{141} So read, \textit{Klein} does not, however, forbid court stripping, that is the closing down of the federal courts to all cases in which a plaintiff asserts a cause of action founded on a constitutional right, e.g., the First Amendment.\textsuperscript{142} On this view, \textit{Klein} offers protection only once Congress has called the lower federal courts into play in a category of cases; it provides no guarantee that Congress will open the courts to any particular set of cases.

\footnotesize{\textsuperscript{136} 7 Ct. Cl. 393 (1872).  
\textsuperscript{137} Ch. 120, § 3, 12 Stat. 820, 820 (1863). For a complete discussion of the operation of this and other acts as they led to the crisis which spawned the \textit{Klein} and \textit{Armstrong} cases discussed in this section, see Young I, supra note 23, at 1197-1209. In particular, see \textit{id.} at 1197 n.43.  
\textsuperscript{138} See Young, supra note 23, at 1219-22.  
\textsuperscript{139} Id. at 1219-22.  
\textsuperscript{140} Id.  
\textsuperscript{141} Id.  
\textsuperscript{142} Id.}
Klein's companion case, Armstrong v. United States, is not discussed by the modern Supreme Court and commentators. In Armstrong, the Court struck down a statutory provision designed to eliminate lower federal court jurisdiction over a category of cases. Consequently, Armstrong not only raises the validity of congressional court stripping, but also constitutes a holding against that sort of jurisdictional regulation. Consequently, it is a precedent against broad congressional control of lower federal court jurisdiction, although admittedly it is a precedent weakened to some degree by its age and by the state of legal theory at the time it was decided.

Klein and Armstrong arose out of the same general statutory and case law matrix. Both dealt with the right of pardoned Confederate sympathizers to compensation for property seized by Union troops behind enemy lines during the Civil War. The claims were made under the Abandoned and Captured Property Acts which provided for the compensation of former owners of captured property if they had remained loyal to the Union. Before Armstrong and Klein, in United States v. Padelford, the Court had read the Act as permitting recovery by those who in fact had not been loyal but were later pardoned. In angry response to this interpretation, the Radical Republicans in Congress successfully forced through legislation in 1870 having two features, one relevant to Klein and one to Armstrong. While both features were written in jurisdictional terms, the first feature was a puppeteering provision while the second was a court-stripping measure.

The puppeteering provision of the 1870 Act provided that a pardoned, but disloyal, claimant who had won a judgment in the

143. Armstrong is, however, mentioned in Young, supra note 23, at 1214 n.135 and HART & WECHSLER 3D, supra note 9, at 369 n.5. See supra Part II and notes 15-17, 100 and accompanying text for discussions of recent cases and scholarship which cast doubt on Congress's power to court strip.

144. See Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1872).

145. See United States v. Klein, 80 U.S. (13 Wall.) 128, 136-44 (1872); Armstrong, 80 U.S. (13 Wall.) at 155-56. For a description and discussion of the Civil War legislation in play in these cases, see Young, supra note 23, 1197-1209.

146. Ch. 120, 12 Stat. 820 (1863).

147. See id. § 3; see also Klein, 80 U.S. at 136-44; Armstrong, 80 U.S. at 155-56.

148. 76 U.S. (9 Wall.) 531 (1870).

149. Id. at 542-43 ("[I]f the property had been seized before the oath was taken, the faith of the government was pledged to its restoration upon the taking of the oath in good faith."). For a discussion of Padelford, see Young, supra note 23, at 1201-03.

150. See Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 [hereinafter 1870 Act]. See also Young, supra note 23, 1203-09 (describing the Act as a Radical Republican attempt to avoid both the statutory interpretation and the constitutional implications of the Padelford decision).
lower federal courts, must have it reversed by the Supreme Court.\footnote{151}{The 1870 Act, 16 Stat. at 235. The relevant language reads: "And in all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant [who was disloyal but subsequently pardoned] ... the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." \textit{Id.} For the proposition that the phrase "dismiss the cause" meant that the Supreme Court must, in effect, reverse the U.S. Court of Claims, see \textit{Klein}, 80 U.S. at 145-46; \textit{Young}, supra note 23, at 1219-24.} This was the measure struck down in \textit{Klein}.\footnote{152}{\textit{Klein}, 80 U.S. at 146-48.} The measure did not involve court stripping. The Supreme Court had been given, not denied, jurisdiction to act; that jurisdiction, however, was shaped to control the Court's decision on the merits. It was a jurisdiction only to reverse a judgment based on a pardon, regardless of the Court's analysis of the merits of the constitutional claim.\footnote{153}{See supra text accompanying note 154. The 1870 Act was not in force when Armstrong's case was dismissed in the Court of Claims and hence was not the ground for that court's dismissal. See \textit{Armstrong}, 5 Ct. Cl. at 625-26 (dismissing the suit on the ground of Armstrong's disloyalty). When Armstrong's appeal was before the Supreme Court, the court rejected the Court of Claims' claim that the jurisdictional issue was barred by the 1870 Act. See \textit{Armstrong}, 91 U.S. at 649-50 (discussing the Court of Claims' claim that the jurisdictional issue was barred by the 1870 Act).} \addcontentsline{toc}{section}{Armstrong is a different case. It involved the second feature of the 1870 Act, a court-stripping provision. This provision deprived the federal trial courts of the power to hear cases brought by the pardoned disloyal:

\begin{quote}
[N]o pardon ... shall be admissible in evidence on the part of any claimant ... [in any court under the Act, and] ... such pardon and acceptance shall be taken and deemed ... conclusive evidence that such person did take part in ... the late rebellion ... and on proof of such pardon and acceptance ... the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.\footnote{154}{\textit{Armstrong} v. United States, 80 U.S. (13 Wall.) 154, 155-56 (1872), \textit{rev'd} 5 Ct. Cl. 623 (1869). For a Court of Claims decision anticipating \textit{Armstrong} by its use of \textit{Klein} to ignore the court-stripping provisions of the 1870 Act, see \textit{Waring} v. United States, 7 Ct. Cl. 501, 504 (1872) ("[U]nder the principles laid down in the recent opinion of the Supreme Court in Klein's Case, it is our duty to give effect to [the presidential pardon] ... "). For a discussion of \textit{Waring}, see \textit{Sager}, supra note 3, at 29 n.31, and \textit{Young}, supra note 23, at 1222-23 n.179.}"
\end{quote}

In \textit{Armstrong}, the Supreme Court, citing \textit{Klein}, reversed the dismissal of a pardon recipient's claim for captured cotton and remanded the case for consideration on the merits.\footnote{155}{Armstrong v. United States, 80 U.S. (13 Wall.) 154, 155-56 (1872), \textit{rev'd} 5 Ct. Cl. 623 (1869). For a Court of Claims decision anticipating \textit{Armstrong} by its use of \textit{Klein} to ignore the court-stripping provisions of the 1870 Act, see \textit{Waring} v. United States, 7 Ct. Cl. 501, 504 (1872) ("[U]nder the principles laid down in the recent opinion of the Supreme Court in Klein's Case, it is our duty to give effect to [the presidential pardon] ... "). For a discussion of \textit{Waring}, see \textit{Sager}, supra note 3, at 29 n.31, and \textit{Young}, supra note 23, at 1222-23 n.179.} This disposition was inconsistent with the court-stripping portion of the 1870 Act that purported to exclude claims of pardoned disloyals from the jurisdiction of the lower federal courts.\footnote{156}{\textit{Young}, supra note 23, at 1222-23 n.179.} Consequently, \textit{Armstrong} held that at least some court-stripping measures are unconstitutional.
Armstrong reached its holding summarily, offering no indication as to its reasoning other than a citation to Klein. However, a Court of Claims decision shortly after Armstrong, Witkowski v. United States, reached a result identical to that in Armstrong and provides an analysis of the issues which, though confused, is more detailed than that offered by Armstrong. Although we cannot be sure, it is possible that the Witkowski court's contemporaneous discussion of the issues provides a window into the Supreme Court's reasoning in Armstrong.

Witkowski sued under the Abandoned and Captured Property Act to recover the proceeds of cotton seized from him by the Union Army and later sold by the United States. Although he maintained his innocence of giving aid and comfort to the rebellion, he offered a presidential pardon as an alternative ground for finding the loyalty required by the Act as a prerequisite to reimbursement. The Court of Claims originally dismissed Witkowski's suit. On the strength of the intervening Supreme Court decision in Klein, the Court of Claims granted Witkowski's motion for reconsideration and awarded him judgment.

Although Klein dealt with puppeteering and not court striping, the Court of Claims used Klein to justify hearing Witkowski's case, a case which the 1870 Act clearly excluded from its jurisdic-

1870 Act was in force. Armstrong, 80 U.S. at 155-56. There is, and was at the time the Supreme Court decided Armstrong, a requirement that federal courts apply new and otherwise constitutional statutes to cases pending before it. See United States v. The Schooner Peggy, 5 U.S. 64, 68, 1 Cranch 103, 109-10 (1801); see also HART & WECHSLER supra note 9, at 368-69 & n.4 (recognizing "the ancient principle, clear since the decision in [The Schooner Peggy] that the courts are obligated to apply law (otherwise valid) as they find it at the time of their decision, including when a case is on review, the time of appellate judgment.") (emphasis added); Young, supra note 23, at 1240 & nn.238-41. Hence, if Congress validly could have excluded pardonees from the Court of Claims, the Supreme Court would have affirmed the Court of Claims dismissal on the independent and intervening ground of the 1870 Act. Instead the Court remanded, ignoring the jurisdictional restriction as unconstitutional. Armstrong, 80 U.S. at 155-56.

It is important also to note that the Court so held in spite of its own recent recognition of the Court of Claims as an inferior court of the United States constituted under Article III of the Constitution and therefore subject to any valid congressional regulation of jurisdiction under that Article. Klein, 80 U.S. at 144-45. See infra note 171 for further discussion of this point.

158. 7 Ct. Cl. 393 (1872).
159. Id. at 393.
160. Id. at 394.
161. Id. at 393-94.
162. Id. at 393-94, 399.
163. For the meaning of this distinction, see supra notes 141-144 and accompanying text.
164. Id. at 396-99.
tion. The Court of Claims opinion accompanying Witkowski’s trial on remand shows understandable confusion about the meaning of *Klein*:

> It is the unquestionable intent of *Klein* that the statute is unconstitutional because it interferes with the proper administration of justice in the judicial department of the Government, of which the Court of Claims is an element; and that while Congress may withdraw cases from its jurisdiction, or prescribe the terms and conditions upon which actions may be brought, yet Congress cannot prescribe to it a rule of decision, nor interfere with the proper exercise of judicial functions.

Well, which is it? In passing the Abandoned and Captured Property Acts has Congress permissibly “withdraw[n]” claims based on presidential pardons from the Court of Claims’ jurisdiction or has it “interfere[d] with the proper exercise of judicial function?” Does Congress have plenary powers to remove cases from the jurisdiction of the lower federal courts or are those powers constrained in some ways? If the powers are constrained what are the limits?

The court-stripping section of the 1870 Act states that the Court of Claims shall have no jurisdiction to hear a suit seeking proceeds of abandoned and captured property brought by one who accepted a pardon. Yet, the Court of Claims in *Witkowski* proceeded to resolve the merits. On the surface at least, the most plausible way to reconcile *Witkowski*’s result (judicial jurisdiction over claims despite a clear statute to the contrary) and its seemingly contrary language (“Congress may withdraw cases from [the court’s] jurisdiction”) is to assume that the court recognized limits to the latter congressional power. In short, some measures, despite their form, were not bona fide jurisdictional regulations because they were designed to frustrate constitutional rights. Similar reasoning must underlie the Supreme Court’s decision in *Armstrong*.

**B. Significance of the Armstrong and Witkowski Decisions**

What did these old opinions mean when written and what is their force in today’s debate over Congress’s jurisdictional powers? For example, do they significantly support the suggestion of limits on Con-

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165. 1870 Act, 16 Stat. at 235; see also supra notes 151-154 and accompanying text.
166. *Witkowski*, 7 Ct. Cl. at 397 (emphasis added).
167. See 1870 Act, 16 Stat. at 235; see also supra text accompanying note 154.
gress's jurisdictional powers made by Supreme Court majorities since Johnson v. Robinson and decried by Justice Scalia in Webster v. Doe.

There are several seemingly plausible ways to harmonize Waring, Witkowski, and Armstrong with the later cases that proclaim unlimited congressional power—ways that would detract from Armstrong's power as a countervailing case. There are two possible explanations I find especially unconvincing. One would view the implications of Armstrong, Waring, and Witkowski as limited to the Court of Claims, the court whose jurisdiction was in question in those cases. The other would explain the result in those cases based on the inseparability of the Court of Claims jurisdictional provisions of the 1870 Act from those held unconstitutional in Klein.

169. 415 U.S. 361 (1974). For other cases, see supra note 100.
170. 486 U.S. 592, 612-14 (Scalia, J., dissenting).
171. The argument would be that the Court of Claims is a special court and that determinations concerning its jurisdiction are not generalizable to other federal courts. Lending some support to this view is the Supreme Court's opinion in Williams v. United States, 289 U.S. 533 (1933), which determined that the Court of Claims was not an Article III court. 289 U.S. at 580-81. However, Williams has been criticized as incoherent. Hart & Wechsler 2d, supra note 9, at 398-99 (characterizing Williams as an "intellectual disaster" because of its conclusion that the Court of Claims was not an Article III court, even though all of its cases were within the judicial power as defined in Article III).

More importantly, the Williams view of the Court of Claims was not the law when Klein was decided. Indeed, Williams repudiated statements made in Klein itself that the Court of Claims was an Article III court: "The Court of Claims is thus constituted one of those inferior courts which Congress authorizes ..." United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1872); see Young, supra note 23, at 1255-56. Furthermore, it seems a safe assumption that Congress has more authority to limit the jurisdiction of Article I courts than that of Article III courts. If the Court of Claims had been deemed an Article I court in 1872, then presumably the Armstrong court would have been even less deferential to restrictions on Article III courts.

172. This argument would be that the court-stripping provision was not held unconstitutional in Armstrong, but rather held inseparable from the puppeteering provision struck down in Klein. However, Armstrong is not written in terms suggesting inseparability, but rather in terms of the Court of Claims' obligation to enforce the underlying pardon-based substantive rights stemming from the Presidential pardon. See Armstrong v. United States, 80 U.S. (13 Wall.) 154, 156 (1872) ("[The pardon] was a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect."). Nowhere did the Court of Claims in Witkowski suggest that the Armstrong decision was based on separability. See Witkowski, 7 Ct. Cl. at 399-94. Finally, legislative intent determines the effectiveness of one portion of a statute when another is struck down on grounds of inseparability. From the debates in Congress, there can be no doubt that Congress would have intended the court-stripping provision of the Act to stand even if that portion directed to the appellate jurisdiction of the Supreme Court failed constitutional scrutiny. See Young, supra note 23, at 1203-10 (indicating the intensity of Congress's desire to inflict severe penalties on Confederate sympathizers whose loyalty was based only on pardons and describing the care with which the statute's language was fashioned to achieve this result in both the Supreme Court and the Court of Claims).
There are, on the surface, two more plausible ways to harmonize Armstrong with broad court-stripping powers. One proposes that the Supreme Court was unaware of the jurisdictional language of the statute and consequently did not intend to override the powers of Congress in that realm. The second assumes that the Armstrong Court specifically construed the statute in a way permitting it to avoid deciding the constitutionality of the jurisdictional limit, thereby rendering Armstrong a statutory interpretation case and not a precedent on the constitutionality of court-stripping legislation.

Both these suggestions ultimately are unpersuasive. First, there is little question that the Court was familiar with the language of the statute, and with the intent of its drafters to extinguish pardon rights either directly or by means of jurisdictional limitations. Second, it is improbable that Armstrong really rested on sub silentio statutory interpretation—one which avoided the constitutional-jurisdictional question by reading the 1870 Act to permit Armstrong’s suit in the Court of Claims. This is so precisely because the jurisdictional provisions of the 1870 Act were directed only to persons asserting pardon rights and were clearly intended to prevent their enforcement. It is difficult to imagine a more clearly intentional and specifically focused attempt on the part of Congress to stop federal trial courts from hearing claims made under the Constitution.

173. Justice Chase wrote the opinion of the Court in United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870), Klein, 80 U.S. (15 Wall.) 128 (1872), and Armstrong, 80 U.S. (13 Wall.) 154 (1872). He was one of the most politically minded Justices in the history of the Court. He had been a state governor, a United States Senator, a member of Lincoln’s cabinet and had serious Presidential ambitions. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 122-23 (3d ed. 1992); 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION pt. 1, 13-18, 22-32, 515-57, 1465-67 (1971). The 1870 Act was designed to negate the effects of his own opinion in Padelford, which had permitted recovery by the disloyal but pardoned under the Abandoned and Captured Property Act. See Padelford, 76 U.S. at 557. It seems likely that Justice Chase knew of the debate on the 1870 Act, attacking his Padelford opinion, soon after that debate appeared in the Congressional Globe (the precursor of the Congressional Record). See CONG. GLOBE, 41st Cong., 2d Sess. 3809-25 (1870) (containing statements making clear the backers’ attempt to avoid Supreme Court decisions according pardonees rights to recover property). See also Young, supra note 23, at 1203-09.

In addition, shortly before Armstrong was decided in 1872, the Court in Klein had taken the extreme step of ruling a portion of the 1870 Act unconstitutional. Klein, 80 U.S., at 146-48. In doing so the Court would naturally have scrutinized the Act and its legislative history in the Congressional Globe and seen Congress’s attack on Justice Chase’s earlier work. For these reasons, it is impossible to believe that Justice Chase and his Court were not aware of the objects of the 1870 Act at least by the time of Klein and Armstrong.

174. See supra notes 151-154 and accompanying text.

175. See Young, supra note 23, at 1203-09.
Finally, a more serious objection to Armstrong's power as a countervailing case questions not its status as a holding against court stripping, but rather the degree of its force as holding. At the time of Armstrong, the Court may not have possessed a theoretical framework that would allow it to distinguish between Klein-style puppeteering (controlling the result of a case by manipulating the exercise of jurisdiction) and Armstrong-style court stripping (prohibiting the exercise of jurisdiction at all in a particular case). This theoretical net was not clearly cast over the cases until 1953 by Hart in his dialogue. It is possible that, if the Court had considered this distinction, it would have decided Armstrong differently. It might have validated the court-stripping provision as significantly different from the puppeteering which occurred in Klein. But, it is also possible that the Court would have rejected the significance of the distinction, deciding Armstrong precisely as it did on the ground that both court stripping and puppeteering are forms of unconstitutional jurisdictional tampering.

All of this is speculation. Armstrong did strike down a court-stripping provision. While Armstrong is not as forceful as it would have been if it had considered and specifically rejected Hart's distinction between court stripping and puppeteering, at a minimum one must count Armstrong as evidence that the Court has been willing to strike down a statute excluding a class of claims from the lower federal courts' jurisdiction. One can debate the proper weight of Armstrong and allied Court of Claims cases given their position as relatively early cases in a long current of cases on congressional power. What is hard to dispute, however, is the significance of Armstrong's holding if it were followed today. It seems impossible to distinguish, in any meaningful way, the plaintiff in Armstrong from plaintiffs today who might seek federal court enforcement of modern constitutional rights, such as busing or abortion rights, despite a statute which purports to close off the federal courts.

Where does Armstrong leave the debate over Congress's powers? Clearly Armstrong stands as one holding that Congress cannot close off constitutional rights from lower federal court enforcement. Nonetheless, the juggernaut of the later hundred-year history, cited by Hart

176. Hart strongly pressed the distinction between court stripping, on the one hand, and using the lower federal courts as puppets, on the other. Hart, supra note 2, at 1372-74. "When the way of exercising jurisdiction is in question, rather than its denial, the constitutional tests are different." Id. at 1372. See also supra notes 137-156 and accompanying text. The distinction is not self evident. It often takes some care to explain it to my law students and at least one important commentator has quarreled with the distinction. See Henry P. Monaghan, Marbury and the Administrative State, 83 COLUM. L. REV. 1, 22-24 (1983).
as standing for the contrary, remains.\textsuperscript{177} Or does it? Below I reassess the traditional cases described by Hart, focusing on \textit{Lauf v. E.G. Shinner \& Co.},\textsuperscript{178} the case he offers as the strongest supporting complete congressional control. A rereading of \textit{Lauf}, coupled with the countervailing effect of \textit{Armstrong}'s case, renders the case law record a less formidable obstacle to the new scholarship arguing against the validity of court stripping.

\section*{IV. The Force of the Pre-1974 Cases Reconsidered}

\subsection*{A. Background: The Conventional View that \textit{Lauf v. E.G. Shinner \& Co.} Upheld Exclusion of Constitutional Claims from the Federal Trial Courts}

Certainly there are powerful statements in the case law, both before and after Reconstruction, to the effect that Congress has the power to exclude any claims that it wishes to specify from the jurisdiction of the lower federal courts.\textsuperscript{179} The statements are broad, drawing no distinction between the exclusion of cases asserting constitutional claims and other cases. Contrary to suggestions in the best regarded commentary, however, it is doubtful whether any of the statements range beyond dicta into holding.

For example, as discussed in Part I, \textit{Sheldon v. Sill}\textsuperscript{180} is not a holding as to constitutional claims.\textsuperscript{181} The plaintiff in \textit{Sheldon} presented

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{177} See supra Part I.
\item\textsuperscript{178} 303 U.S. 323 (1938).
\item\textsuperscript{179} See supra Part I.A. For an additional earlier statement, see Cary v. Curtis, 44 U.S. 265, 276-77, 3 How. 236, 245 (1845).
\item\textsuperscript{180} 49 U.S. 453, 8 How. 441 (1850).
\item\textsuperscript{181} See supra notes 47-51 and accompanying text. Michael C. Dorf's \textit{Dicta and Article III}, 142 U. Pa. L. Rev. 1997 (1994), was published as this Article went to press. Dorf's piece is a useful exploration of the abstractly contradictory requirements that (1) a judge decide no more than the case before her, and (2) she do so based on general principles which will have authority in later cases. \textit{Id.} at 1997. Dorf rejects a continuum view that would hold that we should recognize degrees of authoritativeness. He opts instead for a system which sorts statements into the bins of dicta and holding. \textit{Id.} at 2049-53. My own view has always resembled the view Dorf rejects. But Dorf has convinced me that the system for determining degrees of authoritativeness may not be one simple continuum, but something more complex. Dorf's view seems to be that we have to credit judges' explanations of how they decide cases even if those explanations are broad and, consequently, control more of the future than other possible explanations. \textit{Id.} at 2043-49. It seems to me that the degree to which we do so does and should depend on a host of factors, including how broadly the explanation ranges and what is at stake. These factors probably are never reducible to an algorithm. Dorf himself makes concessions to problems of overgenerality: Indeed, even if we accept a fairly abstract characterization of the holding of the first case, that does not preclude exceptions. "A rule that ends with the word 'unless . . .' is still a rule." Nor is it obvious that the exceptions must be articulated along with the governing rule or principle. In the first case, the precedent
\end{enumerate}
\end{footnotesize}
no federal constitutional claim as to the merits of his case,\(^\text{182}\) therefore none was frustrated by the Court's enforcement of a technical limit on diversity jurisdiction. Moreover, in *Lockerty v. Phillips*,\(^\text{183}\) the Supreme Court read the case before it as not presenting the question of Congress's power completely to exclude a federal constitutional right from effective enforcement in the federal trial courts.\(^\text{184}\)

court may reason at a very high level of abstraction, so that its reasoning appears to apply to a broad range of circumstances not presented or contemplated. When a litigant later presents to the court its earlier ruling and asks for an unjust or even absurd result, stare decisis does not require that the court oblige.

*Id.* at 2057 (footnote omitted).

As applied to this Article, Dorf's analysis might cause us to view *Sheldon* as a holding that court stripping is valid. On this view we would credit *Sheldon's* statement of its rationale—courts created by statute etc.—as broad enough not only to decide *Sheldon* but also a later case in which a jurisdictional limitation purported to block a constitutional claim.

On the other hand, Dorf might find that *Sheldon* is dicta as to the exclusion of constitutional claims, on the ground that the overgenerality of its statements suggest implied exceptions.

Regardless of how Dorf would read *Sheldon*, I believe that *Sheldon's* general statements, made in a context where no substantive constitutional claim is blocked, should be viewed as having significantly reduced authoritativeness in later cases involving constitutional claims. This is what I mean when I say that *Sheldon's* statements are dicta at most and less than that if not intended to cover constitutional claims. Even if *Sheldon* did consider and intended statements to cover cases asserting constitutional claims, it seems to me that it should matter that the court was not asked to refuse to consider such a claim.

I admire Dorf's effort which has made me resolve to rethink these matters carefully. What is clear to me now, is that I have less enthusiasm than Dorf for science-like rules aimed at more predictable determinations of authoritativeness. I would place more emphasis on a policy-informed art of determining authoritativeness. In such a system, the one that we have, there is a balance between predictability and a flexible responsiveness to a host of considerations.

182. Of course, on appeal, the plaintiff did argue that the statute, forbidding federal trial jurisdiction in his case despite diversity of citizenship was unconstitutional as inconsistent with Article III's provision for federal jurisdiction in suits between citizens of different states. *Sheldon*, 49 U.S. at 448-59, 8 How. at 446. The substantive merits of his suit, however, were based on state law. *Id.* at 462-63, 8 How. at 449-50; see also supra notes 47-51 and accompanying text. In many disputes involving federal statutes there is a jurisdictional limitation which was or could be attacked as constitutionally invalid. I assume, however, that generally such attacks are meritless. In other words, jurisdictional limitations are valid if they exclude statutory interests which have not yet become vested constitutional rights. If Congress has the substantive power to repeal a litigant's interest, I see no reason why Congress cannot accomplish the same result by a jurisdictional limitation. *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.) ("We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment."). *cert denied*, 385 U.S. 887 (1948); see also supra notes 81-86 and accompanying text. The harder issue—the one explored in this article—is whether limitations on the jurisdiction of the lower federal courts become unconstitutional when they result in excluding constitutional claims from those courts.

183. 319 U.S. 182 (1943).

184. *See supra* notes 61-72 and accompanying text.
As described in the scholarly literature, it is *Lauf* which seems to provide the strongest support for broad congressional powers to court strip. This is so because the most influential commentators present *Lauf* as a holding—as a case in which the Supreme Court finally shows that it is willing to act on all of the dicta in cases such as *Sheldon*. In *Lauf*, the Supreme Court *seems* to order a lower federal court to dismiss a plaintiff’s suit for an injunction, a remedy to which the plaintiff claimed entitlement on due process grounds. The Supreme Court *seems* to instruct the lower court to deny injunctive relief on the ground that any due process claim to an injunction would be excluded from the federal trial courts by the Norris-LaGuardia Act’s provisions which strip away federal district court jurisdiction to grant injunctions in labor disputes.

This is the view suggested by Hart in his foundational article and in his fine casebook written with Herbert Wechsler. Both works strongly indicate that *Lauf* contains a holding supporting the most generous view of congressional power over jurisdiction. After reciting earlier cases as finding (1) certain substantive due process rights protecting business from governmental interference, and (2) a subsidiary due process right to an injunction in order to protect that primary right, the casebook continues:

Did the fact that the Norris-LaGuardia Act, as interpreted, merely limited federal jurisdiction render these due process arguments (whatever their validity) irrelevant? This was the view of the reports of the Judiciary Committees . . . . The position was apparently sustained by the Supreme Court in *Lauf v. Shinner* . . . Justice Roberts saying: “There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.”

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185. See supra notes 53-60 and accompanying text and infra notes 191-195 and accompanying text.
186. See supra notes 53-60. In this Part, I offer two arguments which dispute the traditional view of *Lauf*’s holding.
187. See infra notes 198-209 and accompanying text.
189. See infra notes 198-209 and accompanying text.
190. Hart, supra note 2, at 1363 n.7.
191. HART & WECHSLER 1ST, supra note 9, at 295.
192. See supra notes 190-191.
193. HART & WECHSLER 1ST, supra note 9, at 295 (citing Coppage v. Kansas, 236 U.S. 1 (1915) and Adair v. United States, 208 U.S. 161 (1908)).
194. Id. (citing Truax v. Corrigan, 257 U.S. 312 (1921)).
195. Id. (emphasis added) (footnote and citations omitted). This reading of *Lauf* emerges from a combined reading of a passage in Hart’s dialogue, see supra text accompa-
B. The Conventional View Reconsidered

In each of the two subparts below, I will make an argument disputing Hart's reading of *Lauf* as a strong holding. The first argument is that *Lauf* can be seen as either dicta or as making no statement at all on Congress's power to exclude constitutional claims from the lower federal courts. The second argument—less interesting but worth considering—concedes, for purposes of argument, that *Lauf* is a holding, but sees it as entitled to less than full precedential weight. This latter argument, based on the demise of substantive due process in 1938, has been suggested, if not clearly made, by other commentators. I simply want to evaluate it, add some new material which supports it, and then mildly endorse it.

1. *Lauf* Holding Reconsidered.—On the surface at least, *Lauf* seems to contain a holding that Congress's jurisdictional powers permit it to exclude constitutional claims. The plaintiff made a due process claim to an injunction on the merits and urged additionally that the Constitution did not permit Congress to use its jurisdictional powers to exclude actions seeking such injunctions from lower federal court jurisdiction. The Supreme Court remanded, instructing the federal trial court to dismiss any claim for an injunction to which the

nying note 60, and from a passage that appears in all three editions of his splendid casebook, see infra text accompanying note 249. See Hart & Wechsler 1st, supra note 9, at 295; Hart & Wechsler 2d, supra note 9, at 316-17; Hart & Wechsler 3d, supra note 9, at 370.

196. This argument has never been made in a clear or forceful form. Frank Thompson, Jr. and Daniel H. Pollitt make a factually incorrect argument that, were it correct, might be seen as depriving *Lauf*'s statements of holding status regarding the power to exclude constitutional claims. Thompson & Pollitt, supra note 15, at 838 & n.161. The authors assert that the plaintiff in *Lauf* “did not argue that he [sic] had a constitutional right to a federal court injunction against labor union picketing.” Id. Although the lower court opinions are less than clear on this point, the respondent-plaintiff did make such an argument before the Supreme Court. Brief of the Respondent at 19-20, Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938) (No. 293). The plaintiff argued a second sort of unconstitutionality as well: that Congress's powers under Article III to control jurisdiction did not permit exclusion of his case. Id. at 20-22. The Supreme Court never rejected these arguments as improperly preserved below. See *Lauf*, 303 U.S. at 325-31. Instead, it avoided resolving the substantive due process claim to an injunction by remanding with instructions to the federal trial court to determine whether the Norris-LaGuardia Act's anti-injunction provision required dismissal. Id. at 330-31. It is this disposition that some have read as indicating that Congress's jurisdictional powers override substantive rights. In the discussion below, I explain why this may be wrong, but Thompson and Pollitt's work offers me no support.

Three sets of commentators do make arguments somewhat resembling mine. See Eisenberg, supra note 15; Sager, supra note 3; and Tushnet & Jaff, supra note 17. See infra notes 221-222 for discussion of these arguments.

197. See infra note 222 and accompanying text.

Norris-LaGuardia anti-injunction provisions applied. On the surface, it would seem safe to say the Supreme Court held that Congress's jurisdictional powers trumped the constitutional rights which were asserted. In other words, the Court apparently upheld court stripping.

The significant issue in *Lauf*, for purposes of this Article, was whether the Norris-LaGuardia Act prohibited the federal courts from granting the relief requested. The applicable provisions of that law prohibited federal courts from issuing injunctions in "labor disputes" unless stringent criteria were met. *Lauf* was a suit to restrain a union from what was alleged to be abusive picketing. According to findings by the federal district court, the plaintiff's employees had declined to join the defendant union and the union picketed the employer in order to persuade it to require its employees to join. Plaintiff's suit, grounded on diversity of citizenship jurisdiction, alleged that the picketing violated its rights under state law. The lower federal courts determined that the Act did not apply because the case involved no labor dispute. The Supreme Court disagreed and remanded for a determination as to whether an injunction was warranted under the statute's very narrow exceptions.

Before reaching this conclusion, the Supreme Court said of the Norris-LaGuardia Act's withdrawal of jurisdiction to grant injunctions in many labor disputes: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." It is this statement, in the context of *Lauf*'s facts and an important earlier precedent, *Truax v. Corrigan*, which Hart seems to read as holding that Congress's jurisdictional powers permit it to exclude many, if not all, constitutionally based causes of action from the trial jurisdiction of the federal courts.

203. Id. at 325-26.
204. Id. at 327, 330-31.
205. Id. at 326-27.
206. Id. at 327-28.
208. Id. at 330 (footnote omitted).
209. 257 U.S. 312 (1921).
210. See supra notes 53-60 and accompanying text.
There is, however, another possible reading of *Lauf* which emerges from a careful re-examination of the language and structure of the opinion. The opinion can be read as skirting the issue of jurisdictional powers versus constitutional rights.

The anti-injunction provision of the Norris-LaGuardia Act, upheld in *Lauf*, contained an exception which permitted injunctions in certain labor disputes when such injunctions were the only reasonable way of protecting against irreparable harm to business interests.\(^{211}\) Language in *Truax v. Corrigan* strongly suggested that it would be a violation of due process for a state not to provide a property holder with an injunctive remedy for harms inflicted by other private individuals if the state provided no other effective protection.\(^{212}\) In this light, *Lauf* takes on a different cast. Arguably, the Norris-LaGuardia Act's provision permitting injunctions in labor disputes in exceptional circumstances saved it from frustrating due process protected rights.\(^{213}\)

Narrow though it was, it is possible that the Supreme Court saw this exception as sufficiently broad to allow the federal trial courts jurisdiction to grant any injunction which was required by due process.

One can read the language and structure of the Court's opinion to suggest that, before it upheld the anti-injunction provisions of Norris-LaGuardia, the Court had first determined the provisions would not operate to exclude from the federal courts any injunctive actions to which plaintiff possessed a right under the Due Process Clause.\(^{214}\) If this is true, *Lauf* contains no holding permitting jurisdictional powers to trump constitutional claims: The Court first determined that the Norris-LaGuardia Act drew exactly the right constitutional lines, excluding no injunction to which plaintiff had a substantive constitutional right.\(^{215}\)


\(^{212}\) *Truax*, 257 U.S. at 330. *See also infra* note 228 for discussion of the business interests in *Truax* and constitutional rights.

\(^{213}\) *See infra* notes 221-222 and accompanying text.

\(^{214}\) *See infra* notes 221-223 and accompanying text.

\(^{215}\) At the time *Lauf* was decided, it is unclear whether commentators saw *Lauf*'s statements of plenary congressional control as clearly correct or simply as dictum with respect to constitutional claims. The commentators simply did not address the issue of the validity of Congress's exclusion of constitutional claims from the lower federal courts. The following exhaustive list of contemporary scholarly materials discussing *Lauf* bears that out. All are student notes or comments. None discusses the validity of court stripping. James D. Carr, Note, *Anti-Injunction Statute—Definition of a Labor Dispute*, 16 N.C. L. Rev. 411 (1938); Erwin B. Ellmann, Comment, *When a "Labor Dispute" Exists Within the Meaning of the Norris-LaGuardia Act*, 96 Mich. L. Rev. 1146 (1938); Edward Scheunemann, *"Labor Disputes" Under the Norris-LaGuardia Act*, 10 Rocky Mt. L. Rev. 193 (1938); Recent Case Note, *Norris-LaGuardia Anti-Injunction Act—Existence of a Labor Dispute*, 13 Ind. L.J. 516 (1938); Recent
A look to the merits of a constitutional claim to determine the constitutional validity of a jurisdictional limit is not unprecedented. As we have seen, the Battaglia court first determined that no constitutional claims would be blocked before it affirmed the validity of jurisdictional restrictions presented to it.216 Indeed, the Battaglia court concluded that the jurisdictional limit was valid only because it did not block adjudication of valid constitutional claims.217

How might it be inferred that the Lauf Court upheld the anti-injunction provision only after determining that the provision would block no due process rights? The Lauf majority affirmed Congress’s jurisdictional powers immediately after quoting the safeguard exception to the Norris-LaGuardia anti-injunction provision invoked in Lauf.218

Recall that the Court ends a paragraph saying: “There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior Courts of the United States.”219 The full passage in which the court upholds Congress’s powers is easily compatible with a view of those powers as not permitting exclusion of constitutional claims:

Section 7 [of the Norris-LaGuardia Act] declares that “no court of the United States shall have jurisdiction to issue

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217. Id.
218. The provision of the Norris-LaGuardia Act under consideration and quoted by the Court in Lauf was section 7, which allowed certain labor injunctions, when required by compelling circumstances. See infra note 220 and accompanying text. Not at issue in Lauf was section 4, 29 U.S.C. §§ 104 (1988), which flatly forbade certain other labor injunctions, including those sought to stop employees and their union from taking specified actions against their employer. Particularly, section 4 prohibited injunctive enforcement of yellow dog contracts—contracts whereby employers successfully bargained with employees that they will not engage in union activities. See S. Rep. No. 165, 72d Cong., 1st Sess. 14-18 (1932). The activities at issue in Lauf did not fall under section 4 because the employer’s injunction sought relief against the alleged disruptive activities of a union that the employees had refused to join. See supra note 203 and accompanying text. Consequently the Court in Lauf did not confront the constitutionality of a provision that forbade, without exceptions for compelling circumstances, injunctions against union activities.

However, even as to the flat prohibition in section 4, not at issue in Lauf, the legislative history carries some indication that Congress believed that the Court was likely to conclude that Section 4 blocked no constitutional rights. See H.R. Rep. No. 669, 72d Cong., 1st Sess. (1932). The Congress appeared to find some solace in the Courts recent pronouncements on the right of employees to organize, id. at 7, and indicating that it believed that the Court had given Congress no reason to believe that outlawing injunctions would be unconstitutional, id. at 16. These statements arguably offer support for the proposition that Congress had no intention to block the assertion of Constitutional rights.
219. Lauf, 303 U.S. at 330 (emphasis added) (citations omitted).
a temporary or permanent injunction in any case involving or growing out of a labor dispute;" . . . "except after findings of fact by the court, to the effect (a) that unlawful acts have been threatened and will be committed unless restrained" . . . . By subsections (b) to (e) it is provided that relief shall not be granted unless the court finds that substantial and irreparable injury to complainants' property will follow; that . . . greater injury will be inflicted upon the complainant by denying the relief than will be inflicted upon defendants by granting it; that complainant has no adequate remedy at law; and that the public officers charged with the duty to protect complainants' property are unable or unwilling to provide adequate protection. There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States. 220

The italicized language suggests that the unavailability of state police protection for business interests in a labor dispute and the inadequacy of a damage action combine to permit a federal injunction, if the usual irreparable harm and balance of the equities tests are also met. 221 Coming near the end of a paragraph which the majority may have intended to indicate the compatibility of the Act with substantive due process, the word "thus" could be read as meaning "under circumstances where injunctions are available if constitutionally necessary." If this is what the Court in Lauf intended, then it left for another day's determination the constitutionality of congressional limits on jurisdiction that close out constitutional rights. 222

220. Id. at 329-30 (emphasis added) (footnotes omitted).

221. The statute certainly does not say that remedies in the state courts are per se adequate. See 29 U.S.C. §§ 101-115 (1988). Indeed, if one does not interpret "public officers charged with the duty to protect complainants' property" as including state judges, 29 U.S.C. § 107(e), the statute does not seem to imply that the availability of adequate injunctive relief in the state courts ousts the federal courts of power to grant an injunction. Cf. Tushnet & Jaff, supra note 17, at 1322 n.52 (viewing the availability of an injunctive remedy in state courts as saving the Norris-LaGuardia Act's exclusion of federal jurisdiction from unconstitutionality).

222. Eisenberg offers similar analysis leading to the conclusion that the Norris-LaGuardia Act is constitutional "today," but clearly he does not suggest, as I do, that Lauf itself may have used the interpretation he offers of the Norris-LaGuardia Act to avoid deciding the constitutionality of the jurisdictional exclusion as applied in Lauf. Eisenberg, supra note 15, at 528-29. Instead, he appears to assume that the Court in Lauf upheld the Act's jurisdictional exclusion of plaintiffs attack on the anti-injunction provision without a real resolution of the merits: "[T]he Court did not have to reach the substantive issue of the validity of the district court injunction because it upheld the withdrawal of jurisdiction . . . ." Id. at 529. Apparently Eisenberg finds this somewhat troublesome because he reads an earlier case, Truax v. Corrigan, 257 U.S. 312 (1921), to recognize a constitutional right to an injunction that would have been extinguished by the anti-injunction provisions of the Norris-LaGuardia Act. After discussing Truax, Eisenberg sets out to narrow what he believes otherwise would have been Lauf's broad holding in favor of court stripping. He does
While this is a plausible alternative reading of *Lauf*, it is not without difficulties. The possible inferences just discussed are weakened by other features of the opinion. First, the Court never says expressly that the Norris-LaGuardia Act is compatible with any substantive due process right to relief which might have remained in 1938. Second, this by concluding that the substantive due process approach taken in *Truax* had fallen from favor in the Supreme Court. Though he describes *Truax* itself as "in peril" and "discredited," he never describes it as overruled. Eisenberg, supra note 15, at 529.

The meaning of this analysis is not clear. On the one hand, if Eisenberg had read the Norris-LaGuardia Act to permit any injunction substantively required by due process, he would have had no need to discredit *Truax* in order to limit *Lauf*. On this assumption, *Lauf* would contain no holding that Congress can exclude constitutional rights, because the Act would have been read not to exclude them.

On the other hand, if the Court had overruled *Truax* sub silentio in order to validate the Act's jurisdictional exclusion, then the *Lauf* Court found court stripping unconstitutional. However, nowhere is there any hint of this in the *Lauf* Court's opinion. Additionally, Eisenberg does not seem to view *Lauf* as holding that a jurisdictional restriction is invalid if it excludes enforcement of a real constitutional right: He says that the Court avoided the substantive merits of the constitutional claim of a right to an injunction. *Id.*

Eisenberg's analysis leaves us with the difficult notion that a federal court that upholds the exclusion of an alleged constitutional right from its jurisdiction without first passing on the merits of the claim can somehow manage to avoid holding that the jurisdictional exclusion is valid irrespective of the validity of the constitutional claim. But how else could one characterize such a decision other than as a holding that jurisdictional provisions trump substantive constitutional rights?

My plausible reading of *Lauf* avoids these difficulties by showing how one could read *Lauf* as interpreting the Norris-LaGuardia Act to permit any injunction required by due process, including *Truax* style due process if it still held sway. I do not suggest that the Supreme Court expected the district court to overrule *Truax* on remand. Carefully examined, *Truax* was an equal protection case and *Lauf* a due process case of first impression. See infra notes 252-256 and accompanying text. It would make sense to allow a federal district court familiar with all of the facts to determine whether the specific injunction sought in *Lauf* met the Norris-LaGuardia Act's exceptional circumstances test: a test that may have permitted injunctions where required by due process and possibly in other circumstances.

Larry Sager's argument may be similar to mine. See Sager, supra note 3. Sager first emphasizes the quite different argument that the substantive due process right asserted in *Lauf* was probably no longer plausible when *Lauf* was decided. See id. at 19 n.6. This alone does not, however, destroy *Lauf*'s status as holding, because the Court used the jurisdictional provision to avoid resolving the merits. See supra notes 202-207 and accompanying text. Sager then alludes in the same footnote to the fact that the Norris-LaGuardia Act "permits labor injunctions in certain circumstances." Sager, supra note 3, at 19 & n.6. Sager never explains how this is connected to the proposition asserted in the accompanying text that the "judiciary has never had the occasion to rule decisively on [the constitutionality of court stripping]." *Id.* at 19. It is possible that, by these fragmentary statements, Sager intends to assert a version of the argument that I have just concluded in the text above. See supra notes 211-221 and accompanying text.

Certainly that portion of the Norris-LaGuardia Act at issue in *Lauf*, section 7, and its legislative history are compatible with the interpretation that I offer above. See supra note 218. Even those harsher provisions of the Norris-LaGuardia Act which flatly preclude some injunctions, are not clear as to their intent to exclude injunctions if required by due process or equal protection. *Id.*
the Act's exceptions permitting injunctions may have been too minimal\(^{223}\) to preserve due process from the perspective of the *Lochner v. New York*\(^{224}\) ethos, if the latter still prevailed as late as the *Lauf* decision.\(^{225}\)

A third objection to this revisionist reading stems from a citation appearing in *Lauf*. At the end of the crucial passage approving Congress's powers "thus" to regulate jurisdiction, the Court cites to *Kline v. Burkhardt Construction*.\(^{226}\) The passages cited in *Kline* state strongly and clearly that there are no limits on Congress's power to limit the jurisdiction of the lower federal courts.\(^{227}\)

The *Lauf* Court's citation to *Kline* weakens a revisionist reading, but not decisively. Like similar statements in *Sheldon* and *Lockerty*, *Kline*’s statements are dicta as to constitutional claims.\(^{228}\) Moreover, it

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223. The requirement that state officers be found unable or unwilling to protect the rights of businesses, 29 U.S.C. § 7, may have been so stringent as to make injunctions unavailable in some cases where they were required by the Constitution.

224. 198 U.S. 45 (1905).

225. Substantive due process doctrine developed in the nineteenth century as natural rights and natural law philosophy was read into the Due Process Clause to invalidate state and federal legislation. The height of Supreme Court acceptance and application of this doctrine occurred during the period from the turn of the century to approximately 1936. *Lochner v. New York*, 198 U.S. 45 (1905), exemplifies this period. In *Lochner*, and in many other cases of the period, the Court invalidated economic and social legislation which it viewed as interfering with the liberty to contract. See John E. Nowak & Ronald D. Rotunda, Constitutional Law § 11.3 (4th ed. 1991); Gerald Gunther, Individual Rights in Constitutional Law 104-62 (12th ed. 1991).

During this period, many states and the federal government began to experiment with economic and social legislation, ranging from the regulation of work hours to health conditions in the workplace. However, the Court struck down these reforms as contrary to the substance of the Due Process Clause, except when the state could strongly justify the legislation as appropriate exercise of the police power. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908). This judicial interventionism began to ebb by the time of the New Deal and the Court's 1938 *Lauf* decision. See Nowak & Rotunda, supra; Gunther, supra. See also infra notes 245, 247.


228. *Kline* was a breach of contract action, *id.* at 227, that did not involve a restriction on the lower federal courts' jurisdiction in any ordinary sense. In *Kline*, the Court considered arguments concerning the power of federal courts to enjoin duplicative proceedings pending in state court. *Id.* at 233-34. The party supporting the injunction argued that, if a federal court failed to enjoin then pending state court proceedings that duplicated those pending before the federal court, the state court might reach judgment first. This would in turn require dismissal of the federal proceedings on res judicata grounds, ultimately depriving the plaintiffs of a federal judgment. *Id.* at 229, 233. This argument raised no constitutional issues other than the res judicata/jurisdictional issue. In rejecting it, the Court stated that the availability of a federal forum in the first place was entirely a matter of legislative grace. *Id.* at 233. This proposition seems adequate to reject plaintiffs’ argument that the state court proceedings should be stayed, but it is much broader than was necessary to do so. There is nothing obviously constitutionally problematic about a regime in
is possible that they are not even dicta. Perhaps Kline and cases containing similar language, such as Sheldon v. Sill,229 did not intend their statements to cover exclusions aimed at constitutional rights. If so, the view of the Court in these cases parallels the reading of Witkowski v. United States230 and Armstrong v. United States231 which I offer above.232 One might view the citation of Kline in Lauf as saying: “We have made some very broad statements of Congress’ power in cases such as Kline, but certainly here, where the courts have jurisdiction when necessary to provide what due process requires, there can be no question of Congress’ power.”

In my view, the plausible, but less than certain alternative reading of Lauf that I offer above, leaves Congress’s powers over the lower federal courts as unsettled after Lauf as its powers over the Supreme Court’s appellate jurisdiction are left after Ex Parte McCardle.233 Like Lauf, McCardle contains much language suggesting that it upheld congressional power to exclude constitutional claims,234 but McCardle’s circumstances and some of its language ultimately call into question its value as a clear holding favoring absolute control.235 Commentators generally have treated McCardle as less than a clear holding that Congress has plenary power to exclude constitutional issues from the Supreme Court’s appellate jurisdiction.236 Lauf deserves the same sta-

which federal courts must be open to hear constitutional claims, but in which earlier state court judgments as to those claims are accorded preclusive effect by the lower federal courts. Of course, the Supreme Court remains open to review the merits of state court judgements that preclude the maintenance or continuance of specific federal actions.

229. 49 U.S. 453, 8 How. 441 (1850). See supra notes 48-52 and accompanying text.
230. 7 Ct. Cl. 501 (1872).
231. 80 U.S. (13 Wall.) 154 (1872).
232. See supra notes 154-168 and accompanying text.
233. 74 U.S. (7 Wall.) 506 (1868).
235. See McCardle, 74 U.S. at 515 (dismissing an appeal but suggesting, in the opinion’s last paragraph, that there may have been a route by which McCardle could have raised his constitutional issues before the Supreme Court other than by means of the route that Congress chose to close off); BERNARD SCHWARTZ, CONSTITUTIONAL LAW 15-20 (1972); 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, 246-51 (1970); Hart, supra note 2, at 1364; Leonard G. Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 178-80 (1960); see also Van Alstyne, supra note 234, at 247-50. Van Alstyne accepts the characterization of McCardle’s statements as to the exclusion of Constitutional claims as dicta, but sees this as “technical revisionism.” Id. at 249-50. He takes McCardle’s dicta seriously in finding no internal limits to Congress’s exceptions power, but does find limits in other provisions of the Constitution such as the Bill of Rights. Id. at 259-60.
236. Ratner, supra note 235, at 178-80 (concluding that McCardle did not hold that Congress can withhold any constitutional claims from the Supreme Court’s appellate jurisdic-
tus in its realm, dealing with congressional powers over the lower federal courts.

2. The Strength of Any Holding in Lauf.—In the preceding section, I argued that Lauf’s statements affirming Congress’s court-stripping powers are plausibly no more than dicta. More precisely, the Supreme Court may have resolved Lauf on statutory interpretation grounds, thereby avoiding a decision as to the constitutionality of court stripping. But even if I am wrong and Lauf does contain a holding validating court stripping, that holding is a comparatively weak one. It is weak because of the probable invalidity of the substantive constitutional claims237 which the Court may have allowed Congress to exclude from consideration by the federal courts. This argument has been suggested by several commentators but never fully spelled out.238

The first premise of these arguments is that, by early 1938 when Lauf was decided, the substantive due process rights asserted in Lauf and blocked by the Norris-LaGuardia Act were no longer plausible. These alleged rights were those of a business (1) to be free from certain sorts of regulatory interference and (2) to an injunction to effectuate the rights referred to in (1).239 The argument is that these were the alleged rights asserted in Lauf and that they belonged to the substantive due process regime of Lochner, a regime which had been repudiated by the time of Lauf.240

The unstated but obviously implicit second premise must be that the weakness of the substantive rights asserted would weaken Lauf’s

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237. See supra note 225 for an explanation of the decline of substantive process.

238. Rotunda implicitly endorses this argument by applying post-Carolene Products rational basis equal protection analysis, see Carolene Prods. Co. v. United States, 323 U.S. 18 (1944), to the Norris-LaGuardia Act and concluding that the Act violated no substantive right because the classification made in Lauf involved no suspect class. Rotunda, supra note 15, at 851-52. From this, he concludes that the Supreme Court “implicitly acknowledged” the demise of the earlier declared constitutional rights whose assertion may have been blocked in Lauf. Id. at 852. In the context of his argument that substantive constitutional rights limit Congress’s court-stripping powers, his point seems to be that Lauf is consistent with the proposition that constitutional rights cannot be trumped by Congress’s Article III powers. Id. at 851-52. See also Eisenberg, supra note 15, at 529-30 (apparently taking some solace from the fact that by the time Lauf was decided the substantive rights urged by the plaintiff were “already in peril”); Tushnet & Jaff, supra note 17, at 1322 n.52 (recognizing briefly the argument discussed in this section of my Article, although not endorsing it).

239. See supra notes 193-194 and accompanying text; Lauf, 303 U.S. at 325.

240. See supra note 225 and infra note 245.
jurisdictional holding. On the surface this seems very strange. In *Lauf*, the respondent raised both a claim of substantive constitutional entitlement to an injunction and a claim that Congress's exclusion of such claims from the federal courts was unconstitutional.\textsuperscript{241} Recall that, for the purposes of this section, we are assuming that the *Lauf* Court disposed of the case by giving effect to the Norris-LaGuardia Act as a court-stripping provision. Assuming this, it follows that the Court thought that the merits of the constitutional claims asserted were irrelevant. To put it another way, by deciding the jurisdictional issue without resolving the merits, the Court recognized the possible validity of the substantive constitutional claims, but nevertheless allowed their exclusion.

How can an assessment that the claims were substantively weak detract from the strength of the Court's very different conclusion that their weakness, strength or even clear validity was irrelevant because of Congress's power to trump enforcement of constitutional rights through its power over jurisdiction? To the extent that the argument for weak precedential weight has any validity, its point must be psychological: A court may be less careful about affirming Congress's court-stripping powers when the stakes are lower, that is, when in fact no constitutional rights are likely to be frustrated. This seems the most likely unstated premise underlying the commentary which advances the "Lochner was dead" argument for weakening any holding in *Lauf*.\textsuperscript{242} It is common sense that, as the amount at stake increases, the more carefully a decision-maker tends to think. There is some support in Supreme Court cases for the proposition that a less carefully considered holding merits less precedential weight. For example, the Supreme Court's practice of treating a holding in summary affirmances as entitled to less weight than that in fully considered opinions also supports this proposition.\textsuperscript{243}

If we accept the premises that substantive weakness leads to decreased consideration and that decreased consideration leads to decreased precedential weight, we must nevertheless examine the factual basis of the very first premise: that the Justices knew *Lochner's* substantive due process scheme was dead. Here analysis seems to require more than the received hindsight.

\begin{itemize}
\item \textsuperscript{242} For this commentary \textit{see supra} note 238.
\item \textsuperscript{243} Edelman v. Jordan, 415 U.S. 651, 670-71 (1974) ("They are not of the same precedential value as would be an opinion . . . on the merits." (footnote omitted)).
\end{itemize}
Admittedly there is great force to the notion that the regime of *Lochner* was ending as *Lauf* was decided. *Lauf* was decided after *West Coast Hotel Co. v. Parrish*\(^\text{244}\) when the Justices opposing the regime of *Lochner* seemed to turn the tide of war,\(^\text{245}\) but about two months before the Court's decision in *Carotene Products*,\(^\text{246}\) the Appomattox of the *Lochner* regime.\(^\text{247}\)

While it is fair to guess that at the time of *Lauf* it was implausible that *Lochner*-style rights would be extended, this is not sufficient to support *Lauf* as a substantively easy case. Hart's account of *Lauf* suggests that the appellant sought, not a mere extension of *Lochner*, but rather, the overruling of clear substantive due process precedents, such as *Truax v. Corrigan*.\(^\text{248}\) Using a jurisdictional provision to exclude a highly specific right, clearly established under the *Lochner* regime, might well be troubling to the Court. One might expect that these circumstances would *increase* the care with which the Court considered the jurisdictional exclusion, casting doubt on the argument I present here to discount *Lauf's* upholding of court stripping. Yet, this reasoning assumes *Lauf* was asserting an established right, rather than presenting a case of first impression. My argument in this section is that *Lauf* was a case of first impression in a climate hostile to the rights asserted. Therefore, it is possible that its jurisdictional holding was less carefully considered due to the improbability that constitutional rights in fact would be denied enforcement.

As I read them, Henry Hart's article and casebook suggest that *Lauf* blocked clearly established rights. Running the usual risks of lengthy quotation, here are the key casebook passages:

> The Norris-LaGuardia Act . . . narrowly restricted the authority of courts of the United States to issue a restraining order or a temporary or permanent injunction in “a case involving or growing out of a labor dispute,” and provided that

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\(^{244}\) 300 U.S. 379 (1936).

\(^{245}\) The Court signaled in *West Coast Hotel* and *Nebbia v. New York*, 291 U.S. 502 (1934), that it was beginning to curtail its strict review of ordinary social and economic legislation. *See* Nowak & Rotunda, *supra* note 225; Gunther, *supra* note 225. For a fuller discussion of the *Lochner* regime, see *supra* note 225.

\(^{246}\) 304 U.S. 144 (1938).

\(^{247}\) By 1938, perhaps in response both to growing criticism that it had abandoned its traditional restrained role and to political pressure from the Roosevelt White House, the Court made a definite step away from the interventionism of the substantive due process analyses of its early twentieth century case law. In *Carotene Products*, the Court announced its intention to uphold legislation if it was reasonably supported by any "facts either known or which could reasonably be assumed." *Carotene Prods.*, 304 U.S. at 154 (emphasis added). *See* Nowak & Rotunda, *supra* note 225.

\(^{248}\) 257 U.S. 312 (1921); *see* Hart & Wechsler 1St, *supra* note 9, at 295.
“yellow-dog” contracts [employee agreements to forswear union activities] “shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court.” The term “court of the United States” was defined to mean “any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress.” The Act throughout was drawn as a limitation of the “jurisdiction” of the courts.

At the time of the enactment, *Truax v. Corrigan* . . . had found state legislation similarly limiting employers’ remedies to be a denial of due process; and [the earlier cases] *Coppage v. Kansas*, . . . and *Adair v. United States*, . . . had held that the right to condition employment on an undertaking not to join a labor union or on non-membership also was protected by the due process clauses of the Constitution.

Did the fact that the Norris-LaGuardia Act, as interpreted, merely limited federal jurisdiction render these [federal] due process arguments (whatever their validity) irrelevant? This was the view of the reports of the Judiciary Committees . . . . The position was apparently sustained by the Supreme Court in *Lauf v. Skinner* . . . Justice Roberts saying: “There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.”

I believe these passages, although not clear on the point, unintentionally give a misimpression that the constitutional right to an injunction asserted in *Lauf* was the same as that asserted in *Truax*, specifically a right to an injunction to enforce a yellow-dog contract.

Such an understanding of *Lauf* is doubly wrong. First, neither *Truax* itself nor *Lauf* involved a yellow-dog contract. Second, the constitutional right to an injunction that *Truax* did establish was most clearly grounded on the Equal Protection Clause not on the Due Pro-


250. The third and current edition of *Hart & Wechsler* contains the following footnote appended to the just quoted passage: “*Lauf* was an action by an employer to enjoin a union and one of its officials from engaging in picketing and related activities.” *Hart & Wechsler 3d*, *supra* note 9, at 370 n.6. Although I am not sure, I believe this note is designed to dispell the possible inferences from the passages above that *Lauf* involved a “yellow-dog contract,” as considered in *Coppage*, 236 U.S. 1 (1915) and *Adair*, 208 U.S. 161 (1908) or the specific right to an injunction declared in *Truax*.
cess Clause.\textsuperscript{251} In \textit{Truax}, the Court found it an equal protection violation for a state to grant businesses injunctions to protect their interests from a variety of injurious behavior, but to deny injunctions to protect against injury stemming from labor disputes.\textsuperscript{252}

The Equal Protection Clause contains prohibitions running against state governments, but not the federal government.\textsuperscript{253} Consequently \textit{Truax}'s precise equal protection holding, directed at state legislation, was unavailable for use against the Act of Congress attacked in \textit{Lauf}.\textsuperscript{254} It is true that in dicta \textit{Truax} did suggest that an inequality might be so grotesque as to violate due process as well as equal protection.\textsuperscript{255} However, cases decided both just before and just after \textit{Lauf} made clear that the standards were different so that federally created

\begin{itemize}
  \item \textsuperscript{251} \textit{Truax}, 257 U.S. at 331-39. The Court suggested the possibility of a due process violation as well, but seemed to avoid definitive resolution of that issue. \textit{Id.} at 330-39; see also infra note 254.
  \item \textsuperscript{252} \textit{Id.} The \textit{Truax} Court reviewed an Arizona statute that prohibited state courts from issuing injunctions in certain labor disputes. The suit was brought in an Arizona court by an employer who sought an injunction to stop former employees and their union from “destroying” plaintiff’s business by allegedly abusive and threatening behavior. \textit{Id.} at 321-22. Based on the statute, the state courts refused the injunction. \textit{Id.} at 323-24. The Supreme Court reversed on grounds that the anti-injunction statute was a violation of the Fourteenth Amendment's Equal Protection Clause, \textit{id.} at 331, and possibly of its Due Process Clause as well. \textit{Id.} at 330; see also supra note 254.
  \item \textsuperscript{253} U.S. CONST. amend. XIV, § 1.
  \item \textsuperscript{254} See \textit{Truax}, 257 U.S. at 331-32. Contrary to familiar current due process principles, the Supreme Court suggested that a state’s failure to grant any judicial remedy for one private party’s destruction of another’s property, might deprive the latter of due process of law. \textit{Id.} at 329-30. Arguably, however, this was dictum because the Court skeptically recognized at least a possibility that some sufficient non-injunctive remedy remained available to the plaintiffs. \textit{Id.} at 330.
  \item \textsuperscript{255} \textit{Id.}
\end{itemize}
inequalities often would not violate due process even if they would violate equal protection.256

As a result of all this, the substantive constitutional merits of Lauf did not follow easily from those of Truax. The Court could not have simply struck down the federal statute on grounds that identical (or even similar) state laws had been held to violate equal protection in Truax. Issues of first impression under the Due Process Clause would have been presented. I agree with the implicit view of several commentators that after West Coast Hotel and weeks before Carolene Products, it is likely that a majority of Justices knew that the Court would resolve such an issue in favor of the constitutionality of the Norris-LaGuardia Act.

For purposes of argument, then, let us assume that which I disputed in section B.1 above. Let us assume that the due process right asserted in Lauf was excluded on purely jurisdictional grounds. Even on this assumption, the analysis presented in this section shows that the existence of the right which the plaintiff claimed in Lauf was an issue of first impression appearing in an inhospitable climate. Hence I find at least plausible the implicit arguments of some commentators. Their view seems to be that the Lauf Court may have been less careful in its opinion excluding that right from the federal courts and that

256. Two cases, roughly contemporaneous with Lauf, provide indications of the propositions (1) that some inequalities might be so sufficiently gross to violate both due process and equal protection but that (2) equal protection was the more confining standard. In a pre-Lauf case, Steward Machine Co. v. Davis, 301 U.S. 548 (1937), the Court wrote:

The Fifth Amendment unlike the Fourteenth has no equal protection clause. . . .

If this latitude of judgment is lawful for the states, it is lawful, a fortiori, in legislation by the Congress, which is subject to restraints less narrow and confining. . . . The classifications and exemptions [in question here would] be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. . . . [Therefore the] act of Congress is . . . valid, so far at least as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment. . . .

Id. at 584-85. In a post-Lauf case, Currin v. Wallace, 306 U.S. 1, (1939) the Court wrote:

Undoubtedly, the exercise of the commerce power is subject to the Fifth Amendment but that Amendment, unlike the Fourteenth, has no equal protection clause. . . . If it be assumed that there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment, that is a different matter from a contention that mere lack of uniformity in the exercise of the commerce power renders the action of Congress invalid.

Id. at 14.

It was only years later in Bolling v. Sharpe, 347 U.S. 497 (1953)—a companion case to Brown v. Board of Education, 347 U.S. 483 (1953)—that the Court began reading an equal protection component into the Fifth Amendment's Due Process Clause which was substantially identical to the Equal Protection Clause itself.
therefore any holding supporting court stripping is weakened by the contemporaneous demise of *Lochner.*

**CONCLUSION**

The case law record contains one absolutely clear Supreme Court holding as to the validity of court stripping, *Armstrong v. United States.* That case strikes down a jurisdictional limit that would have blocked assertion of a constitutional claim in federal trial courts. The case law contains one opinion, *Lauf v. E.G. Shinner & Co.,* which may or may not be viewed as holding to the contrary. But the dicta in *Sheldon v. Sill,* *Lauf,* and *Lockerty v. Phillips* upholding court stripping are extremely strong, and unlike *Armstrong,* those cases provided reasons for their conclusions. It is hard to compare the significance of the *Sill-Lauf-Lockerty* line of cases with the countervailing force of *Armstrong.* On the one hand, the former cases are relatively recent and contain clear dicta supporting nearly unbridled congressional power to exclude constitutional claims from enforcement in the lower federal courts. On the other hand, *Armstrong* is a much older case, but there the court actually confronted a jurisdictional exclusion of a constitutional right. It struck down the exclusion and upheld the right.

My conclusion from this—that the case law record is much less clear than previously thought—is a significant one. It proves Justice Scalia wrong. From no reasonable perspective do the cases alone preclude the sort of debate which has been taking place among commentators in recent years and which the Court seemed to legitimate with *Johnson v. Robison.* When the need arises in a case before the Court, the new scholarship should receive a fair hearing. The Court should also consider whether court-stripping powers better complete or whether they undercut the system of checks and balances as they have evolved from the framers' design. What would be disappointing would be a statement that the matter is settled followed by a string cite to *Sheldon, Lauf* and Hart's fine article.

257. See supra note 238 and accompanying text for a list of articles appearing to this argument.
258. 80 U.S. (13 Wall.) 154 (1872).
259. 303 U.S. 323 (1938).
260. 49 U.S. 453, 8 How. 441 (1850).
261. 319 U.S. 182 (1943).