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## Jurisdictional Implications in the Reduced Funding of Lower Federal Courts

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# Jurisdictional Implications in the Reduced Funding of Lower Federal Courts

James P. George\*

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This article argues two related propositions. First, if Congress were to eliminate all funding for lower federal courts, its constitutional authority to regulate those courts would become as meaningless as the empty courthouses. Second, Congress breaches its duty to furnish a forum at a point short of full defunding, and with that breach, Congress’s regulatory power over private civil disputes otherwise litigable in state courts—preempted and removable state law claims—becomes constitutionally invalid. The first fact setting of full defunding is hypothetical; the second has been underway for several years.

I. THE DEFUNDING OF FEDERAL COURTS

For the past two decades, Congress has undermined the operation of federal courts with a combination of inadequate budget increases and remarkable expansions of federal jurisdiction. As explained in the following section, the budget shortfalls are greater than apparent on the face of the budget because of the unique, constitutionally-mandated allocation of fixed costs and so-called discretionary operating costs within the federal judiciary.

A. *The Judicial Budget*

Federal courts are in an unprecedented funding crisis for

which there is, as of now, no end in sight and no plausible solution. Funding shortages are not new to the judiciary—Congress short-funded the jury allocation in 1986,<sup>1</sup> and even declined funds for purely political reasons in its 1802 attempt to unseat Federalist judges appointed by President Adams.<sup>2</sup> But the current crisis, now several years underway, is of a magnitude that if unchecked may well redistribute the power balance among the government's three branches. The judiciary's most recent and most pointed response is Chief Justice Rehnquist's commissioning of a study that resulted in the *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*,<sup>3</sup> a report that both quantifies and places in context the judiciary's crisis and provides a number of good faith contingency plans to deal with deteriorating support.

Tight funding from a tax-cutting Congress is not the only problem. The fact of lagging funds is aggravated by the judiciary's unique distinction between mandatory or fixed costs and "discretionary" costs. Examples of fixed costs are salaries for judges and their immediate staffs (secretaries and judicial clerks) and rent paid to the General Services Administration. All other expenses are discretionary—these include the salaries for all other employees (district clerks and their staffs, probation office, federal public defender), and the purchase of equipment.<sup>4</sup>

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1. See *Armster v. United States Dist. Court*, 792 F.2d 1423, 1430 (9th Cir. 1986) (holding that the "civil trial system may not be suspended for lack of funds."); see also James T. Brennan, *Judicial Fiscal Independence*, 23 U. FLA. L. REV. 277, 279 (1971) (noting earlier funding shortages, particularly in state courts); Geoffrey C. Hazard, Jr. et al., Comment, *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286 (1972) (same); Jonathan Bunge, *Congressional Underappropriation for Civil Juries: Responding to the Attack on a Constitutional Guarantee*, 55 U. CHI. L. REV. 237, 238 n.3 (1988) (same).

2. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) (stating that the newly-appointed judges sued to compel funding, but the opinion skirts their argument); UNITED STATES CONST. ANNOT., 600 (J. Killian & G. Costello, eds., 1992) (citing W. CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES*, 58-78 (1918)).

3. *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond* (Aug. 12, 2004) [hereinafter *Cost-Containment Report*] (unpublished report, App. F to the Report of the Executive Committee, Judicial Conference of the United States, approved on Sept. 21, 2004) (on file with author). Although the Report is not publicly available, the proceedings approving the Report are available at <http://www.uscourts.gov/judconf/sep04proc.pdf>.

4. *Cost-Containment Report*, *supra* note 3, at 6 ("Under statute, only pay and benefits for Article III judges and bankruptcy judges are considered 'mandatory' requirements. In determining how to spend available funds, however,

Recent judicial budgets have been flat or modestly increased,<sup>5</sup> with Congress justifying its denials of needed new funds as the result of lean times for all government departments.<sup>6</sup> But the problem is growing worse more quickly than we might speculate from these modest budget increases. Fixed costs have risen at a far greater rate than the annual percentage increases, leaving a dwindling allotment for the so-called discretionary costs.<sup>7</sup> In describing these allocations, it is important to understand that the term “discretionary” does not mean that these services can be eliminated; rather, it means the local district has discretion to allocate this money depending on local needs, while the local district does not have discretion in paying judicial salaries or rent to the Government Services Administration. The mandatory or fixed expenses will increasingly eat up the federal court budget while essential employees are terminated and essential court services cut.

Within these fixed expenses, two components must be distinguished—judicial salaries and rent. Judges’ salaries account for nine percent of the total budget, and studies show they are

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additional areas customarily have been set apart by the Executive Committee for full funding without cutbacks, including magistrate judgeships, chambers staff costs, certain law enforcement-related costs, lawbooks and computer-assisted legal research, and space rental payments. Most of these costs have been deemed ‘uncontrollable’ in the short term. To attain a balanced financial plan, the committee restricts spending in other areas that are considered discretionary. These discretionary categories include non-chambers staffing, general operating costs, and technology. These expenditures largely fund the court units—clerks’ offices, probation and pretrial services, circuit executives, staff attorneys, and other support functions.”)

5. *Cost-Containment Report*, *supra* note 3, at i (“On top of the last two years of inadequate funding, the judiciary confronts the prospect of larger shortfalls over the next several years. Estimates of probable funding levels, when compared with budget requirements based on current policies and practices, indicate that a growing gap of hundreds of millions of dollars will materialize over the next five years—putting thousands of court jobs at risk.”); *id.* at 3 (“In past years, Congress provided less funding than requested, with the percentage increases declining each year for the past five years.”).

6. Michael McGough, *Judiciary Faces Fight for Federal Funding*, PITTSBURGH POST-GAZETTE, Apr. 25, 2004, at A16 (quoting Senator Arlen Specter: “We’re coming out of a recession, we’re at war, and we have a big deficit,” Specter said. “I’m prepared to listen [to the judges], but it’s a matter of comparing them to other departments whose problems are more acute. This is an era of belt-tightening.”). *But see infra* notes 33-34 and accompanying text (suggesting a less neutral motive).

7. *See infra* notes 13-19 and accompanying text.

significantly underpaid.<sup>8</sup> Rent is the other major fixed-cost component. That federal courts even pay rent will be a surprise to most lawyers, but they do. The Government Services Administration, that is, the executive branch, “owns” the buildings housing the federal courts. The GSA sets the rental rate and does so according to its own formula,<sup>9</sup> and as a result, rent has been the largest percentage of budget growth.<sup>10</sup> The resulting irony is that our federal courts are compromised because we are charging ourselves too much rent. To the extent that the executive branch in any given administration chooses to pursue an anti-judicial agenda, the GSA’s ability to set its rental rates would seem to undermine separation of powers.<sup>11</sup>

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8. Am. Bar Ass’n & Fed. Bar Ass’n, *Federal Judicial Pay Erosion: A Report on the Need for Reform* 8-18 (2001), <http://www.abanet.org/poladv/fedjudreport.pdf> (last visited Nov. 25, 2005); see also *Adjusting the Compensation of Federal Judges*, 80 JUDICATURE 248 (1997) (reporting that since 1993 judicial salaries have declined 12.2 percent in real dollars); *Economic Independence for Federal Judges*, 84 JUDICATURE 56 (2000) (advocating higher judicial pay).

9. 40 U.S.C.A. §§ 584-86 (West 2005); 41 C.F.R. § 102-85.15 (2005).

10. *Cost-Containment Report*, *supra* note 3, at 2 (“The judiciary’s overall annual budget needs are driven by the cost increases necessary to continue current operations, and by increases associated with growth in workload, judges, staff and space. Cost increases in the two primary spending areas, i.e., personnel and rent, have significantly outpaced inflation. Rent costs have grown at a faster pace than personnel costs”).

11. On April 13, 2005—late in this article’s writing—the Judicial Conference of the United States issued a memorandum complaining again of the GSA’s rent structure. The memo included the points that: (1) the GSA has discretion under Title 40 U.S.C. § 581 “to exempt federal entities in GSA controlled space from rental payments”; (2) budget shortages required the judicial branch to cut eight percent of its total staff (1,790 positions) in fiscal year 2004 and early fiscal year 2005, cuts far more drastic than any other federal department or agency had to make; (3) “even though the judiciary receives only two-tenths of one percent of the federal budget,” it pays “more in rent in total dollars than any other department or agency in the federal government,” including the Defense Department, except for the Department of Justice which pays three percent of its larger budget in rent, compared to the judiciary’s payment of twenty-two percent of its budget; (4) many federal agencies pay no rent at all on their government-owned facilities; (5) overall, federal agencies pay an average of 0.19 percent of their budgets in rent, and Congress pays 0.56 percent of its budget, while the judiciary pays twenty-two percent of its budget in rent, that is, the judiciary pays 116 times more in rent, as a percentage of budget, than the executive branch and thirty-nine times more than Congress; (6) the judiciary’s rent has increased from \$133 million in 1986 to its current \$923 million; (7) with scheduled increases, the judiciary will have to lay

In 2004, fifty-nine percent of the federal judicial budget went to fixed costs and forty-one percent to discretionary costs.<sup>12</sup> Assuming Congress continues in this budget pattern, the Cost Containment Report projects that fixed costs will require seventy-two percent of the budget by 2009, leaving only twenty-eight percent to cover the discretionary costs.<sup>13</sup> As noted above, discretionary costs may be erroneously viewed as unnecessary. The largest component is salaries for personnel outside the judges' chambers—court clerks, public defenders, probationary staffs, and so on. But the federal courts are not overstocked with employees. In light of the federal docket's enormous growth,<sup>14</sup> it is significant to note that “[o]ver the past 10 years, the square footage occupied by the judiciary has doubled while personnel has grown by 23 percent . . . .”<sup>15</sup> This disparity has put the judiciary behind and must be addressed in the next few years.

Personnel costs will grow by \$953 million and staffing by about 5,000 over the next five years. Slightly less than two-thirds of this amount is attributable to normal pay cost increases for existing staff. The remaining one-third is driven by application of the judiciary's current work measurement formulas that would, if fully funded, restore clerks and probation and pretrial services staffing levels to full formula, provide staff for new senior and magistrate judges, and provide additional staff to clerks and

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off a thousand employees a year to pay its rent, which will imperil the survival of the federal court system; (8) while many federal departments pay no rent or little rent, the GSA requires the federal courts to pay rent that includes the recovery of capital costs on buildings that have been fully amortized, not once but many times over; (9) the GSA uses this windfall (termed “confiscatory rent”) to pay its top-level employees \$46,000 more a year than any justice or member of Congress. The memorandum concluded with a demand that the GSA Administrator and the Office of Management and Budget provide rent relief for the courts. Memorandum from Judicial Conference of the United States, Major Rent Charges and Increases Imposed by GSA Are the Principal Factors in the Judiciary's Continuing Fiscal Crisis (Apr. 13, 2005) (on file with the author).

12. *Cost-Containment Report*, *supra* note 3, at 6, 7.

13. *Cost-Containment Report*, *supra* note 3, at 7.

14. See *infra* Part I.B (describing how the growing economy and Congress's expansion of federal jurisdiction has increased the size of the federal docket).

15. *Cost-Containment Report*, *supra* note 3, at ii.

probation and pretrial services offices to address future work load growth.<sup>16</sup>

According to the Cost-Containment Report, Congress and the President are unlikely to fund at anywhere near those levels.<sup>17</sup> The problem is exacerbated because the fat, if there ever was any, has already been cut,<sup>18</sup> and the budget-starved judicial system is now eating away at its muscle: “when faced with a very contracted budget in FY 2004, and the threat of a hard freeze in FY 2005, courts were compelled to reduce their work force nationwide by 1,350 positions,

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16. *Cost-Containment Report*, *supra* note 3, at iv.

17. *Cost-Containment Report*, *supra* note 3, at 4 (“Even the most optimistic projections indicate that future budget increases will fall well below defined funding requirements to operate the federal courts. It is unlikely that the judiciary will obtain double-digit percentage funding increases in the coming years, which is what would be needed to support the forecasted budget requirements. For fiscal year 2005, the judiciary needs an increase of over six percent simply to maintain current staff and services, and an eleven percent increase to fund fully its requirements using current methodologies.”).

18. The *Cost-Containment Report* explains that:

Until recently, most court managers could manage their workforce and meet operational needs within their allotted funds without severe consequences. That scenario has changed. Over the last two years, court allotments have been reduced well below the amounts required by the applicable funding formulas. In 2004, some court units, including offices with growing caseloads, received less funding in total than the amount needed simply to continue to pay existing staff salaries. To get by, managers are freezing promotions, instituting furloughs, offering early retirements and buyouts, and laying off staff.

In recent years, as budget growth slowed, the easier reductions have been made. Managers across the judiciary have adjusted their operations and staff to live within budget constraints. In the near future, much tougher decisions will be needed. *Following historical practices, resulting cutbacks in budget allotments to the courts could far exceed the ability of individual courts to absorb without severe consequences for the administration of justice.* Because of the expected growth in the categories of spending that have been deemed uncontrollable, thousands of court staff positions could be lost over the next several years.

*Supra* note 3, at 6 (emphasis added); *see also* David Shepardson, *Federal Court Cuts Hurt Michigan*, DETROIT NEWS, Aug. 31, 2004, at A1 (quoting Chief U.S. District Judge Bernard Friedman as stating, “We have cut to the bone. There’s no fat left.”).



or six percent.”<sup>19</sup>

These data are not mere statistical reports but have been making local news, though interestingly with little coverage in nationally-circulated daily newspapers.<sup>20</sup> In 2004, the Detroit News reported that “Federal Court Cuts Hurt Michigan,” explaining that, “Budget constraints have forced the U.S. District Court in Detroit to cut back on drug treatment for former inmates, grant dozens of convicts early release from probation and increase caseloads for probation officers.”<sup>21</sup> The story reported that Detroit, having the eighth largest caseload in the United States with over 5,000 annual filings, would reduce its workforce twelve percent by the end of 2004, even with no further budget cuts.<sup>22</sup>

More dramatically, the St. Louis Post-Dispatch reported that federal courts in the Southern District of Illinois, already eleven percent below the prescribed staffing formula, were prepared to close one day a week in the face of budget cuts.<sup>23</sup> The Pittsburgh Post-Gazette reported devastating consequences to the federal court system nationwide with a potential of a twenty percent layoff of clerks, probation officers and public defenders, quoting Judge John Heyburn II, budget chair of the Judicial Conference, that “[t]he federal judiciary is at a crisis point.”<sup>24</sup> The Recorder—a San Francisco legal newspaper—reported that “[e]arlier this year, the Northern District’s pretrial services office couldn’t cover its phone bill,” and explained how the court personnel were using their own cell phones instead.<sup>25</sup> In 2003, the Philadelphia Inquirer reported that “[f]ederal judges in New Jersey are scrambling to cut costs after

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19. *Where the Money Goes: A Look at How the Judiciary’s FY 2005 Budget Is Divided*, 37 THIRD BRANCH, NEWSLETTER OF THE FEDERAL COURTS 2 (Feb. 2005), available at <http://www.uscourts.gov/ttb/feb05ttb/budget>.

20. Late in this article’s writing, the following stories appeared, trailing two years of reporting in regional and local newspapers: Peter Wallsten, *Two Evangelicals Want to Strip Courts’ Funds*, L.A. TIMES, Apr. 22, 2005, at A22; Ron Chernow, *Chopping Off the Weakest Branch*, N.Y. TIMES, May 6, 2005, at A27; Mike Allen, *GOP Seeks More Curbs on Courts*, WASHINGTON POST, May 12, 2005, at A03.

21. Shepardson, *supra* note 18, at A1.

22. Shepardson, *supra* note 18, at A1.

23. Michael Shaw, *Southern Illinois U.S. Courts May Go to 4-Day Workweek*, ST. LOUIS POST-DISPATCH, Apr. 15, 2004, at C1.

24. McGough, *supra* note 6, at A16.

25. Jeff Chorney, *Cuts Leave Court Services in Limbo*, THE RECORDER, Aug. 9, 2004, at 1.

learning that their court system is expected to run out of money to pay jurors on civil trials before the fiscal year ends.”<sup>26</sup> Reporting the same story, the New Jersey Record quoted Boston Judge William Young, another Judicial Conference member, as stating that this is “government not working in the very basic ways.”<sup>27</sup>

The Third Branch Newsletter provides the most thorough explanation of the crisis, quoting from the Judicial Conference Budget Committee chair’s testimony before Congress and various interviews. The headline best illustrates the problem: “As Workload and Resources Head in Opposite Directions, Crisis Looms for Federal Courts.”<sup>28</sup> But Legal Times offers the best opening summary: “Closing the federal courthouse one day a week. Putting civil trials on hold for a month. Granting felony offenders early release. Deferring payments to court-appointed attorneys. Curtailing drug treatment. And firing staff.”<sup>29</sup> That story goes on to report that federal courts in the District of Columbia, like those in the Southern District of Illinois, were contemplating one-day-a-week closings in the face of a criminal trial docket that had doubled in one year coupled with a five-percent decreased budget over the same period.<sup>30</sup> The Eastern District of Virginia, the story continued, faced similar budget cuts while taking on some of the largest of the terrorist cases.

For example, the case against Zacarias Moussaoui, the alleged “20th hijacker,” has generated more than 1,175 court filings. Every one of those must be handled, not only by the judge and her staff, but also by the clerk’s office. “A complicated case like this is a drain on resources even in the best of years . . . .”<sup>31</sup>

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26. *Federal Courts Struggle to Stretch Their Budgets*, PHILADELPHIA INQUIRER, Dec. 29, 2003, at B5; see also Kate Coscarelli, *Feds Try to Avoid Juror-Pay Shortfall*, NEWARK STAR-LEDGER, Dec. 25, 2003, at 47 (stating that federal judges are tightening their belts to avoid juror-pay shortfall).

27. *Money to Pay Federal Jurors Running Low; Crunch May Jeopardize Civil Trials in N.J. in Fiscal Year*, THE RECORD, Dec. 28, 2003, at A3.

28. *As Workload and Resources Head in Opposite Directions, Crisis Looms in Federal Courts*, 36 THIRD BRANCH, NEWSLETTER OF THE FEDERAL COURTS 3 (Mar. 2004), available at <http://www.uscourts.gov/ttb/mar04ttb/crisis/>.

29. Tom Schoenberg, *Budget Crisis Looms for D.C.’s Federal Court*, LEGAL TIMES, June 28, 2004, at 1.

30. *Id.*

31. *Id.*; see also Bruce Moyer, *FBA Urges Court Funding Relief*, 51 FED. LAWYER 10 (Oct. 2004) (noting that workloads of federal courts are increasing while budgets and resources are decreasing).

Some may argue that these budget reductions are simply good business practice in tight budget times, and that as long as the judges preside, justice will be forthcoming in spite of greatly reduced staffing. The Cost-Containment Report makes contrary projections,<sup>32</sup> and lawyers who depend on these essential court personnel require no proof of their role and value. Moreover, the notion that Congress is simply tightening its spending is contradicted by its leaders. In his retreat from comments deemed threatening to federal judges in regard to the Terry Schiavo case, House Majority Leader Tom DeLay clarified that his plans were entirely within the law: “The legislative branch has certain responsibilities and obligations given to us by the Constitution. We set the jurisdiction of the courts. We set up the courts. We can unset the courts. We have the power of the purse. We have oversight of how we spend their money.”<sup>33</sup> On March 17, 2005, DeLay and Senate Majority Leader Bill Frist met privately with evangelical leaders to discuss ideas for reining in federal judges. One idea discussed in detail there was “using legislative tactics to withhold money from courts.”<sup>34</sup> The Washington Post reported a few weeks later that “House Republican leaders plan to use budgetary, oversight and disciplinary authority to assert greater control over the federal courts before next year’s elections.”<sup>35</sup>

B. *The Collision of Reduced Funding and Expanded Jurisdiction*

Against this backdrop of severe funding cuts, consider Congress’s phenomenal expansion of federal jurisdiction over the past three decades.

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32. See *Cost-Containment Report*, *supra* note 3, at 4 (predicting “significant impairment of judicial branch operations”).

33. Rick Klein, *DeLay Apologizes for Blaming Federal Judges in Schiavo Case But House Leader Calls for Probe of Judicial Activism*, BOSTON GLOBE, Apr. 14, 2005, at A9.

34. Wallsten, *supra* note 20, at A22.

35. Allen, *supra* note 20, at A3.

## 1. Congressional Power over Federal Court Jurisdiction

The Constitution mandates the creation of a federal court system as one of three branches of a limited national government, the apex of a federal system in which states exercise more general governmental power and retain all authority not constitutionally designated for the national government.<sup>36</sup> The United States Constitution designed an interdependent system of three governmental branches whose functions are fairly distinct, but whose powers are interdependent in a checks-and-balances system designed to curtail power abuses by any branch. As a result, the judicial function is focused in one branch but the judicial power is spread among all three branches. This distribution of power is accomplished in three power dynamics, that is, instances of the judicial branch having its control over a specific function checked by one or both other branches. The first two power dynamics are well known; the third has been obscure but that may change.

The first judicial power dynamic is judicial selection, tenure and autonomy. Justices and judges appointed under Article III have lifetime tenure during good behavior, and salary protection to help insulate them from political and social pressure,<sup>37</sup> but must first be nominated by the president and then subjected to Senate confirmation or rejection.<sup>38</sup>

The second judicial power dynamic is federal subject matter jurisdiction—the Constitution provides only an interstitial sketch of the federal judiciary's limited jurisdiction and authorizes Congress to fill in the gaps by shaping Article III's boundaries as times and circumstances require. Congress has done this by giving further definition to federal questions and diversity claims, and acting on the implied boundaries of Article III by authorizing the joinder of related non-federal claims and the removal of cases from state courts.<sup>39</sup> In

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36. U.S. CONST., amend. X. *See generally* KATHLEEN SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 87-90 (15th ed. 2004) (summarizing the structure of the constitutional arrangement); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* §§ 1, 7 (6th ed. 2002) (discussing the historical bases of the federal courts and the limits on their jurisdiction).

37. U.S. CONST., art. III, § 1.

38. U.S. CONST., art. II, § 2, cl. 2.

39. *See generally* WRIGHT & KANE, *supra* note 36, at §§ 17-22(A) (stating that the further definition of federal question jurisdiction is subject to Congress's

turn, the federal judiciary regulates its own subject matter jurisdiction with two doctrines: the first is justiciability, focusing on the appropriateness of claims and claimants before the court,<sup>40</sup> and the second is judicial review, allowing courts to test the constitutionality of Congress's actions.<sup>41</sup> Although the courts have used their powers since at least *Marbury v. Madison*<sup>42</sup> in 1803, Congress's broad power to define federal judicial jurisdiction was little used until Franklin Roosevelt's administration, although the New Deal's expansion of federal power has not abated under other later, and more politically-conservative, administrations.

A third judicial power dynamic—untested up to now—concerns the federal judiciary's budget, which is controlled by Congress, subject to presidential veto,<sup>43</sup> and not generally subject to judicial review.<sup>44</sup> But the court does have a check on severe

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Article I powers of prescriptive jurisdiction). For the joinder of claims not qualifying as federal questions or diversity claims, *see* 28 U.S.C. § 1367 (1993) (governing joinder of supplemental claims, that is, those forming a part of the same case or controversy as federal question or diversity claims); *see also id.* at § 1441(c) (governing removal of separate and independent claims from state to federal court). *See generally* WRIGHT & KANE, *supra* note 36, at §§ 9, 19 (relating the history of an ancillary jurisdiction and pendent claims in federal supplemental jurisdiction). For removal jurisdiction, *see generally* 28 U.S.C.A. §§ 1441-52 (West 1994 & Supp. 2004), and WRIGHT & KANE, *supra* note 36, at §§ 38-41 (describing the scope, history, and procedure for removal to federal court and describing the remand process after removal).

40. *See generally* WRIGHT & KANE, *supra* note 36, at §§ 12-14 (discussing the constitutional mandates governing the nature of claims in federal courts, the necessary standing of the litigants, and whether federal courts may decide political questions).

41. *See* SULLIVAN & GUNTHER, *supra* note 36, at 3-31 (summarizing *Marbury v. Madison* and the history of judicial review); WRIGHT & KANE, *supra* note 36, at 61-62 (linking judicial review to justiciability).

42. 5 U.S. (1 Cranch) 137 (1803). *See infra* notes 110, 168-226 and accompanying text.

43. *See* U.S. CONST. art. I, § 8 (defining Congress's budget power); *id.* at art. I, § 7, cl. 3 (defining presidential veto power).

44. Under the justiciability doctrine of standing, federal courts have a limited power to adjudicate claims by federal taxpayers challenging congressional actions under the Taxing-and-Spending Clause, *Flast v. Cohen*, 392 U.S. 83, 106 (1968), and possibly under the Establishment-of-Religion Clause. *Id.* at 115 (Fortas, J. concurring); *see also* *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (denying taxpayer standing to parties challenging the Executive branch's transfer of property to a parochial school); *United States v. Richardson*, 418 U.S. 166, 177 (1974) (denying taxpayer

underfunding that impairs vital court functions. As explained below, it is the power under the Due Process and other constitutional clauses to bar certain categories of claims—those forcing plaintiffs out of state courts and into federal courts—under the principle that the federal government has breached its duty to provide a forum. This is explained in this article's third section, following the discussion of the courts' expanded docket and the ancient common law duty to provide access to court.

## 2. Expanding Categories of Federal Jurisdiction

At the same moment Congress is stripping funds from the federal courts, it is loading them up with new cases and new categories of cases. Supersizing has caught on in Congress's authorization of federal regulatory power and judicial jurisdiction, and in some areas the two expansions are not correlative. In addition to the astonishing growth of federal criminal jurisdiction,<sup>45</sup> Congress has expanded civil jurisdiction in recent years in two broad categories: first, by the preemption of private law issues formerly governed by state law, and second, by expanded use of minimal diversity jurisdiction to federalize additional state-law claims not otherwise regulated by Congress.

### *a. Preemption*

Federal regulation of specific legal issues has always been thought necessary for the smooth workings of a federal system, just as a limited scope of federal encroachment has been thought, at least historically, to maintain an important decentralization of power on a range of issues, and a proper balance between the state and federal systems. These federalized legal issues are an exercise of both Congress's Article I powers to regulate matters such as interstate and foreign commerce, and of its Article III power to define federal

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standing and citizen standing to party seeking access to CIA's budget on the basis of the Accounts Clause). To the extent these precedents allow an action regarding Congress's court budget cuts, proper plaintiffs would be parties aggrieved as litigants in other federal cases, and who might have to show an ongoing injury rather than a one-time lack of access to court.

45. See *infra* notes 80-92 and accompanying text (discussing increases in the federal docket).

questions for public and private legal disputes. Of course, the two are not always exercised together—Congress may choose to regulate an Article I matter and leave enforcement to the federal agencies without creating a private remedy (although the object of the enforcement would almost always have the right to a federal forum to review the agency's action).<sup>46</sup>

Congress has increasingly chosen to add the private remedy, and two examples in the past few decades are the federalization of fraud claims in many private actions (RICO claims)<sup>47</sup>, and of contract suits for employee benefits (ERISA claims).<sup>48</sup> The Administrative Office began tracking both claims in fiscal year 1991, when there were 972 RICO claims and 9,843 ERISA claims.<sup>49</sup> In fiscal year 2004, the RICO claims dropped slightly to 777 while the ERISA claims rose to 11,421.<sup>50</sup> These are only two of many examples in the growing federalization of private remedies formerly governed by state law, and another set of numbers demonstrate the significance of that growth. In fiscal year 1977, federal question jurisdiction in private disputes, excluding disputes in which the United States is a party, accounted for 58,083 cases, or sixty-four percent of the private civil docket, while diversity cases in that year accounted for 31,735 cases, or thirty-five percent of the private civil docket.<sup>51</sup> In fiscal year 2004, there were 165,241 federal question claims in private disputes, or seventy-one percent of the private civil

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46. See *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 817 (1986) (holding that Ohio's incorporation of federal drug-labeling standards into state law did not create a federal question in the absence of congressional intent to create a private remedy).

47. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961-68 (West 2000) (defining private remedy for fraud).

48. Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§ 1001-1461 (West 1999 & Supp. I 2004). The private remedy is authorized under 29 U.S.C.A. § 1132, with federal courts having exclusive jurisdiction. *Id.* § 1131(e).

49. U.S. District Courts: Civil Cases Filed by Nature of Suit, tbl.2.2 (2005), <http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf> (last visited Nov. 25, 2005).

50. *Id.*

51. U.S. District Courts: Civil Cases Filed by Jurisdiction, tbl.2.1 (2005), <http://www.uscourts.gov/judicialfactsfigures/table2.01.pdf> (last visited Nov. 25, 2005) [hereinafter *Table 2.1*] (stating that the private civil docket includes both numbers listed for private federal question and diversity claims, and local jurisdiction claims, but not public disputes in which the United States is a party).

docket, and 67,624 diversity claims, or twenty-nine percent of the civil docket.<sup>52</sup> Put another way, between fiscal years 1977 and 2004, federal question claims in private disputes grew 284% and diversity claims grew 213%.

In addition to these former state law claims now crowding the federal docket, there is an important distinction between the RICO and ERISA claims. For RICO, the federal remedy creates concurrent jurisdiction for federal and state courts, and more important, does not preempt a state law fraud claim or the access to state courts for those disputes.<sup>53</sup> Plaintiffs bringing a RICO claim may choose between filing in state or federal court, but in choosing state court, face removal to federal court if all defendants elect to do so. Plaintiffs wanting to avoid federal court have a further choice and that is to avoid pleading the RICO claim, thus limiting the fraud claim to state law. ERISA claims are another matter. In choosing to regulate employee benefits, Congress also chose to preempt the field, leaving plaintiffs no choice but to litigate their contract and fiduciary duty claims in federal court. There is nothing inherently wrong with Congress's regulation of these areas or its creation of private remedies. But even if federal regulation is good as a normalization of the nation's laws and economy, Congress should fund the judicial function of its regulation.

#### *b. Minimum Diversity*

Article III authorizes claims between various categories of parties from different states and countries, with the goal of offering a more neutral forum to nonresident parties.<sup>54</sup> From its creation in the Judiciary Act of 1789, the primary diversity statute has been read as requiring complete diversity, that is, all plaintiffs must be from a different state or country than all defendants.<sup>55</sup> In addition, Congress has always narrowed the diversity docket by imposing an amount-in-controversy threshold (unmentioned in Article III),

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52. *Id.*

53. *McCarter v. Mitcham*, 883 F.2d 196, 201 (3d. Cir. 1989).

54. *See WRIGHT & KANE*, *supra* note 36, at 152 (noting that the neutral forum goal is absent from the legislative history but expressed in later court opinions).

55. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *see also WRIGHT & KANE*, *supra* note 36, at 158-59 (noting that, with only one exception, the statutory requirement of complete diversity has been consistently followed).



starting with \$500 in 1789<sup>56</sup> and rising periodically to today's "exceeding \$75,000" requirement.<sup>57</sup>

But Article III's diversity authorization is broader, allowing for federal jurisdiction over the specified diversity categories as long as not all parties are from the same state. This is called minimal diversity and though little used in the past, its popularity is growing. In 1948, Congress enacted the interpleader statute to protect "stakeholders" (such as insurers and fiduciaries) from multiple findings of liability in different courts adjudicating related claims. The federal system already had an interpleader claim under Rule 22, but for non-federal claims, it required complete diversity between all the claimants and the stakeholder and was little used.<sup>58</sup> Unlike Rule 22 interpleader, the statutory version requires only minimal diversity between the claimants, that is, all claimants could not be from the same state or country. The Administrative Office does not tally case filings under § 1335, but from 1948 until now, LexisNexis lists approximately 854 opinions.<sup>59</sup>

In 1968, Congress enacted the multidistrict litigation statute—28 U.S.C. § 1407—allowing for the venue transfer of cases from multiple courts to a single district for consolidated pretrial proceedings.<sup>60</sup> The statute's purpose is efficient use of judicial resources in cases having common pretrial questions that can be determined more conveniently in a single court. The Judicial Panel on Multidistrict Litigation oversees the transfer requests, and in fiscal year 2004, the Panel considered 22,516 civil actions, granting transfer on 10,681 cases from ninety-one district courts.<sup>61</sup> Since 1968, it has transferred 211,317 civil actions for consolidated pretrial proceedings, with 10,899 being ultimately remanded to the transferor district for trial, 389 reassigned within the transferee district, and 136,070 actions terminated in the transferee court.<sup>62</sup> These transfers

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56. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

57. 28 U.S.C.A. § 1332(a) (West 1993 & Supp. I 2004).

58. FED. R. CIV. P. 22. See WRIGHT & KANE, *supra* note 36, at 538 (discussing the diversity requirement between the stakeholder and all claimants).

59. LexisNexis search done on April 20, 2005 by author and research assistant at <http://www.lexisnexis.com>.

60. 28 U.S.C.A. § 1407 (West 1993).

61. Leonidas Ralph Mecham, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, at 25 (2004) [hereinafter *Judicial Business—2004*], available at <http://www.uscourts.gov/judbus2004/front/JudicialBusiness.pdf>.

62. *Id.*

demonstrate the efficiency of § 1407 in cutting workload for the federal system as a whole, but any assessments of efficiency and economy must be offset by the costs. Many multidistrict cases concern subject matter that was not litigated in federal court until the New Deal (e.g., securities fraud) or later (air crashes, toxic torts)—that is, § 1407 has saved labor in areas that required no labor seventy-five, or even forty years ago. In addition, a net gain in system-wide efficiency does little to ease the burden suffered by the transferee court. These burdens have apparently been bearable when federal courts were adequately funded. They will amplify with funding cuts.

In the past four years, Congress's efforts to federalize state-law tort claims has led to two new minimal diversity acts, both designed to compel new categories of plaintiffs out of state court and into federal court. The first was the Multiparty, Multiforum Jurisdiction Trial Act of 2001, authorizing a single forum for certain interstate disasters such as air crashes involving at least seventy-five deaths.<sup>63</sup> The act also amends the removal statutes so that cases filed in various state courts may be compelled into federal court and then transferred to a single federal district court.<sup>64</sup> For cases meeting this minimal diversity formula in single-accident settings, the act legislatively overrules *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,<sup>65</sup> which held that a court may not use the inconvenient forum transfer under 28 U.S.C. § 1404 to retain a case for trial after obtaining the case under the multidistrict transfer provision of 28 U.S.C. § 1407. The second recent minimal diversity expansion is the Class Action Fairness Act of 2005, which creates minimal diversity over class actions having at least \$5 million in controversy and at least one class member with diverse citizenship from any defendant,

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63. 28 U.S.C.A. § 1369 (West 1993 & Supp. I 2004). The act allows claims arising from single disasters involving seventy-five or more deaths to be brought in federal court based on minimal diversity of citizenship between the parties, meeting any one of three further requirements that (1) one defendant resides in a state and a substantial part of the accident occurred in another state, or (2) any two defendants reside in different states, or (3) substantial parts of the accident occurred in different states. *Id.* at § 1369(a). The act requires abstention in cases where "the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens, where the claims will be governed by the law of that State." *Id.* at § 1369(b).

64. 28 U.S.C.A. § 1441(e) (West 1993 & Supp. I 2004).

65. 523 U.S. 26 (1998).

providing further that the court may decline jurisdiction in certain specified settings deemed inconsistent with the act's purposes.<sup>66</sup> In addition to regulating settlements,<sup>67</sup> the Class Action Fairness Act of 2005 amends the general diversity statute<sup>68</sup> and adds a new removal statute<sup>69</sup> that when combined with existing venue rules will "allow corporate defendants to move most large class-actions into federal court from state courts."<sup>70</sup> Case filing numbers are not yet available for the new class-action law, but the Administrative Office of the United States Courts predicts that the act will "result in hundreds of additional class action cases being brought in federal court each year."<sup>71</sup> The Multi-party/Multi-forum law, narrowly focused on singular disasters, will produce far fewer filings but will have a significant docket impact on any district receiving a case.

### 3. The Federal Docket

Civil and criminal case filings are predictably increasing in federal courts, owing both to Congress's expansion of federal jurisdiction and the growing American and global economy. In fiscal year 2004 (FY 2004), district court filings increased nine percent, with 281,338 civil filings (an 11.2% increase over FY 2003), and criminal filings remaining roughly even with 71,022 filings (up .5% over FY 2003).<sup>72</sup> Bankruptcy filings fell 2.6% this year, but remain high at 1,618,987, up 83.3% from FY 1995.<sup>73</sup> Although the new bankruptcy act President Bush signed on April 20, 2005, may lower filings over time, the immediate result will no doubt be a spike in filings to clear the proposed act's effective date,

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66. Pub. L. No. 109-2, § 1, 2005 U.S.C.C.A.N. (119 Stat.) 4 (to be codified in scattered sections of 28 U.S.C.).

67. *Id.* at § 3.

68. *Id.* at § 4 (redefining 28 U.S.C. § 1332(d) class action jurisdiction and specifying grounds for declining jurisdiction).

69. *Id.* at § 5 (adding 28 U.S.C. § 1453).

70. David Rogers, *Senate Poised to Pass Class Action Bill*, WALL ST. J., Feb. 10, 2005, at A10.

71. News Release, Administrative Office of U.S. Courts, *Judiciary Asks Congress to Ease Financial Hardships of Courts*, at 2 (Apr. 12, 2005), available at [www.uscourts.gov/Press\\_Releases/index/html](http://www.uscourts.gov/Press_Releases/index/html) (last visited Nov. 25, 2005) [hereinafter *Judiciary Asks Congress*] (follow the hyperlink matching the title of the news release under the "April 2005" heading).

72. *Judicial Business—2004*, *supra* note 61, at 11.

73. *Judicial Business—2004*, *supra* note 61, at 11.

scheduled in the current bill for 180 days after the act's adoption.<sup>74</sup> For the courts of appeals, FY 2004 was the tenth consecutive year of increases with 62,762 appeals filed, up 3.1% over FY 2003 and up twenty-five percent in the past decade.<sup>75</sup> More significantly, the appellate courts are slowing in case resolution, with cases pending at the end of FY 2004 up 14.3% from FY 2003.<sup>76</sup> Since 1990—the date of the most recent comprehensive federal judgeship bill—no new federal appellate judgeships have been created even though the appeals docket has grown by forty-six percent in that time, while in the same period, thirty-four new federal district judgeships were created to meet a thirty-nine percent docket increase.<sup>77</sup>

In considering the current budget shortages, a more important picture emerges in examining the past twenty years. From 1960 to 2004, civil filings increased from 59,284 to 281,338 (475%) while the number of judges increased from 245 to 679 (277%).<sup>78</sup> From 1977 (the starting year for this table) to 2004, civil filings increased from 133,929 to 281,338 (210%); during this time federal question filings increased 284% (from 58,083 to 165,241) while diversity filings increased at the lesser rate of 213% (from 31,735 to 67,624),<sup>79</sup> showing not only growth, but that growth is more attributable to Congress's federalization of the law than it is to diversity litigation.

The criminal docket is an additional concern, not merely for overall court operations, but particularly for private civil litigants who will be bumped to the lowest priority by the Speedy Trial Act.<sup>80</sup> Although criminal cases make up only twenty percent of the case filings,<sup>81</sup> they consume disproportionate time compared with civil

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74. 11 U.S.C.A. § 101 (West 2005).

75. *Judicial Business—2004*, *supra* note 61, at 11.

76. *Judicial Business—2004*, *supra* note 61, at 11.

77. News Release, Administrative Office of U.S. Courts, Conference Calls Off-Site Security for Judges Top Priority, at 2 (Mar. 15, 2005), *available at* [www.uscourts.gov/Press\\_Releases/index.html](http://www.uscourts.gov/Press_Releases/index.html) (last visited Nov. 25, 2005) [hereinafter *Off-Site Security*] (follow the hyperlink matching the title of the news release under the "March 2005" heading).

78. *Table 2.1*, *supra* note 51.

79. *Table 2.1*, *supra* note 51.

80. Speedy Trial Act of 1974, 18 U.S.C.A. §§ 3161-74 (West 2000 & Supp. I 2004).

81. *Judicial Business—2004*, *supra* note 61, at 11 (noting that for fiscal year 2004, there were 352,360 civil and criminal filings in federal district courts, of which 71,022 were criminal cases).

cases, many of which never have a court hearing.<sup>82</sup> The extra time provided for criminal trials and their priority on the docket has been amplified by Congress's rampant expansion of federal criminal jurisdiction, raising various concerns. The Criminal Justice Section of the American Bar Association formed a task force to examine the "astonishing" expansion of federal criminal law,<sup>83</sup> and in 1998 issued its report, *The Federalization of Criminal Law*, noting a "widespread concern about the number of new federal crimes being created annually by Congress,"<sup>84</sup> and the "[r]ecent dramatic increase in the number and variety of federal crimes."<sup>85</sup> The report explains that in the first years following the Constitution's adoption in 1789, federal crimes were fewer than a dozen and dealt with offenses against the federal government itself such as "treason, bribery of federal officials, perjury in federal court, theft of government property, and revenue fraud."<sup>86</sup> Federal criminal jurisdiction expanded in the last third of the nineteenth century with the passage of federal mail fraud statutes linked to interstate commerce, and again with Prohibition in the early twentieth century.<sup>87</sup> The 1960s and 70s saw another expansion in the concern over organized crime and street gangs, which then "dramatically" expanded in the 1980s and 90s. As of 1998, of the federal crimes enacted since 1865, more than forty percent have been enacted since 1970, and more than twenty-five percent from 1980 to 1996 (the year in which the data was compiled for the ABA study).<sup>88</sup> One tally the report failed to determine is the current number of federal crimes, explaining that "it may be impossible to determine exactly how many federal crimes could be prosecuted today . . . ."<sup>89</sup>

Looking at the most recent Congress at the time of the study,

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82. See generally David R. Cook et al., *Criminal Caseload in U.S. District Courts: More Than Meets the Eye*, 44 AM. U. L. REV. 1579 (1995) (discussing massive expansion of criminal caseload in federal courts).

83. James Strazella, *The Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUST. 10.

84. *Id.* at 1.

85. *Id.* at 2.

86. *Id.* at 5.

87. *Id.* at 6-7.

88. Strazella, *supra* note 82, at 7 n.9.

89. Strazella, *supra* note 83, at 2; see Strazella, *supra* note 83, at 10 (discussing criminal sanctions under administrative regulation); Strazella, *supra* note 83, at 10 n.13 (noting that the vast percentage of regulations connect congressional statutory prohibitions to the context of the regulation).

the report concludes that “[a]ll signs indicate that the federalization trend is growing, not slowing, in fact as well as perception . . . . An estimated 1,000 bills dealing with criminal statutes were introduced in the most recent [105th] Congress.”<sup>90</sup> Many of these crimes duplicate state laws and were enacted “without requests for their enactment from state or federal law enforcement officials.”<sup>91</sup> Rather, the ABA Task Force was told explicitly by more than one source that many of these new federal laws are passed “not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular.”<sup>92</sup>

#### 4. Technology and Other Changes

Apart from the Congress’s jurisdictional expansions, federal courts are also struggling with other recent laws that reflect changing times and technology. Courts are quickly moving to electronic document filing, a change which will save filing and storage space but will require frequent and expensive updates in equipment along with more highly trained clerical personnel to manage the system. Online filing brings several conveniences to the court, such as saved space and easier document retrieval, but those advantages are not entirely net gains. They are somewhat offset by the need for a different level of file maintenance, the need to employ more highly-trained clerical personnel, and the cost of periodic equipment upgrades—the old file cabinets and even the rolling shelves—did not require regular replacement as computer systems now do, with technology costs consuming six percent of the Salaries and Expenses budget.<sup>93</sup> Perhaps the most onerous aspect of the new technology is Congress’s decision for online posting in the e-Government Act.<sup>94</sup> For several years now, federal courts have maintained web sites accessible by the public that included location and contact information for both the judges and the clerks, copies of local rules and standing orders, and any individual local rules a judge may

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90. Strazella, *supra* note 83, at 11.

91. Strazella, *supra* note 83, at 2.

92. Strazella, *supra* note 83, at 2.

93. *Cost-Containment Report*, *supra* note 3, at 35.

94. See E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A), 116 Stat. 2899, 2914 (codified as amended primarily in scattered sections of 44 U.S.C.A. and 5 U.S.C.A.) (West Supp. I 2004) (providing for the coordination of federal information through online posting).

impose.<sup>95</sup> As of April 16, 2005, the e-Government Act adds to this the requirement that each federal district post online each court's docket information, the substance of all written opinions issued by each court, in a text-searchable format, regardless of the publication designation, and all documents filed electronically by parties.<sup>96</sup> No data are available on the labor impact this will bring to the judges' and district clerks, but assuming the system is well maintained, the result will no doubt be an increase in the work formerly required in simply hole punching the nine-by-twelve document and clasp it in the file. This, too, will require more highly-trained personnel, not to mention the burden it imposes on judges and their staffs to draft each order as though the world will be viewing and possibly citing it.

Another aspect of changing times is the growing need for both on-site and off-site security for judges in the wake of occasional violence and frequent threats. On March 15, 2005, the Judicial Conference of the United States passed a resolution calling on the Justice Department and the Marshall's Service to review security policies, and on Congress and the President to provide the necessary money.<sup>97</sup> Because of the paralyzing effect of threats against judges, it is certain that the security services will respond, and it is equally certain that more security will mean more cost. The money paid to the Marshall's Service (part of the Executive Branch) is not separately funded but like the rent comes out of the judiciary's budget. As a fixed cost, it will come out first. Unless Congress reverses its budget-stripping agenda and fully accounts for the entirety of the increased security costs, the debit will be against the operating costs.

Other burdens arise when case filings surge in a particular area, caused by changes in the law such as the Class Action Fairness Act of 2005,<sup>98</sup> the Bankruptcy Abuse Reform and Consumer Protection Act of 2005,<sup>99</sup> scientific developments that expose toxins such as asbestos,<sup>100</sup> or corporate scandals resulting in increased

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95. See, e.g., U.S. District Court—Northern District of Texas, <http://www.txnd.uscourts.gov> (last visited Nov. 25, 2005) (providing court information for the Northern District of Texas).

96. E-Government Act of 2002, 44 U.S.C.A. § 205(a)-(c).

97. *Off-Site Security*, *supra* note 77.

98. *Judiciary Asks Congress*, *supra* note 71.

99. 11 U.S.C.A. § 101 (West 2005).

100. See *Table 2.1*, *supra* note 51 (showing the sporadic nature of asbestos suits: 11,812 cases were filed in 1988, down to 7,818 in 1989, and back up to

securities fraud claims.<sup>101</sup> Crisis flows inescapably from these numbers and the resulting negative forecasts discussed in this section. Perhaps the negative projections will prove wrong, and instead of crisis, case filings will decline with tort reform, and electronic filing and file maintenance will require fewer personnel to manage the docket. No one is predicting such a panacea. The crisis may be most acute in the personnel numbers. Because of budget constraints, federal courts lost six percent of their workforce in fiscal year 2004, and have lost eighteen percent since fiscal year 2001.<sup>102</sup> Critics of Congress's short funding have proposed remedies in the form of the courts exercising an inherent power either to bill Congress or raise revenue.<sup>103</sup> Without critiquing them here, they are constitutionally doubtful at best. A more basic solution exists in the Fifth Amendment's Due Process Clause which, along with other doctrines, requires the government to furnish access to courts for justiciable disputes. Congress may short-fund or even close federal courts, but if it does, our judicial system must default to the state courts, a possibility contemplated at the Constitutional Convention. The next section discusses the duty to furnish a forum (or to provide access to courts), its exceptions, and its application to all phases of government.

## II. THE RIGHT OF COURT ACCESS AND THE CORRESPONDING DUTY TO FURNISH A FORUM

Access to courts is the bedrock of the Anglo-American system with guarantees dating back at least to the Magna Carta. The

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13,809 in 1990; beginning in 1991, filings fell to the 5,000 to 8,000 range from 1991 through 2001 with a high year of 9,111 in 1998, then jumped to 26,818 in 2002, falling the next year to 1,562).

101. See *Table 2.1, supra* note 51 (showing commodities and exchange cases and securities actions steadily dropped from 2,649 cases in 1988 to 1,669 cases in 1997, then began a climb to 2,358 in 1998, and jumped from 2,678 in 2000 up to 3,538 in 2001, the year Enron fell). Predictably, employee-benefit claims surged slightly in 2001 along with the securities claims, and both have retained their increases up through 2004. See *Table 2.1, supra* note 51.

102. *Judiciary Asks Congress, supra* note 71.

103. See *infra* notes 329-330 (noting two theories of court-initiated funding remedies: the "inherent power doctrine," holding that courts have an inherent power to raise revenue, and the second theory, holding that courts have the power to bill Congress directly).



importance of a viable court system is readily apparent in several of the Magna Carta's clauses, with the barons having forced King John to guarantee not only the right to a jury trial<sup>104</sup> and the right to justice that was rendered rather than sold,<sup>105</sup> but also the availability of two levels of courts. Specifically, King John guaranteed a Common Pleas court system apart from the king's court<sup>106</sup> and provided for an available forum for certain claims in the counties where they arose.<sup>107</sup> As for the king's court, King John pledged that he or his Chief Justiciary would send two judges through each county four times a year who, along with locally-elected knights, would hold court. If the courts could not be held for any reason, a sufficient number of assigned judges would hold over until the judicial matters were resolved.<sup>108</sup> A later section, the one pledging to rid the courts of corruption, has a second clause with a telling ring for the defunding problem: "To no one will We sell, to none will We deny or defer, right or justice."<sup>109</sup>

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104. MAGNA CARTA cl. 39, *reprinted in* CLAIRE BREAY, *MAGNA CARTA, MANUSCRIPTS AND MYTHS* 52 (2002).

105. *Id.* at 52 cl. 40.

106. *Id.* at 50 cl. 17 ("Common Pleas shall not follow Our Court, but be holden in some certain place[,]" translated as "Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.").

107. *Id.* at 51 cl. 18 ("Recognisances of Novel Disseisin, Mort d'Ancestor, and Darrein Presentment shall be taken in their proper counties only . . .").

108. *Id.*

We Ourself, or, if We be absent from the Realm, Our Chief Justiciary, shall send two justiciaries through each county four times a year, who, together with four knights elected out of each shire by the people thereof, shall hold the said assizes on the day and in the place aforesaid. And if the said assizes cannot be held on the day appointed, so many of the knights and freeholders as shall have been present thereat on that day shall remain as will be sufficient for the administration of justice, according as the business to be done be greater or less.

*Id.*

109. MAGNA CARTA cl. 40, *reprinted in* CLAIRE BREAY, *MAGNA CARTA, MANUSCRIPTS AND MYTHS* 52 (2002); *see also* William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333 (1997) (describing the historical roots of Tennessee's open courts clause and the right to a judicial remedy in the text of the Magna Carta); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003) (summarizing English antecedents).

Blackstone's Commentaries noted that the common law's three primary rights—life, liberty and property—would be declared in vain if not for the

subordinate right of every Englishman [to apply] to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty and property, courts of justice must at all times be open to the subject, and the law must be duly administered therein.<sup>110</sup>

In struggling to define a new government with the Articles of Confederation, England's former American colonies at first rejected the role of a national judiciary in creating only a national legislature, leaving executive and judicial power to the states.<sup>111</sup> When the first American governmental structure seemed inadequate and a second Constitutional Convention was organized, delegates argued at length about the need for and the structure of a federal judiciary.<sup>112</sup> The result was a balance of power not only among the three federal branches, but between the federal and state systems as well, a delicate federalism underscored by the notion that courts of original jurisdiction would be available—federal courts if Congress created them, and state courts if it did not.

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110. WILLIAM BLACKSTONE, 1 COMMENTARIES \*137. In *Marbury v. Madison*, Chief Justice Marshall quoted Blackstone for the proposition that the violation of legal rights necessarily implies a remedy: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 5 U.S. (1 Cranch) 137, 163 (1803). Marshall further quoted that "it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.*

111. See generally RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1-3 (5th ed. 2003) (discussing the Articles of Confederation and their omission of an executive branch and court system).

112. See generally THE FEDERALIST Nos. 78-82 (Alexander Hamilton) (discussing the need for a federal judiciary and suggesting the structure it should take). See FALLON ET AL., *supra* note 111, at 4-20 (detailing the debate on the judiciary at the Constitutional Convention).

A. *Constitutional Bases for the Duty to Furnish a Forum*

1. The Constitution's Distribution of Powers for the Judiciary and the Implicit Need for Courts of Original Jurisdiction—State or Federal

Improving on the Articles of Confederation, the United States Constitution created a dichotomous American judiciary which preserved the state courts' role as the primary judicial body and provided for federal-court jurisdiction over a limited range of disputes. In addition to the powers retained by the states, the Constitution further designed a federal power-balancing system in which the newly-created federal judiciary would be held in check by the sharing of judicial appointment-and-removal power by the president and Congress,<sup>113</sup> and by Congress having the power to define federal subject matter jurisdiction within the broad borders set by Article III.<sup>114</sup>

Article III outlines federal judicial jurisdiction in three ways. First, it limits federal jurisdiction to nine broad categories (including two interstitial categories for federal questions and diversity claims),<sup>115</sup> and then gives Congress the power to further define those interstitial categories.<sup>116</sup> Second, Article III requires Congress to

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113. U.S. CONST. art. II, § 2, cl. 2.

114. *Id.* at art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

115. *Id.* at art. III, § 2 (enumerating cases and controversies which the Supreme Court and lower federal courts may hear)

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

*Id.*; see KILLIAN & COSTELLO, *supra* note 2, at 647-821 (stating that the first five categories create federal questions (both general and specific), although categories two through nine may be governed by federal, state, or foreign law).

116. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall

create one Supreme Court but gives Congress discretion in creating lower federal courts, including the discretion to create none.<sup>117</sup> Third, Article III vests the Supreme Court with appellate jurisdiction over all nine categories of Article III cases, except for “Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party,” over which the Supreme Court has original jurisdiction.<sup>118</sup> Article III thus limits the Supreme Court’s power to appellate review for most Article III cases; it follows that some lower court must have original jurisdiction over those disputes, although those courts need not be federal courts.<sup>119</sup>

Against this backdrop of Congressional power to define the lower federal courts’ jurisdiction, does Congress have any duty to fund them? While it has the authority under Article I’s spending clause and necessary and proper clause, neither Article I nor Article III require Congress to fund the lower courts—in fact, Congress may abolish those lower courts. But it must be remembered that the Constitution also contemplates the availability of courts of original jurisdiction—state or federal—to hear categories of Article III cases and controversies. The Constitution’s drafters saw a need for some federal judiciary, at least a Supreme Court, but contemplated that state courts would be the default forum both for general claims and federal questions.<sup>120</sup>

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be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). See CHARLES A. WRIGHT ET AL., 13 FEDERAL PRACTICE & PROCEDURE 3d § 3536 (1984 & Supp. 2004) (noting that controversy remains as to how far Congress may go in creating these courts and their jurisdictional boundaries).

117. U.S. CONST. art. III, § 1.

118. *Id.* at art. III, § 2.

119. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362-64, 1372, 1386-87, 1401 (1953) (discussing arguments about Congress’s ability to limit federal jurisdiction and arguing that individuals do not have a right to a proceeding in federal court). See generally WRIGHT ET AL. *supra* note 116, at § 3536 (discussing federal jurisdiction under 28 U.S.C. § 1331(a)); see also MARTIN REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 27 (1980) (discussing the jurisdictional limits on state and federal courts); Paul Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030 (1982) (discussing Congress’s power to eliminate the federal courts).

120. See *Testa v. Katt*, 330 U.S. 386, 394 (1947) (stating that state courts must adjudicate federal question cases over which they have concurrent jurisdiction). See also Lea Brilmayer & Stefan Underhill, *Congressional*

## 2. Other Constitutional Doctrines Requiring Access to Courts and the Remedy for Breach

The Constitution's implicit recognition of the right to a judicial forum goes further than Article III's outline of federal judicial jurisdiction. Case law based on five constitutional doctrines endorse some aspect of access to courts: the First Amendment's petition clause,<sup>121</sup> Fifth Amendment due process,<sup>122</sup> Fourteenth Amendment due process,<sup>123</sup> Fourteenth Amendment equal protection,<sup>124</sup> and the privileges and immunities clause from Article IV and the Fourteenth Amendment.<sup>125</sup>

These cases create a claim with resulting remedies of injunctive relief against the court-blocking law, and in some cases, money damages against government officials. Supporting language dates back to at least 1823<sup>126</sup> and is summarized in an 1872 Supreme Court opinion:

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*Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 827-28 (1983) (citing several cases in support of the proposition that state courts must provide access for federal claims comparable to the access they provide for local claims).

121. *Bill Johnson's Rests. Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *Cal. Motor Transp. Co. v. Trucking Ltd.*, 404 U.S. 508, 513 (1972); *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967); *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 1 (1964); *Harrison v. Springdale Water & Sewer Comm.*, 780 F.2d 1422, 1427-29 (8th Cir. 1986).

122. *Murray v. Giarratano*, 492 U.S. 1, 11 n.6 (1989); *Walters v. Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 335 (1985).

123. *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

124. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

125. *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907); *Blake v. McClung*, 172 U.S. 239, 249 (1898); *see also Slaughter-House Cases*, 83 U.S. 36, 75-80 (1873) (stating in dictum the range of privileges and immunities under Article IV and the Fourteenth Amendment).

126. *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (stating that the Privileges and Immunities Clause governs rights "which are in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union" and lists as one of several examples, the right "to institute and maintain actions of any kind in the courts of the state"); *see also Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870) (finding that the Privileges and Immunities Clause allows one to enter any state in the Union and maintain actions in that state).

The right to sue and defend in the courts is the alternative to force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens.<sup>127</sup>

As Justice Souter explained in *Christopher v. Harbury*, the cases fall into two areas—those challenging a rule or regulation that impedes access to courts, and those seeking damages for the defendants' having undermined a plaintiff's case—one either already litigated or about to be litigated.<sup>128</sup>

The first line of cases in which a rule or regulation impeded court access established the rights of prisoners' access regarding appeals or post-conviction relief. These included such underlying rights as eliminating requirements that habeas petitions be properly drawn<sup>129</sup> by the parole board's legal investigator,<sup>130</sup> the elimination of filing fees for habeas claims,<sup>131</sup> the availability of free trial transcripts for appeals,<sup>132</sup> the appointment of legal counsel for indigent defendants' appeals,<sup>133</sup> access to law books,<sup>134</sup> and related claims.<sup>135</sup> A similar line of holdings invokes the right to access to

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127. *Chambers*, 207 U.S. at 148 (holding that Ohio's wrongful death statute's exclusion of plaintiff's claim did not violate the Privileges and Immunities Clause) (citations omitted).

128. 536 U.S. 403, 413-14 (2002).

129. *Cochran v. Kansas*, 316 U.S. 255, 258 (1942).

130. *Ex parte Hull*, 312 U.S. 546, 549 (1941).

131. *Burns v. Ohio*, 360 U.S. 252, 257-58 (1959); *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

132. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *Mayer v. City of Chicago*, 404 U.S. 189, 198-99 (1971).

133. *Douglas v. California*, 372 U.S. 353, 357-58 (1963).

134. *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

135. *E.g.*, *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (holding that prison cannot unreasonably bar assistance from other prisoners in preparing lawsuits); *acc'd*, *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990) (stating that disciplining prisoner for having pursued prior lawsuit violates access to courts rule); *Rudolph v. Locke*, 594 F.2d 1076, 1078 (5th Cir. 1979); *Harris v. Pate*, 440 F.2d 315, 318-19 (7th Cir. 1971) (stating that right of access to courts requires continuance to allow prisoner time to obtain affidavits); *Sigafus v. Brown*, 416 F.2d 105, 107 (7th Cir. 1969) (holding that sheriff's destruction of lawsuit papers

courts to strike down filing fee requirements for indigents in divorce cases<sup>136</sup> and for the record-preparation fees in child custody cases.<sup>137</sup> The Supreme Court has twice used the doctrine to disallow state bar associations' efforts to prevent unions from using in-house attorneys and union staffers to assist members with legal problems.<sup>138</sup>

These cases involved single-issue impediments to litigation such as filing fees, but some courthouse bars may overtly block the lawsuit in its entirety. Bars to litigation are legitimate in most instances, including limits on subject matter jurisdiction, time bars, and anti-suit injunctions. But even these fundamental bars have exceptions. Subject matter jurisdiction limits have been held unconstitutional where they distinguish between residents and nonresidents in pursuing certain claims.<sup>139</sup> Limitations periods may not be arbitrary.<sup>140</sup> Anti-suit injunctions between different

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for habeas claim interferes with access to the courts); *see also* *Bounds*, 430 U.S. at 822-23 n.8 (listing more examples of such cases).

136. *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

137. *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996).

138. *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 221-22 (1967); *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 8 (1964).

139. *E.g.*, *Hughes v. Fetter*, 341 U.S. 609, 612-13 (1951) (holding that Wisconsin cannot use its subject matter jurisdiction rules to bar a wrongful death claim arising in Illinois); *Blake v. McClung*, 172 U.S. 239, 254-55 (1898) (finding that the Privileges and Immunities Clause bars Tennessee from denying nonresident creditors access to courts to pursue claims against insolvent corporations, or giving preference to resident creditors over nonresident creditors); *cf.* *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 151 (1907) (finding that an Ohio wrongful death statute limiting claims to Ohio decedents did not violate the Privileges and Immunities Clause).

140. Although statutes of limitation are old and pervasive, *e.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 724 (1988), the Supreme Court has emphasized that they are not a fundamental right, *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), and they do encounter constitutional bars. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (holding that Pennsylvania's six-year limitation period for paternity actions violated equal protection). The test, which varies according to the category of claim and its discoverability, is whether the time period provides plaintiff with an "opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (striking down Illinois's 120-day period for convening a conference with the state employment commission). In addition, a forum state may not apply its own limitation period to a transitory action, even though it has jurisdiction over the parties, if it lacks a reasonable connection to the dispute. *See Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) (noting that a state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them").

jurisdictions must overcome a strong presumption favoring the exercise of jurisdiction.<sup>141</sup> Creative litigants have also used federal substantive law in attempts to block oncoming litigation, and have failed because of their opponents' First Amendment right to petition. Examples include the attempted use of antitrust laws to block lawsuits by a competitor seeking to enforce trucking regulations,<sup>142</sup> and unfair labor practice laws to block an employer's well-founded lawsuit even though it was filed in retaliation for an employee exercising a protected right.<sup>143</sup>

The second line of access-to-court cases involves obstruction-of-justice claims for tampering with or spoliation of evidence by government actors. Unlike the first category in which the goal is merely to remove an impediment to the suit, the access claims in this second category may be distinct grounds for recovery where the cover-up undermined or prevented an earlier lawsuit. *Bell v. City of Milwaukee*<sup>144</sup> is an example of the years that can pass before the access claim is brought. A Milwaukee policeman shot and killed Daniel Bell in 1958.<sup>145</sup> When he admitted the crime years later, Thomas Grady claimed the gun accidentally discharged when he was pursuing the unarmed Bell.<sup>146</sup> But at the time, Grady and fellow-officer Krause fabricated a story that Bell had attacked them

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141. See, e.g., *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (denying a request for a federal court injunction against state litigation); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1358 (6th Cir. 1992) (denying a request for a federal injunction against Hong Kong litigation); *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 651-52 (Tex. 1996) (denying a request for an anti-suit injunction against Illinois litigation). In addition, the Anti-Injunction Act, 28 U.S.C.A. § 2283 (West 1994), forbids federal injunctions against state litigation except where expressly authorized by Congress, or in aid of the federal court's jurisdiction, or to protect or effectuate a federal court judgment. Note that the anti-suit injunction does not control the second court's treatment of the order to cease litigation. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 236 (1998) (allowing a witness enjoined from testifying in a case in Michigan to testify in a case before the Missouri Supreme Court). See generally James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769 (1999) (discussing parallel litigation in various contexts).

142. *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510-11 (1972) (finding no antitrust violation where trucking companies "conspired" to bring regulatory claims against competitors).

143. *Bill Johnson's Rests. Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

144. 746 F.2d 1205 (7th Cir. 1984).

145. *Id.* at 1215.

146. *Id.* at 1216.



with a knife.<sup>147</sup> Bell's father sued in 1959 and after a mistrial, settled for \$1,800 and dismissed his claim.<sup>148</sup> Bell's father died in 1962, and in 1978, one of the officers confessed the cover-up to the district attorney.<sup>149</sup> This later investigation led to Bell's siblings filing a new claim in 1979, for which a jury awarded \$1,590,670 on various claims.<sup>150</sup> On appeal, defendants' objections included a challenge to the viability of plaintiffs' access to justice claim, which was founded on a federal civil rights statute governing obstruction of justice.<sup>151</sup> Rejecting defendants' argument that obstruction of justice required more than merely impeding a private cause of action, the court held that "[t]o deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses."<sup>152</sup>

*Ryland v. Shapiro* was a claim for Lavonna Ryland's death, initially ruled a suicide.<sup>153</sup> Her parents were skeptical and pushed further investigation. She had been shot at the home of Alfred Shapiro, an assistant district attorney who was later convicted of her murder, although on appeal that conviction was set aside for insufficient evidence. Nonetheless, Ryland's parents sued Shapiro and two other prosecutors, alleging that after shooting her, Shapiro had telephoned assistant district attorney Edward Roberts and asked him to come to Shapiro's home. Afterward, Roberts and district attorney Edwin Ware prevented a full investigation into the causes of Ryland's death by cancelling her autopsy, attempting to persuade local doctors and coroners to sign death certificate reporting this as a

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147. *Id.*

148. *Id.* at 1226.

149. *Bell*, 746 F.2d at 1223.

150. *Id.* at 1224-25.

151. 42 U.S.C.A. § 1985(3) (West 2000) (the statute is headed "[d]epriving persons of rights or privileges" and provides a civil remedy for anyone "injured in his person or property, or deprived of having or exercising any right or privilege as a citizen of the United States . . .").

152. *Bell*, 746 F.2d at 1261. Although *Bell's* holding suggests that intentional cover-ups are a minimum, the access claim has been recognized for simple negligence, where the court clerk negligently delayed filing the appeal petition. See *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972) ("[A] Section 1983 Action may be based on negligence when it leads to deprivation of rights."); *Crews v. Petrosky*, 509 F. Supp. 1199, 1204 (W.D. Pa. 1981) ("An allegation that a clerk of state court has negligently delayed the filing of a petition for appeal, and that the delay has interfered with an individual's right of access to the courts may state a cause of action.").

153. 708 F.2d 967 (5th Cir. 1983).

suicide, and telling the police it was a suicide.<sup>154</sup> Ryland's parents filed a civil rights claim against Shapiro, Roberts and Ware, alleging that their cover-up interfered with the parents' access to the state courts with a wrongful death claim against Shapiro.<sup>155</sup> The federal district court dismissed but the Fifth Circuit reversed, finding that "[t]he right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution."<sup>156</sup> Looking to precedent, the court continued that "[a] mere formal right of access to the courts does not pass Constitutional muster. Courts have required that the access be 'adequate, effective, and meaningful.'"<sup>157</sup> Finding both a right of access to courts and that the plaintiffs' right here had been abridged, the Fifth Circuit reversed the dismissal and remanded the case for consideration on the merits.<sup>158</sup>

In a similar claim, Erin Delew died when her bicycle was struck by Janet Wagner, who was initially exonerated in an investigation by the Las Vegas police and the Nevada Highway Patrol.<sup>159</sup> Delew's husband and parents rejected this and sued both Wagner and several officials. Specifically, the plaintiffs alleged that Wagner was driving thirty percent over the speed limit, that she had been drinking and was allowed to leave the accident scene without being tested, that this was done because Wagner was married to a Las Vegas police officer, and that the subsequent investigation was a cover-up of Wagner's negligent actions. The federal trial court dismissed but the Ninth Circuit reversed, holding that "the right of access to courts is a fundamental right protected by the Constitution"<sup>160</sup> and more specifically that "the Constitution guarantees plaintiffs the right of meaningful access to the courts, the

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154. *Id.* at 969.

155. *Id.* at 969-70.

156. *Id.* at 971.

157. *Id.* at 972 (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)). The *Ryland* court went on to state that "[o]f what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom can be hermetically sealed against him by a functionary who, by refusal or neglect, impedes the filing of his papers?" *Id.* (quoting *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972)).

158. *Ryland*, 708 F.2d at 976.

159. *Delew v. Wagner*, 143 F.3d 1219, 1221 (9th Cir. 1998).

160. *Id.* at 1222 (citing *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907)).

denial of which is established where a party engages in pre-filing actions which effectively covers up evidence and actually renders any state court remedies ineffective.”<sup>161</sup>

Another theory, apparently untested, is that the Seventh Amendment right to jury trial compels the government to furnish both a forum and a jury. None of the cases arguing for basic access to courts have relied on this premise, but a 1988 law review article examined this question in light of Congress’s 1986 low budgeting of the judiciary and the resulting Judicial Conference order suspending jury trials from June 16 through September 30, 1986.<sup>162</sup> That order led to the Ninth Circuit’s holding in *Armster v. United States* that a three-month delay in the right to a jury trial was unconstitutional.<sup>163</sup> This set the stage for the 1988 law review article’s argument that if Congress failed to budget the courts sufficiently to pay the costs of jury trials, it would be in breach of an affirmative duty to underwrite the jury-trial guaranty, justifying the courts to empanel a jury and send the bill to Congress.<sup>164</sup>

The strongest discussion endorsing a right to court access comes from a case denying a forum for a habeas petition. In *Johnson v. Eisentrager*, German nationals were captured by American military forces in China after World War II hostilities had ceased.<sup>165</sup> They were accused of war crimes<sup>166</sup> and transported to Germany for detention awaiting a military trial. The accused filed

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161. *Id.* (citing *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997)); see also *Harrison v. Springdale Water & Sewer Comm.*, 780 F.2d 1422, 1427-29 (8th Cir. 1986) (holding that frivolous condemnation counterclaim in state court action intended to intimidate plaintiffs violated their First Amendment petition rights); *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979) (holding that bad faith criminal prosecution violated plaintiff’s First Amendment petition rights).

162. *Bunge*, *supra* note 1, at 237-38 (citation omitted).

163. 792 F.2d at 1430.

164. See *Bunge*, *supra* note 1, at 256-72 (basing the argument on the unconstitutional conditions doctrine, which holds that the government may not condition the receipt of its benefits, even discretionary benefits, upon the nonassertion of constitutional rights).

165. 339 U.S. 763, 766 (1950).

166. *Id.* at 793 (Black, J., dissenting) (noting that the plaintiffs claimed they were German civilians working in China, and were accused of giving information to the Japanese military in China after Germany had surrendered and argued that whether plaintiffs’ giving information to the Japanese military was a war crime was “not so simple a question as the Court assumes”).

habeas petitions in the Southern District of New York, claiming innocence and seeking trials in the United States rather than military tribunals in Germany. The district court dismissed for lack of jurisdiction over the foreign-held plaintiffs, but the Second Circuit Court of Appeals reversed with strong language stating that if Congress had intended to restrict habeas relief to prisoners held within the United States, such restrictions violated the right to court access.<sup>167</sup> The Supreme Court reversed the Second Circuit and upheld the trial court's theory that the Constitution's protections, though covering aliens in many situations, had territorial limitations that fell short of these claims.<sup>168</sup> But in so holding, the Court strongly underscored the ancient right of court access for most claimants. It first noted that the law—both common law and international law—had originally held that enemy aliens (citizens of enemy countries) historically could not bring civil claims, but that the United States had grown beyond this by 1813 when Joseph Kent upheld the right of a British national residing in the United States to bring a claim for a debt contracted before the War of 1812.<sup>169</sup> *Kent* held that “[a] lawful residence implies protection, and a capacity to sue and be sued.”<sup>170</sup> The *Johnson* court then quoted from a then-recent Supreme Court holding reaffirming *Kent*:

The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war effort or give aid to the enemy. This may be taken as the sound principle of the common law today.<sup>171</sup>

*Johnson* then distinguished the group who lacked such access—nonresident enemy aliens who remained in service to the hostile country.<sup>172</sup> *Johnson's* importance is not only in recognizing

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167. *Eisenstrager v. Forrester*, 174 F.2d 961, 967 (D.C. Cir. 1949), *rev'd on other grounds sub nom*, *Johnson v. Eisentrager*, 339 U.S. 763, 769-70 (1950).

168. 339 U.S. at 776-91.

169. *Id.* at 776 (citing *Clarke v. Morey*, 10 Johns. 69 (N.Y. 1813)).

170. *Id.* In *Clarke v. Morey*, *Kent* cited the common law for the alien's right to sue and traced the English origins to the “Magna Charta.” 10 Johns. at 70.

171. *Johnson*, 339 U.S. at 776 (quoting *Ex parte Kawato*, 317 U.S. 69, 75 (1942)).

172. *Id.* at 777-78.

this broad right of court access, extending to citizens and aliens except those nonresident aliens who were nationals of an enemy country, but in characterizing the right as one of common law, ancient and modern. That is, the ancient common law guaranteed citizens access to courts, and by 1813 the American common law had extended that access to resident aliens, including citizens of enemy countries if such access would not aid the enemy.<sup>173</sup> In addition to *Johnson's* strong support for court access for most claimants, three dissenters led by Hugo Black argued that the Court of Appeals was right and that even these nonresident enemy aliens (who had not been combatants), being detained by the United States military, had a right to a habeas hearing in a federal court in the United States.<sup>174</sup>

The constitutional claim for access to courts cannot be doubted—even cases holding that the access right was not abridged have nonetheless affirmed its existence.<sup>175</sup> In addition to these five constitutional doctrines and their caselaw endorsements, the Ninth and Tenth Amendments reserve all rights not delineated within the

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173. *Id.* at 776-77.

174. *Id.* at 791-98 (Black, J., dissenting).

175. *See* *Christopher v. Harbury*, 536 U.S. 403 (2002) (holding that access-to-courts claim requires a showing that the underlying claim could have been maintained absent interference or cover-up); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (holding that there is no right to appointed counsel for habeas proceedings); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 333 (1985) (holding that Congress's limiting attorney's fees to \$10 for veterans' disability claims did not violate right of access to courts); *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142 (1907) (holding that Ohio wrongful death statute limiting claims to Ohio decedents did not violate the Privileges and Immunities Clause); *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997) (holding that plaintiff's failure to make some attempt to pursue claim in court precluded recovery for impeding right of access); *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995) (holding that delay caused by alleged conspiracy did not deprive plaintiffs' right to court access); *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994) (holding that alleged conduct by city denying access to courts did not violate "clearly established right" of access to courts); *Williams v. City of Boston*, 784 F.2d 430 (1st Cir. 1986) (holding that plaintiffs had no right to information that was withheld from them); *Graham v. NCAA*, 804 F.2d 953 (6th Cir. 1986) (holding that expulsion from football team in retaliation for successful lawsuit to obtain scholarship was not a denial of access to courts); *Nordgren v. Milliken*, 762 F.2d 851 (10th Cir. 1985) (holding that prison's contracting with attorneys to prepare habeas petitions for prisoners instead of furnishing a prison library did not violate access to courts).

Constitution's limited government framework to the states and the people.<sup>176</sup> The doctrine of reserved rights has never been litigated in this regard, or perhaps even proposed as supporting access to state courts. But we have never faced the prospect of expanding federal jurisdiction over state law claims being removed to federal courts with dwindling resources. To the extent that state laws or the common law guarantee access to courts, Congress's failure to fund federal courts (or any other federal failure) returns this function to the state courts unless, unthinkable, the right of court access can be preempted and then ignored.

*B. Forum Availability as a Duty Imposed on Three Branches of Government*

English antecedents and the constitutional doctrines discussed above impose access-to-court duties on all three branches of the United States government, with some of the doctrines also applying to state governments. Chief Justice Marshall stated the government-wide duty in *Marbury v. Madison*:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of the government is to afford that protection . . . . [The] government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.<sup>177</sup>

Marshall made the observation quoted above as a premise to fashioning a remedy for *Marbury* in response to President Jefferson's withdrawal of a government appointment. *Marbury* lost, however, because he had mistakenly sought an original mandamus in the Supreme Court—the wrong forum—and thus had his claim dismissed for lack of original jurisdiction.<sup>178</sup> The case is nonetheless a milestone of American jurisprudence for its establishment of the

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176. U.S. CONST. amend. IX, X.

177. 5 U.S. (1 Cranch) 137, 163 (1803).

178. *Id.* at 137.

Court's inherent power to infer a remedy in the absence of an express cause of action, as well as the president's susceptibility to judicial review. But Marshall's quote reaches further than the facts in *Marbury*, recognizing the government's broader duty to "afford that protection"—that is, the assessment of facts in light of the law, a primarily judicial function since the time of King John.<sup>179</sup>

Marshall's edict that a legal right implies a remedy has been somewhat curtailed since the time of *Marbury*. Legislatures, for example, may create a public right for the accurate labeling of pharmaceuticals but limit enforcement to government agencies and withhold a private remedy, as Congress did in *Merrell Dow*.<sup>180</sup> It is important to note, however, that the federal pharmaceutical standards at issue in *Merrell Dow* did not displace plaintiffs' right to seek damages in state court (or in a federal diversity claim) for common law negligence. Plaintiffs thus retained their day in court and a remedy, but without the extra claim invented by Congress—a claim for a private right that did not exist under the federal regulatory scheme.

The fact that modern regulatory law can create public rights without creating private remedies does not detract in the least from *Marbury*'s express notion that the breach of a common law right entails a remedy, and the necessary implication that the court, through judicial review, is the means of obtaining that remedy. Without a right of court access for appropriate claims, *Marbury*'s fundamental equation fails.

Apart from *Marbury*, the doctrine is more fully developed in a number of cases arising in various fact settings that illustrate the right of court access, the government's corresponding duties, and the exceptions. Although this article argues that a breach of Congress's duty is underway, it is important to establish first the duty of court access as applicable to all three branches—it may have exceptions in narrow settings as explained in each section below, but the duty is pervasive.

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179. See Brilmayer & Underhill, *supra* note 120, at 829-33 (1983) (discussing how state courts provide forums for actions arising under the laws of the federal government and other state governments).

180. 478 U.S. 804, 806 (1986) (finding that Ohio's incorporation of federal drug-labeling standards into state law did not create a federal question in the absence of Congressional intent to create a private remedy).

## 1. The Court's Duty to Exercise Jurisdiction

In a case requiring state courts to hear federal claims, the Supreme Court has recognized “the common fealty of all courts, both state and national, to both state and national constitutions, and the duty resting upon them, when it [is] within the scope of their authority, to protect and enforce rights lawfully created . . . .”<sup>181</sup> Apart from categorical endorsements for court access such as this, the court's duty is best explained through its exceptions, with emphatic explanations of the strong presumption favoring jurisdiction and the narrowness of the exception. The cases are based on a variety of distinct doctrines involving courts declining or deferring jurisdiction in the face of such matters as significant inconvenience to a litigant, wasteful parallel litigation, or federalism and other policy conflicts between jurisdictions. The conflicts arise in multiple settings, between state and federal courts, between sister-state courts, and between American and foreign courts. Standing against these remedies of dismissal or deferral is a strong presumption—in some cases a requirement—that the court exercise jurisdiction. The non-exercise of jurisdiction is generally premised on the availability of another suitable forum.

### *a. Declining Cases for Convenience and Efficiency*

Significant inconvenience to litigants and the waste of parallel lawsuits are both grounds for declining jurisdiction under a variety of multi-faceted tests. Because all applicable doctrines require that an alternative forum be available, due process and the right of court access are not implicated. *Forum non conveniens* is a common ground for declining otherwise valid jurisdiction. There are two categories: venue transfers within the same jurisdiction, and the interjurisdictional forum switch requiring dismissal in the first forum for refile in a distinct second forum. In the intrajurisdictional venue transfer, forum availability is a given because the case is merely transferred within the same system without dismissal. That safeguard is missing for the interjurisdictional transfer because of dismissal and the need to obtain jurisdiction in the second forum.

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181. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 223 (1915).



For the cross-jurisdictional cases (and the domestic ones as well), a strong presumption favors plaintiff's choice of forum,<sup>182</sup> and plaintiff's court access is not threatened because the dismissal is premised on the availability of another suitable forum.<sup>183</sup> To ensure court access, the first forum normally grants a conditional dismissal based on defendant's agreement to refile in the second forum, to litigate on the merits, and to waive any objections to jurisdiction, venue, time limitations or other procedural bars.<sup>184</sup> Throughout the law of inconvenient forum—from the presumption favoring plaintiff's initial forum choice to the safeguards for movement to the second forum—the right to court access is a prime concern, at least in the required court analysis. However, so as not to overstate the protection for plaintiffs, the law of *forum non conveniens* does not require an equal second forum, only an adequate one. Plaintiff may face a less favorable law or different procedural requirements.<sup>185</sup> To the extent that plaintiffs fail to re-file in the second forum, the doctrine may be seen as denying meaningful court access. On the other hand, defendants have a right to meaningful court access as well. Assuming that courts grant *forum non conveniens* dismissals only in cases posing significant burdens on the defendant—a limit the doctrine contemplates but no doubt exceeds in many cases—its unavailability could mean equal fairness in many cases.

Parallel litigation is a second category of cases justifying the declining of jurisdiction. In dealing with parallel cases, a court has four choices: (1) allow both cases to proceed with the first to judgment having whatever preclusive effect it may have; (2) stay its own case for possible litigation later on any claims surviving preclusion; (3) dismiss its own case; or (4) enjoin a party from

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182. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (“[T]here is ordinarily a strong presumption in favor of a plaintiff's choice of forum . . . .”); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (holding that state courts may apply the doctrine of *forum non conveniens* when appropriate, but there is an interest in having local cases tried locally); *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 642-43 (7th Cir. 2003) (same).

183. *Gulf Oil*, 330 U.S. at 506-07; *Piper Aircraft*, 454 U.S. at 254 n.22.

184. See, e.g., *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 205-06 (2d Cir. 1987) (analyzing different procedural requirements before dismissing actions for *forum non conveniens*).

185. See *Piper Aircraft*, 454 U.S. at 247-54 (holding that unfavorable law should not be a significant consideration in a *forum non conveniens* inquiry).

litigating in the other forum.<sup>186</sup> Parallel litigation, at least in theory, has no court-access problem; to the contrary, the parties have access to two or more courts. But the law surrounding parallel litigation nonetheless illustrates the importance of court access. For example, the inadequacy of the other forum is a valid objection to a stay or dismissal in the desired forum,<sup>187</sup> although this ground is less clear for anti-suit injunctions.<sup>188</sup> As with inconvenient forum, in most settings a presumption favors the first-filing plaintiff's choice of forum, although other factors may overcome that presumption.<sup>189</sup> The *Colorado River* doctrine dealing with parallel litigation between federal and state courts illustrates this well. In stating the strong presumption against staying a federal lawsuit in deference to a first-filed state-court case, the Supreme Court noted a "virtually unflagging obligation of the federal courts to exercise jurisdiction given them."<sup>190</sup> The Court drew this presumption from three cases starting with Chief Justice Marshall's statement in *Cohens v. Virginia*—"It is most true that this Court will not take jurisdiction if it should not: but is equally true, that it must take jurisdiction if it

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186. George, *supra* note 141, at 777-81.

187. *E.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 n.20 (1983) (stating that a stay was necessary to "deter vexatious use of the federal courts").

188. Federal circuits are split into two camps on the standards for anti-suit injunctions, but both include the factor of protecting the forum's public policies. *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1352-54 (6th Cir. 1992). The adequacy of the other forum is not an express factor in the test, although in *Gau Shan*, the district court enjoined the litigation in Hong Kong on the grounds that allowing it to continue would violate the federal courts' policy of a just, speedy and inexpensive determination of every action. *Id.* at 1354. The court of appeals reversed, based on comity and the principle that anti-suit injunctions should be issued in only the most extreme cases. *Id.* at 1358-59. That the law of anti-suit injunctions does not emphasize the other forum's adequacy is somewhat irrelevant to the goal of promoting court access. To the contrary, to promote anti-suit injunctions would impair court access if the enjoining forum itself was inadequate.

189. *See* George, *supra* note 141, at 785-812 (explaining that for parallel cases within the same jurisdiction there is no presumption favoring the litigation of both cases, based on the efficient use of that jurisdiction's judicial resources).

190. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The Court nonetheless dismissed the federal case and in doing so defined the doctrine for overcoming the strong presumption favoring proceeding with a validly-filed case. *Id.* at 817-20; *see also* WRIGHT & KANE, *supra* note 36, at 338-41 (discussing those factors); George, *supra* note 141, at 855-64 (discussing *Colorado River* in detail).

should.”<sup>191</sup>

*b. Declining Cases Based on Federalism*

Abstaining from interference with state interests is yet another grounds for declining jurisdiction and thereby denying plaintiff's choice of forum. The *Pullman* doctrine is a good example, derived from a case in which the Texas Railroad Commission had ordered that a conductor be stationed on all trains having a Pullman sleeping car.<sup>192</sup> In the late 1930s, the railroads and the Pullman Company had a practice of assigning one porter (a lower rank than conductor) to each Pullman car, with one conductor in charge of all passenger cars for the train.<sup>193</sup> But many trains in rural

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191. 19 U.S. (6 Wheat.) 264, 404 (1821). The other two cases were *McClellan v. Carland*, 217 U.S. 268, 281-82 (1910) (finding that the federal court had a duty to adjudicate the case before it and could not defer to a state court which had intervened in the federal action), and *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964) (reversing the district court's dismissal of plaintiff's constitutional claims, recognizing plaintiff's right to return to the federal court after initial *Pullman* abstention required intermediate resort to state court). This strong presumption favoring the retention of the federal case does not apply to federal declaratory judgment actions brought by state court defendants. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (clarifying *Colorado River* and holding that federal courts have a broad discretion in dismissing federal declaratory judgment actions that parallel state lawsuits).

Discussing the Supreme Court's declining of its original jurisdiction in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), Professor Shapiro questions the Court's reliance on this *Cohens* quote (above), used in *Wyandotte's* reference to "the time honored maxim of the Anglo-American common law tradition that a court possessed of jurisdiction generally must exercise it." David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 561 (1985) (discussing *Wyandotte*, 401 U.S. at 496-97). Shapiro argues that jurisdiction is more discretionary than obligatory and questions *Wyandotte's* invocation of this seemingly sweeping maxim while citing only *Cohens*. *Id.* at 570-71. While Shapiro makes valid points about the range of judicial discretion in exercising jurisdiction (including the discretion to refuse an injunction because the applicant failed to prove the required elements), his questioning the existence of the "time-honored maxim" does not consider the due process and First Amendment lines of cases discussed in this article.

192. *R.R. of Tex. v. Pullman Co.*, 312 U.S. 496, 497-98, 501-02 (1941) (noting that the disputes may involve parallel litigation but are governed by federalism concerns rather than traditional parallel litigation laws); George, *supra* note 141, at 864-75 (discussing federalism concerns in the *Pullman* doctrine).

193. *Pullman*, 312 U.S. at 497.

Texas had only one passenger car, a Pullman sleeper.<sup>194</sup> Rather than staff it with two employees—a conductor and a porter—the Pullman Company merely had a porter in charge.<sup>195</sup> At the time, all conductors were white and all porters were black.<sup>196</sup> The conductors' union obtained the Railroad Commission's order requiring a conductor, which, as a matter of economics displaced the porters.<sup>197</sup> The Pullman Company and the railroads sued in federal court to enjoin the Commission from enforcing the order, and the porters intervened to raise Fourteenth Amendment equal protection objections.<sup>198</sup> Plaintiffs lost in front of a three-judge district court, leading to a direct appeal to the Supreme Court.<sup>199</sup> A unanimous Court reversed in Justice Frankfurter's classic opinion which noted that this dispute, unlitigated in Texas, was based on an order by a state agency whose delegated power was broad and ambiguous.<sup>200</sup> Citing the need to avoid constitutional encounters between state and federal law, the Court reasoned that if the Commission's order were held invalid under Texas law, the constitutional issue would be moot.<sup>201</sup> The Court remanded the case with orders that it be stayed and that the parties seek a resolution in Texas state courts.<sup>202</sup>

*Pullman* can be hastily read as requiring exhaustion of remedies for constitutional challenges to state law. This reading is inaccurate because the Court emphasized that the abstention requirement applied, under these facts, only because this was a question of first impression under Texas law. The resulting abstention rule, which varies slightly among the circuits, is that federal courts should temporarily abstain from questioning the constitutionality of ambiguous state laws that have not been litigated in that state's courts.<sup>203</sup> Cases falling short of these requirements

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194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 498.

198. *Pulman.*, 312 U.S. at 498.

199. *Id.*

200. *Id.* at 499-500.

201. *Id.* at 501.

202. *Id.* at 501-02.

203. See George, *supra* note 141, at 866-67 (discussing the *Pullman* tests in the various circuits); see also *United Fence & Guard Rail Corp. v. Cuomo*, 878 F.2d 588, 594 (2d Cir. 1989) (stating that the Second Circuit's three-part test: (1) unclear state law (2) raising a constitutional issue, and (3) susceptible to a reasonable interpretation that would avoid the constitutional issue).

must remain in federal court.

*Pullman* abstention is a valid exercise of federalism, but the opinion left unresolved the potential unfairness of denying plaintiff a properly-invoked federal forum for a constitutional question. Of course, *Pullman* stays do not deny court access as such. To the contrary, two courts are made available, with the state court having jurisdiction equal to the federal court's to litigate the constitutional claim. But does plaintiff have a right to the federal forum by filing there first? And upon losing the constitutional claim in state court, should plaintiff be precluded from pursuing that claim in the federal court where it remains stayed? The answer to both questions is yes, plaintiff has a right to federal court access by filing there first. To guarantee access to federal courts after a *Pullman* abstention, in 1964 the Supreme Court created the *England* reservation. It provides that if *Pullman* abstention requires a party to resort to state courts, the party may either submit all issues to the state court, or instead notify the state court of the constitutional issue and reserve them for later litigation in the stayed federal case, if necessary.<sup>204</sup> The Court's language in *England* underscores the plaintiff's right to access to a federal forum, "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."<sup>205</sup>

Some abstention doctrines—*Burford*, for example—allow dismissal of the federal case with no possibility of returning to federal court.<sup>206</sup> There is no denial of court access in these cases because the declining of federal jurisdiction is premised on the appropriateness of a state forum, and according to *Burford*, the inappropriateness of the federal forum in some cases. *Burford* was a federal diversity action seeking an injunction against the enforcement of a Texas state agency decision regarding an oil drilling permit. The oil permits were often contentiously litigated and the applicable law had considerable discretion based on the variety of geological and mineral ownership settings that might occur. To avoid a haphazard development of precedent in a complicated regulatory area, Texas had established a centralized review system in the state court of appeals in Austin, a system which

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204. *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 418-22 (1964).

205. *Id.* at 415 (citing *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909)).

206. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

had been undermined by litigants' forum shopping in federal courts.<sup>207</sup> The Supreme Court—with five votes—ruled that federal courts should decline diversity jurisdiction in a matter involving a complex area of state regulatory law with a centralized state-court review system, and in doing so, paid little textual attention to any presumption favoring the exercise of federal litigation.<sup>208</sup> The court-access argument was not ignored, however, and came in a strongly-worded dissent from Justice Frankfurter, joined by three others.<sup>209</sup> Among other differences with the majority, Frankfurter argued that “[t]he duty of the judiciary is to exercise the jurisdiction which Congress has conferred.”<sup>210</sup> As discussed later in this article, the fact that Frankfurter's argument is couched in terms of separation of powers should not compel the conclusion that it is a duty owed only to Congress.<sup>211</sup> Although the *Burford* majority did not acknowledge a presumption favoring the exercise of jurisdiction, since then the Supreme Court has in *Quackenbush v. Allstate Insurance Company*.<sup>212</sup>

Two other abstention doctrines jointly restrict federal courts from enjoining pending state litigation. The *Younger/Pennzoil* doctrine requires that federal anti-suit injunctions against pending state litigation satisfy strict equitable injunction standards, that is, plaintiff must establish the three elements of bad faith, irreparable harm, and no adequate remedy at law.<sup>213</sup> Addressing different

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207. *Id.* at 317-30.

208. *Id.* at 331-34. This reasoning appears to confuse the difference between threshold jurisdiction to hear the case and the discretion to deny injunctive relief. That equity is discretionary on the merits does not mean that a lawsuit seeking an equitable remedy must be discretionarily declined without consideration. *Burford* may nonetheless be valid as an exercise of balancing the interests of federalism, particularly in light of the trouble Texas had at the time with federal courts rendering uneducated decisions about oil and gas regulation.

209. *Id.* at 336-48 (Frankfurter, J., dissenting).

210. *Id.* at 348.

211. See *infra* notes 237-44 and accompanying text (claiming that the court-access argument is best explained using both the separation of powers argument and the due process argument).

212. 517 U.S. 706, 731 (1996) (noting that the *Burford* doctrine “only rarely favors abstention”).

213. *Younger v. Harris*, 401 U.S. 37, 54 (1971); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (discussing the application of *Younger*); see also CHARLES A. WRIGHT ET AL., 17A FEDERAL PRACTICE & PROCEDURE 2d § 4255 (1988) (discussing the contours of *Younger*).

concerns in the same setting, the Anti-Injunction Act limits federal anti-suit injunctions against pending state litigation to three narrow exceptions: where injunctions are congressionally authorized, where necessary in aid of the federal court's in-rem jurisdiction, and where necessary to protect or enforce a federal court's final judgment.<sup>214</sup> While the other abstention doctrines primarily protect state-federal relations, both of these anti-injunction doctrines demonstrate the irony of denying or restricting the use of a federal forum in order to protect a party's prior access to a state forum, and the exceptions for each come into play to protect another party's superior right to a federal forum.

The act of state doctrine, sometimes labeled abstention, permits a state or federal court to defer to the sovereign acts of foreign governments done within their territories. It is better described as a choice of law rule as the Supreme Court did in *W.S. Kirkpatrick & Co. v. Environmental Tectronics Corp. International*.<sup>215</sup> In *Kirkpatrick*, a losing bidder for a Nigerian government contract sued the winning bidder, alleging bribery, to which the defendant raised an act-of-state defense, that is, the money paid to the Nigerian government was necessarily valid as part of a sovereign act in awarding the contract. Rejecting the abstention label and finding the act of state doctrine inapplicable for lack of a sovereign act, the unanimous Court concluded with the strong presumption favoring the exercise of jurisdiction:

The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign

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214. 28 U.S.C.A. § 2283 (West 1994). For cases applying this act, see generally *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988) (applying the Act to a wrongful death suit); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977) (applying the Act in an antitrust suit); *Mitchum v. Foster*, 407 U.S. 225, 228-29 (1972) (discussing the Act in the context of a First and Fourteenth Amendment cause of action); *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 129-30 (1941) (applying the Act to insurance litigation); see generally CHARLES A. WRIGHT ET AL., *supra* note 213, at § 4224 (discussing the Act).

215. 493 U.S. 400, 408 (1990).

sovereigns taken within their own jurisdictions shall be deemed valid.<sup>216</sup>

*c. Declining Removed Cases and Supplemental Claims*

Removal and supplemental jurisdiction provide another ground for federal courts to decline jurisdiction. Both jurisdictional categories allow for the removal of non-federal claims (arising under state or foreign law) lacking independent jurisdiction bases in federal court; both have statutory grounds for remanding the dispute to state court if all federal claims have been resolved, or if the state-law issues predominate or are novel or complex.<sup>217</sup> As with abstention, these denials of a federal forum are based in every instance on the availability and appropriateness of an alternative state forum. In a larger perspective, removal and supplemental jurisdiction are primary examples of the government fulfilling its duty to provide a forum—a federal forum—for disputes with jurisdictionally-mixed state and federal claims, and taking the extra step to ensure that the federal forum is denied only in the few instances where a state forum is more appropriate.

*d. Declining Cases for Local Public Policy Reasons*

The cases discussed thus far in this section involve declining jurisdiction in deference to another jurisdiction's interests. The opposite scenario—favoring local interests—can also lead to the suppression of litigation where the forum refuses to litigate nonresidents' claims, or claims which violate local public policy. Although such exclusions are valid in many cases, state courts (and the state legislatures regulating them) are subject to the same court-access requirements as the federal government under due process,

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216. *Id.* at 409.

217. 28 U.S.C.A. § 1367(c) (West 1993) (remand of supplemental claims); 28 U.S.C.A. § 1441(c) (West 1994) (remand of separate and independent state law claims); see *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988) (holding that a federal district court has discretion under the doctrine of pendent jurisdiction to remand to a state court).



equal protection, and the right to petition.<sup>218</sup> In addition to sharing the requirements of the federal government, state courts are subject to the privileges and immunities clause requiring them to treat citizens of sister states as their own regarding court access,<sup>219</sup> by full faith and credit requiring state courts to furnish a forum not only for judgment-enforcement purposes<sup>220</sup> but also to litigate claims arising under sister states' laws,<sup>221</sup> and by the supremacy clause requiring state courts to accept jurisdiction over federal law claims.<sup>222</sup> In addition, forty states have constitutional provisions which equal or exceed the federal doctrines discussed in this article.<sup>223</sup>

*e. Supreme Court Declinations of  
Original Jurisdiction*

The Supreme Court has occasionally declined jurisdiction,

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218. See *supra* notes 112-53, 164-74 and accompanying text (discussing the basis of these requirements).

219. See *supra* notes 121, 122, 136 and accompanying text (surveying the origin of the application of court-access requirements to the states).

220. See *Fauntleroy v. Lum*, 210 U.S. 230, 236 (1908) (stating that at least two states have attempted to block a repugnant sister-state judgment by claiming to lack a competent court and that these attempts fell to Full Faith and Credit); see also *Kenney v. Supreme Lodge of the World, Loyal Order of Moose*, 252 U.S. 411 (1920) (same). States must honor final judgments from sister states even if rendered on matters illegal in the enforcing state, *Fauntleroy*, 210 U.S. at 233, or contrary to the enforcing state's public policy, *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233-35 (1998), although states may reject sister-state judgments interfering with matters under the enforcing state's exclusive control. See *Baker*, 522 U.S. at 233-35 (denying enforcement of a Michigan injunction attempting to stop defendant's employee from testifying in a Missouri lawsuit).

221. See *Hughes v. Fetter*, 341 U.S. 609, 612-13 (1951) (holding that a Wisconsin wrongful death statute, which limited remedies to deaths occurring in Wisconsin, was unconstitutional when construed to deny jurisdiction to claim for death in Illinois).

222. *Testa v. Katt*, 330 U.S. 386, 393 (1947).

223. *Phillips*, *supra* note 109, at 1310 n.6. The Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST., art. 1, § 13. Precedent has clarified section 13's access-to-court guaranty: "It is therefore not to be doubted that the legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another. Such a cause of action . . . could not be taken away; nor could the use of the courts for its enforcement be destroyed." *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556 (Tex. 1916).

sometimes in deference to lower courts having concurrent jurisdiction, and in rare instances where no other courts existed because of the Supreme Court's exclusive jurisdiction. *Ohio v. Wyandotte Chemicals Corporation* is a leading example of declining concurrent original jurisdiction.<sup>224</sup> *Wyandotte* concerned an Ohio nuisance-abatement complaint regarding *Wyandotte* and other companies who were dumping mercury into Lake Erie.<sup>225</sup> The Court noted its obvious jurisdiction, based on the claim by a State against corporations from other states and Canada,<sup>226</sup> before declining on the grounds that the issue was complex and required the expertise of fact-finding bodies—courts and agencies—that the Supreme Court could not well provide within its experience as a mostly appellate review court. But the Court did not lightly decline the case, even though its jurisdiction was concurrent with lower courts. Rather, the Court began with the “time-honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it.”<sup>227</sup> The Court then developed a two-part test for declining its original/concurrent jurisdiction:

(1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of this Court's functions attuned to its other responsibilities.<sup>228</sup>

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224. 401 U.S. 493 (1971).

225. *Id.* at 494.

226. The Court's original jurisdiction came from 28 U.S.C. § 1251(b)(3) authorizing concurrent original jurisdiction over “all actions or proceedings by a State against the citizens of another State or aliens.” The defendant corporations were from Michigan, Delaware, and Canada. *Id.* at 494-95.

227. *Id.* at 496-97 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)); see *supra* note 191 and accompanying text regarding *Cohens*.

228. *Id.* at 499; see also *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (stating that the Court had original, but not exclusive jurisdiction in actions between a state and citizens of another state); *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 113 (1972) (stating that original jurisdiction allows for discretion over cases); *United States v. Nevada & California*, 412 U.S. 534, 538 (1973) (stating that the Court seeks to use original jurisdiction sparingly).

*Wyandotte* declines jurisdiction for neither inconvenient forum nor parallel litigation reasons, but the principle of efficiency is similar. As with the other two, plaintiffs were merely denied their forum of choice, but not denied a forum in the absolute.<sup>229</sup>

The Court's declinations of exclusive original jurisdiction—limited to controversies between States<sup>230</sup>—are more provoking at first blush but are justified on the facts. In most instances, alternative forums were available in parallel actions not involving all the state parties. In *Arizona v. New Mexico*, for example, the Court declined exclusive jurisdiction in an interstate tax case based on identical issues raised in a parallel case still in litigation in a lower court.<sup>231</sup> It did the same in *Louisiana v. Mississippi*, a state boundary case having issues identical to those in parallel private litigation in lower courts, where the states were somewhat nominal parties.<sup>232</sup> *California v. West Virginia* may be more difficult to justify legally but is nonetheless a sensible rejection of jurisdiction.<sup>233</sup> The action arose from a contract dispute regarding “athletic contests between two state universities.”<sup>234</sup> Without opinion, the Court denied leave to file the original complaint. Justice Stevens dissented and pointed out that even though the states' failure to resolve this “does not speak well for the statesmanship of either party,” it did not justify the rejection of the Court's exclusive jurisdiction in a breach of contract claim.<sup>235</sup> As to both sets of jurisdictional refusals—concurrent and exclusive—scholars have various opinions.<sup>236</sup> But whether the Supreme Court is justified in these declinations or not, it is important to note that in all these examples, *California v. West Virginia* is the only case in which the parties might be left without a forum, and even there it is likely that

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229. See also *United States v. Alabama*, 382 U.S. 897, 897 (1965) (declining jurisdiction because of a parallel case with different parties raising identical questions concerning voting rights).

230. 28 U.S.C.A. § 1251(a) (West 1993). Other than states suing states, all other instances of Supreme Court original jurisdiction are concurrent. See *id.* at § 1251(b).

231. 425 U.S. 794 (1976).

232. 488 U.S. 990 (1988).

233. 454 U.S. 1027 (1981).

234. *Id.* (Stevens, J., dissenting).

235. *Id.*

236. See, e.g., FALLON ET AL., *supra* note 111, at 299-304 (discussing declination of jurisdiction in Supreme Court cases).

the universities could bring local actions without involving the states.

f. *Alternative Doctrinal Sources for Forum Declinations—Separation of Powers and other Overlays of Due Process*

In this section, discussing the court's duty to exercise its jurisdiction, case law establishes the duty as one owed to plaintiff based on due process and other constitutional and common law doctrines. Some cases, along with scholarly analysis, have argued for the same duty but attributed it to separation of powers, thus creating a duty the courts owe to Congress. Professor Redish, for example, has argued that the judge-made abstention doctrines—*Pullman*, *Burford*, *Colorado River*—are an unconstitutional usurpation of Congress's legislative role in deciding how and by whom federal laws will be implemented and enforced.<sup>237</sup> Professor Shapiro has responded that within the Anglo-American structure, jurisdictional grants include an inherent discretion to decline jurisdiction in any number of settings, including those covered by *Pullman*, *Burford*, and *Colorado River*.<sup>238</sup> Redish thus argues that the duty to exercise jurisdiction flows from the legislative authorization and that declining jurisdiction puts the court in an inappropriate policy-making role,<sup>239</sup> while Shapiro argues that jurisdiction is power but not duty, to be exercised with reasonable discretion.<sup>240</sup> My criticism of the arguments by Professors Redish and Shapiro may be misplaced because neither had in mind the question I am posing—may Congress economically impair the federal courts and still retain its full authority to regulate jurisdiction? My rebuttal is nonetheless necessary because of both articles' persuasive and well-documented discussion of discretionary abstention, a phenomenon in which basic court access was not at issue. The Redish/Shapiro discussion was whether the plaintiff should be in state or federal court, not whether plaintiff could be in court at all, a question raising different concerns and different

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237. Martin H. Redish, *Abstention, Separation of Powers, and the Limits of Judicial Function*, 94 YALE L.J. 71, 74 (1984).

238. Shapiro, *supra* note 191, at 544-45.

239. Redish, *supra* note 237, at 114-15.

240. Shapiro, *supra* note 191, at 588-89.

doctrinal sources.

Separation of powers is no doubt at issue when a federal judge declines otherwise valid jurisdiction in, for example, a civil rights case. On this point, either Redish (favoring federal litigation) or Shapiro (favoring discretionary abstention) may be correct depending on how one defines the court's authority to make policy when federalism clashes with separation of powers. But however appropriate it is to assess *Pullman* in light of separation of powers, to leave the discussion there misses a significant point. The President and Congress have significant discretion in exercising their respective jurisdictions. The President has a primary power over foreign policy but wide discretion in using it. Congress may regulate interstate commerce but has discretion as to the breadth and content of its regulations. Courts are different. Although judges have discretion in any number of their functions, they have very little discretion in choosing to exercise or decline jurisdiction, limited to the narrow exceptions explained in this article, which generally involve the availability of another forum. What explains the difference between the widely discretionary exercise of executive and legislative jurisdiction on the one hand, and the strong presumption favoring the exercise of judicial jurisdiction on the other? The answer is due process, not only from the Constitution, but from English common law with lineage back to Runymede and American judicial language reinforcing the doctrine for over two hundred years.<sup>241</sup> Separation of powers compels the courts to heed jurisdictional boundaries set by Congress. But separation of powers does not, by itself, compel any duty to exercise jurisdiction in any given case any more than the Constitution's Article I compels

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241. The D.C. Circuit illustrated this link between separation of powers and due process in a case upholding judicial review of a Social Security benefit denial:

In our view, a statutory provision precluding all judicial review of constitutional issues removes from the courts as an essential function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right. We have little doubt that such a 'limitation on the jurisdiction of both state and federal courts to review the constitutionality of federal legislation . . . would be [an] unconstitutional' infringement of due process.

Bartlett v. Bowen, 816 F.2d 695, 703 (D.C. Cir. 1987) (alteration in original) (quoting Redish, *supra* note 119, at 27).

Congress to exercise all jurisdiction granted there. Due process does compel courts to act, subject to exceptions as described in this article.

It is hardly surprising that scholarly analysis of the court-access duty has focused on doctrines such as separation of powers and bypassed due process.<sup>242</sup> Due process is unlikely to be implicated where a federal court abstains in deference to a state court. Even with occasional examples of jurisdiction-stripping federal statutes,<sup>243</sup> few fact settings over the last two American centuries have raised court-access issues on the level that the current funding shortages may soon do. Court access for rank-and-file litigants in American courts has not been a due process issue<sup>244</sup> other than for disenfranchised groups (even due process has a far-from-perfect history) and in isolated cases raising the exceptions discussed here.

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242. Professor Wright noted briefly that “the judicial experience under the Portal-to-Portal Act, as well as more recent lower court decisions, suggests that there may be some limitations on congressional power to restrict federal court jurisdiction arising out of other portions of the Constitution, such as the Due Process Clause and the First Amendment.” CHARLES A. WRIGHT ET AL., 13 FEDERAL PRACTICE & PROCEDURE § 3526, at 238-39 (1984) (citations to due process and first amendment cases omitted). Alexander Bickel paid similar lip service to the idea of a right to court access. In discussing the Supreme Court’s selective exercise of its jurisdiction, Bickel compared the Court to courts of general jurisdiction, noting that state courts “must, indeed, resolve all controversies within their jurisdiction, because the alternative is chaos.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 173 (2d ed. 1986). The alternative also violates due process.

In an analysis limited to Congress’s jurisdiction-stripping bills for such issues as abortion, Professor Brilmayer argued that Congress has a duty to furnish a federal forum for constitutional claims based on the comity inherent in federalism and principles of conflicts law, relying on analogous forum-furnishing duties imposed by full faith and credit (interstate) and the supremacy clause (state/federal). See Brilmayer & Underhill, *supra* note 120 *passim*.

243. See *infra* notes 245-80 and accompanying text (discussing these statutes in more detail).

244. Professor Shapiro cites Justices Marshall (in *Cohens v. Virginia*) and Brennan (in *Moses, Cohens, and Colorado River*) as mistakenly describing a strong duty for courts to exercise jurisdiction. Shapiro, *supra* note 191, at 543-44, 588 (“[T]he responsibility of the federal courts to adjudicate disputes does and should carry with it significant leeway for the exercise of reasoned discretion in matters relating to federal jurisdiction.”); see also FALLON ET AL., *supra* note 111, at 72-73 (discussing the rise of discretion by the court).

## 2. The Legislature's Duty to Furnish a Forum

In spite of these cases' addressing the judiciary's duty to exercise jurisdiction, the duty does not flow from the judiciary as such, but from the government's duty to furnish a forum. Along with Professor Hart's iconic dialogue,<sup>245</sup> a number of cases offer insight into Congress and state legislatures' attempt to limit judicial review. The starting point once again is *Marbury v. Madison*, a dispute initially between the hopeful appointee Marbury and incoming President Jefferson.<sup>246</sup> It quickly degenerated into a showdown between Chief Justice Marshall and Congress, which repealed the Circuit Court Act of 1801 and then impeached (but failed to convict) Justice Chase.<sup>247</sup> Marshall and judicial review won.

Two Reconstruction cases provide a foundation for constitutional constraints on Congress's power to limit the judiciary. Both were habeas cases, and as with *Marbury*, the Court's holding was limited to jurisdictional issues. But as with *Marbury*, the concepts of the right of court access and the government's duty to furnish it could not have been more central to the jurisdictional issues being considered. Congress won a round in *Ex parte McCardle*'s dismissal for lack of jurisdiction.<sup>248</sup> The dismissal was based on Congress's having repealed the Supreme Court's appellate jurisdiction to review the 1867 habeas statute under which McCardle had filed, the repeal occurring during the pendency of McCardle's case in Congress's effort to keep the southern newspaper editor in jail for writing against Reconstruction.<sup>249</sup> The Court held specifically that Congress had the power to regulate and thus limit the Supreme Court's appellate jurisdiction, but further held that the Court retained appellate jurisdiction over habeas petitions other than those brought under the 1867 Act.<sup>250</sup>

In the same Supreme Court term, *Ex parte Yerger*<sup>251</sup>

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245. See Hart, *supra* note 119 (discussing the legislature's duty to furnish a forum).

246. 5 U.S. (1 Cranch) 137 (1803).

247. SULLIVAN & GUNTHER, *supra* note 36, at 11-15; Chernow, *supra* note 20.

248. 74 U.S. (7 Wall.) 506 (1868).

249. *Id.* at 508-09.

250. *Id.* at 514-15.

251. 75 U.S. (8 Wall.) 85 (1868).

reinforced this presumption favoring jurisdiction. Yerger was accused of murder and though he was a civilian, was in the custody of the Army and faced non-jury trial in a military tribunal. Unlike McCardle, Yerger filed his habeas petition under earlier statutes.<sup>252</sup> After the federal circuit court in Mississippi denied his petition, Yerger was in the same position as McCardle, needing a writ of habeas corpus from the Supreme Court, albeit one issued in appellate review. The Court confirmed McCardle's holding that the 1868 Act repealing the Court's appellate jurisdiction over habeas petitions under the 1867 Act did not affect review of petitions under prior habeas statutes.<sup>253</sup> Yerger could have been limited to an exercise of statutory interpretation—finding as it did that the 1868 repeal was limited to its express language—but the Court took care to emphasize that to hold otherwise would mean that Congress could repeal “the whole appellate jurisdiction of this Court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government . . . .”<sup>254</sup> This is not to say that Congress lacks the power to regulate the Supreme Court's appellate jurisdiction. It is to say that the Court will not relinquish such jurisdiction absent Congress's clear intent,<sup>255</sup> a position based in part on Yerger's right to a forum. Tracing the writ from England's Habeas Corpus Act of Mary 27, 1679, through its adoption in the American Constitution, the Court noted that “[t]he terms of this provision necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new [United States] government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.”<sup>256</sup> Additional right-of-access language appears in the Court's observation that in cases like Yerger's, where the writ has been refused by a lower court and must come from an appellate court, “however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the

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252. *Id.* at 86-88.

253. *Id.* at 105.

254. *Id.* at 106.

255. *Id.*

256. *Ex parte Yerger*, 75 U.S. (8 Wall.) at 95-96. For readers, especially non-lawyers, who may find grounds for rejection in the phrase “founded on more liberal principles,” the Court necessarily meant libertarian principles as opposed to any New Deal meaning.



appellate jurisdiction of this court.”<sup>257</sup>

Most cases directly addressing Congress’s forum-furnishing duty fall under due process. They arise in multiple fact settings for various underlying injuries, but rather than explaining them topically, the doctrine’s evolution is best expressed chronologically. In the landmark *Yakus v. United States*,<sup>258</sup> the Supreme Court upheld a federal law which limited review of criminal convictions under wartime price-control laws to an administrative tribunal, with appellate review in the Supreme Court. In holding that Congress was not required to provide original jurisdiction in an Article III court, the Court held that “[t]here is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process.”<sup>259</sup> *Battaglia v. General Motors Corporation*<sup>260</sup> was a claim challenging the constitutionality of Congress’s repeal of plaintiff’s rights to overtime pay. Plaintiffs ultimately lost on the merits, but in responding to defendant General Motors’s argument that Congress also removed the court’s ability to review the constitutionality of this repeal, the court found that:

the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.<sup>261</sup>

A German prisoner of war filed a habeas corpus petition in *Eisentrager v. Forrestal*.<sup>262</sup> The district court dismissed for lack of

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257. *Id.* at 103.

258. 321 U.S. 414 (1944).

259. *Id.* at 444.

260. 169 F.2d 254 (2d Cir. 1948).

261. *Id.* at 257 (citations omitted).

262. 174 F.2d 961 (D.C. Cir. 1949), *rev’d on other grounds sub nom* Johnson v. Eisentrager, 339 U.S. 763 (1950). The Second Circuit Court of Appeals’ opinion in *Eisentrager* held that because state courts lacked jurisdiction over habeas claims for federal prisoners, Congress could not divest federal courts—and

subject matter jurisdiction, finding that Congress had not included claims by prisoners held outside the United States in the habeas statute. The Second Circuit reversed, holding that the Constitution forbids Congress from withholding a federal forum for habeas corpus for federal prisoners.<sup>263</sup> In reaching its conclusion, the court considered the argument that a lower federal court's power was limited to that granted by Congress, and then narrowed the hypothesis to Congress's omitting jurisdiction over a constitutional claim regarding federal confinement. Because state courts lack power to review federal confinement, to conclude that Congress could strip the power from lower federal courts would be to say that Congress could legislate "outside the necessity for compliance with the Constitution."<sup>264</sup> More recently the Court has held that Congress's elimination of judicial review of administrative bail denials for immigrants facing deportation (where the immigrant had been held for six months with no hearing), did not eliminate a due process review or the Court's power to grant habeas relief in lieu of bail.<sup>265</sup>

In a McCarthy-era opinion analyzed under the standing doctrine—addressing an organization's right to object to being

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thus all courts—from such claims. The holding, though reversed on other grounds, is not all that controversial, but the case's dictum regarding Congress's power in vesting the courts with the broadest range of Article III power is sometimes read as the largest extension of judicial power since Justice Story's notion that Congress was required to vest the courts with all power authorized by Article III. JAMES W. MOORE, ET AL., 15 MOORE'S FEDERAL PRACTICE § 100.20 n.16 (Martin Redish ed., 3d ed. 2005); WRIGHT & KANE, *supra* note 36, at 47.

The Supreme Court reversed on the basis of territorial restrictions in the Constitution's reach—that whatever Congress's power might be as to restricting habeas corpus review, the Constitution's guarantees (due process and habeas in particular) did not extend to enemy aliens alleged to have committed war crimes outside the United States territory, and who were at all times detained outside U.S. territory. *Eisentrager*, 339 U.S. at 776-91. In spite of denying plaintiffs a forum for their habeas claims, *Johnson v. Eisentrager* has some of American law's best arguments for the right of access to court for parties who are not enemy aliens held abroad. See *supra* notes 165-74 and accompanying text (underscoring the right of access to the courts for most parties and limiting the rule against suits by resident alien enemies to suits that might hamper the war effort).

263. *Eisentrager*, 174 F.2d at 967.

264. *Id.* at 966.

265. *Demore v. Hyung Joon Kim*, 538 U.S. 510, 517-18 (2003) (granting habeas relief and listing other cases discussing limits on Congress's power to limit judicial review of administrative decisions).

labeled a communist in an ad hoc procedure by the Justice Department—Justice Frankfurter's concurring opinion drew heavily from the *Brinkerhoff-Faris* case in which the Supreme Court required Missouri to open its state courts to an action against a local tax.<sup>266</sup> Specifically, Frankfurter quoted that “[w]hether acting through its judiciary or its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.”<sup>267</sup>

Two cases involving Selective Service challenges raised the forum availability question during the Vietnam War. In *Petersen v. Clark*,<sup>268</sup> plaintiff sued to enjoin induction into the military and the government objected on the grounds that federal law barred judicial review of a Selective Service decision.<sup>269</sup> The district court found the jurisdiction-stripping statute unconstitutional, citing authority that due process is a limitation on Congress's power to regulate federal jurisdiction.<sup>270</sup> More complicated facts arose in *Murray v. Vaughn*,<sup>271</sup> in which Murray was expelled from the Peace Corps for publishing an editorial against the Vietnam War while at his assigned location in Chile. He then was reclassified by Selective Service and drafted; he sued for injunctive relief to bar the draft, and for reinstatement in the Peace Corps to maintain his prior draft deferment. The government objected to the federal district court's subject matter jurisdiction on the grounds that Murray's claim did not satisfy the \$10,000 jurisdictional amount, arguing that his missing Peace Corps benefits were the only quantifiable claim. The court rejected this characterization both as to how to quantify his losses,<sup>272</sup> and, pertinent to this article, because Murray's First Amendment claim would go without a forum if the \$10,000 amount

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266. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161-62 (1951) (Frankfurter, J., concurring).

267. *Id.* at 162 (quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930)).

268. 285 F. Supp. 700 (N.D. Cal. 1968).

269. *Id.* at 701-02 (discussing 50 U.S.C. App. § 460(b)(3)).

270. *Id.* at 705 (“Congress surely cannot dilute or abrogate existing constitutional guarantees in the guise of exercising its authority to vest, withhold or restrict the judicial power of inferior courts.”).

271. 300 F. Supp. 688 (D.R.I. 1969).

272. *Id.* at 694-95.

were deemed to disqualify it.<sup>273</sup> The court found authority not only in due process but in Article III as well:

Both the Fifth Amendment and Article III, § 2 of the Constitution might well be abused if no avenue is opened for review by the courts of that claim. Specifically, if there is an arguably valid constitutional claim here, and if, as the government contends, neither 28 U.S.C. § 1361 mandamus nor 28 U.S.C. § 1331 general equity jurisdiction is available, how can the plaintiff seek to vindicate his rights? Certainly, the concurrent jurisdiction of the state courts is highly questionable in this context . . . . In summation, it is probable that if § 1331's amount in controversy proviso bars this court from reaching the merits of this case, a plaintiff, who alleges injury to those rights which occupy the highest position in the pantheon of our constitutional values, would be left without judicial process of law. As so applied, § 1331 might well be deemed to violate both the due process clause of the Fifth Amendment and Article III, § 2 of the Constitution insofar as it establishes the judicial branch of the government.<sup>274</sup>

In 1986, the Supreme Court dodged a “serious constitutional question” in *Bowen v. Michigan Academy of Family Physicians* by interpreting a federal statute as not precluding judicial review of certain Medicare payments to doctors.<sup>275</sup> The D.C. Circuit avoided a similar issue in *Bartlett v. Bowen*, when the court considered a law that arguably barred judicial review of a Social Security determination regarding extended care payments to Christian

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273. *Id.* at 694-96. At the time, general federal questions raised under 28 U.S.C. § 1331 had the same amount-in-controversy threshold as diversity claims, limiting federal courts to claims exceeding \$10,000. State courts were ordinarily available to hear concurrent federal question claims with lesser value, but state courts lacked jurisdiction to review the challenged actions by the Peace Corps and Selective Service, and without the federal court, Murray's claim would have no forum.

274. *Id.* at 695 (citations omitted).

275. 476 U.S. 667, 681 n.12 (1986).

Science facilities.<sup>276</sup> The *Bartlett* court held that any statutory construction that precluded review would violate both separation of powers<sup>277</sup> and due process,<sup>278</sup> and drew authority from several scholars including Professor Redish's point that "to the extent that the provisions of Article III are inconsistent with the due process clause of the fifth amendment, those provisions of Article III must be considered modified by the amendment."<sup>279</sup> The *Bartlett* opinion further quoted Professor Ratner:

It is reasonable to conclude, therefore, that the [Constitutional] Convention gave Congress the authority to specify . . . orderly procedures and to modify the jurisdiction from time to time in response to prevailing social and political requirements, within the limits imposed by the Court's essential constitutional role. It is not reasonable to conclude that the Convention gave Congress the power to destroy that role. Reasonably interpreted the clause means "With such exceptions and under such regulations as Congress may make, not inconsistent with the essential functions of the Supreme Court under this Constitution."<sup>280</sup>

Congress is not alone in having federal constitutional limits

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276. 816 F.2d 695 (D.C. Cir. 1987).

277. *Id.* at 703 ("Because the Secretary has no authority to consider constitutional questions, the appellant would have no forum at all for the pursuit of her claims. We would thus be faced with a situation in which Congress has enacted legislation and simultaneously declared that legislation to be immune from any constitutional challenge by the plaintiff.").

278. *Id.* at 706 (quoting Gunther, *Congressional Power to Curtail Federal Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 n.113 (1984), and stating that "[h]owever, '[s]ince restrictions on federal courts ordinarily leave state courts as available forums, curtailments of federal jurisdiction do not typically require confrontation of the difficult and unsettled problem of access to *some* judicial forum.' In other words, courts and legal scholars routinely assume that there is a due process right to have the scope of constitutional rights determined by some independent judicial body—and the Supreme Court has never held or hinted otherwise.").

279. *Id.* at 706 (quoting Redish, *supra* note 119, at 25).

280. *Id.* (quoting Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 171-72 (1960)).

on its power over access to courts. State legislatures (and state courts applying state laws to bar court access) have met similar fates in attempts to limit judicial review. *Brinkerhoff-Faris Trust & Savings Co. v. Hill* is the best example.<sup>281</sup> Plaintiff, a bank, sued to stop local Missouri tax assessments as discriminatory, but the state court dismissed the lawsuit—an equity claim—because the bank had not exhausted its administrative remedies by complaining first to the state tax commission.<sup>282</sup> The Missouri Supreme Court upheld the dismissal and expressly affirmed the exhaustion requirement, even though its own precedent held that the commission lacked adjudicatory power. The United States Supreme Court reversed, holding that “the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense.”<sup>283</sup> As to the argument that this was entirely a Missouri question and did not involve federal or constitutional law, the Court noted:

[W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.<sup>284</sup>

In *Brinkerhoff*, Missouri’s bar to judicial review was court-created but was in the court’s construction of a state statute. The case thus illustrates the wide applicability of the right to court access, first in its express application of a court-access right to both Missouri’s courts and its legislature, and second, in its use as precedent for purely federal cases.<sup>285</sup> State legislatures have also found

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281. 281 U.S. 673 (1930).

282. *Id.* at 674.

283. *Id.* at 678.

284. *Id.* at 682 (emphasis added) (citation omitted).

285. *See, e.g.,* *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) (“[A] state may not deprive a person of all existing remedies for the enforcement of a right . . . unless there is or was afforded to him some real opportunity to protect it.” (quoting *Brinkerhoff-Faris Trust &*

constitutional barriers—either state or federal—to statutes requiring courts to grant legislative continuances for attorney-legislators.<sup>286</sup>

Bars to judicial review are not the only means of legislatures impairing the judicial forum, but are the most litigated examples of inappropriate limits. Other examples of litigation bars include long-arm jurisdiction restrictions, subject matter jurisdiction rules, venue and inconvenient forum rules, and statutes of limitation.<sup>287</sup> All are presumptively valid but may encounter constitutional problems if unreasonably short or restrictive. More telling is the court-access impairment arising from legislative budget cutting, which is not susceptible to judicial review in the federal system and likely not in most state systems. But, the unavailability of a judicial remedy for underfunding the courts does not compel the conclusion that legislatures are free to shirk their duty to furnish courts, as further illustrated in this article.

### 3. The Executive's Duty and the Foreign Policy Commitment to Court Access

The quick answer to questions regarding the executive branch's duty of court access is that King John accepted it at Runymede<sup>288</sup> and President Jefferson re-learned it in *Marbury v. Madison*.<sup>289</sup> Quick answers often fall short, as this one does, but it is true that the original common-law commitment to court availability was imposed directly on the executive, albeit a king who also

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*Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930)).

286. See *Thurmond v. Superior Court*, 427 P.2d 985, 987 (Cal. 1967) (noting that the legislature could not have intended "the serious constitutional question which would ensue" if child support hearing were postponed); *A.B.C. Bus. Forms, Inc. v. Spaet*, 201 So.2d 890, 892 (Fla. 1967) ("As a right guaranteed by the Constitution, the courts must be open to every person for relief against injury."); *Bishop v. Montante*, 237 N.W.2d 465, 467 (1976) (discussing in dictum due process violation for unreasonably long periods of legislative postponements); *Waites v. Sondock*, 561 S.W.2d 772, 773 (Tex. 1977) (stating that it is a violation of due process to postpone action regarding child support).

287. See *supra* note 140 (discussing statutes of limitation).

288. See *supra* notes 104-09 and accompanying text (explaining that in signing the Magna Carta, King John agreed to provisions allowing greater access to the courts).

289. 5 U.S. (1 Cranch) 137, 162-63 (stating that even though the Supreme Court lacked jurisdiction for an original grant of mandamus, Marshall's reasoning set the cornerstone for judicial review and the right to a remedy).

exercised legislative and judicial functions. Of course, King John's acceptance is merely heritage, as is the Magna Carta's commitment to due process.

Under the United States Constitution, the president's direct interaction with the judiciary is limited to federal judicial appointments and veto power over the budget,<sup>290</sup> even though the president has great indirect power in lobbying Congress on a variety of issues including the judiciary's budget and the jurisdiction and venue statutes discussed in this article. Under the Constitution, however, Congress has the far greater control over the federal judiciary and the president's opportunity to deny access to courts is limited. Nonetheless, it has happened. Andrew Jackson's statement regarding *Worcester v. Georgia*<sup>291</sup> that "John Marshall has made his decision, now let him enforce it" had the effect of denying the forum by denying enforcement of its judgment.<sup>292</sup> Because enforcement jurisdiction is an executive power, arguably President Jackson was within his rights. On the other hand, the statement has never been verified,<sup>293</sup> perhaps because Jackson was unwilling to affirm later what he had said privately. In any event, Jackson's ignoring of the judgment ordering the release of missionaries who broke Georgia law by living with Cherokees was mooted by the Georgia governor's pardoning them<sup>294</sup> and Jackson's view of judgment enforcement went untested.

Thirteen days after the fall of Fort Sumter and fearing insurrection in the volatile area around the Capitol, President Lincoln authorized Commanding General Winfield Scott to suspend the writ of habeas corpus in an area between Philadelphia and Washington, D.C.<sup>295</sup> In 1862, Lincoln formalized this with his infamous

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290. See *supra* notes 38, 43 (discussing, respectively, presidential appointment and the veto power).

291. 31 U.S. (6 Pet.) 515 (1832).

292. See SULLIVAN & GUNTHER, *supra* note 36, at 25 (discussing Jackson's statements and their effects).

293. See SULLIVAN & GUNTHER, *supra* note 36, at 25 ("There is a legend that . . . ."); see also KERMIT HALL ET AL., *AMERICAN LEGAL HISTORY* 289 (3d ed. 2005) (referring to Jackson as having "supposedly" made the statement); ALVIN M. JOSEPHY, JR., *500 NATIONS: AN ILLUSTRATED HISTORY OF NORTH AMERICAN INDIANS* 328 (1994) (describing the statement as "legend").

294. KILLIAN & COSTELLO, *supra* note 2, at 795.

295. U.S. CONST. art. I, § 9, cl. 2 (stating that Congress may suspend habeas corpus "in cases of Rebellion or Invasion" if required for public safety); see SULLIVAN & GUNTHER, at 365 (noting that the president has no such power); see



Proclamation Suspending the Writ of Habeas Corpus, used immediately to imprison several citizens accused of activities ranging from sabotage to seditious speeches.<sup>296</sup> This went unchallenged in some detentions without trial, including that of Congressman Vallandigham from Ohio, but was rebuked in *Ex parte Merryman* where Chief Justice Taney (in a lower court while riding circuit) ruled that Maryland Congressman John Merryman's detention by military authorities without trial was unconstitutional.<sup>297</sup> Lincoln later had Congress ratify his suspension of the writ, but was again rebuked after the war in *Ex parte Milligan* when the Supreme Court ruled that even with congressional approval, Milligan's conviction by a military tribunal was unconstitutional and should have been done in an Article III court.<sup>298</sup> At the outset of World War II, the Supreme Court seemed to back away from Milligan in *Ex parte Quirin*, at least as to foreign defendants, in upholding the military-tribunal conviction and death sentence of a small group of German saboteurs who had landed on American shores.<sup>299</sup> The current Court recently reaffirmed the right to habeas in an Article III court for Guantanamo detainees captured in Afghanistan,<sup>300</sup> and again as to a United States citizen captured there.<sup>301</sup> In all these cases of habeas suspensions, defendants were detained under orders of the Executive branch. In the most recent cases following the terrorist attacks of September 11, 2001, Congress had authorized President Bush "to use all necessary and appropriate force"<sup>302</sup> but stopped short of delegating other Article I powers such

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also ABRAHAM LINCOLN, ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865, at 237 (Don E. Fehrenbacher ed., 1989).

296. See SULLIVAN & GUNTHER, *supra* note 36, at 365 (noting that among President Lincoln's actions after taking office in 1861 was his unilateral suspension of the writ of habeas corpus).

297. 17 F. Cas. 144 (D. Md. 1861); see also SULLIVAN & GUNTHER, *supra* note 36, at 365 (discussing *Ex parte Merryman*).

298. 71 U.S. 2 (1866).

299. *Ex parte Quirin*, 317 U.S. 1, 48 (1942). See also *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (upholding the military-tribunal convictions, held in Germany, of German civilians captured in the Pacific theater and convicted as enemy-aliens).

300. See generally *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004) (holding that the district court has jurisdiction to hear habeas challenges of Guantanamo detainees).

301. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004).

302. Joint Resolution for the Authorization for Use of Military Force, Pub. L.

as the suspension of habeas corpus.

Assuming that *Quirin* retains its force—that is, that foreigners captured in the United States during wartime and accused of sabotage can be convicted by a secret military tribunal—it is nonetheless clear that a strong presumption favors not only the right of habeas corpus, but the right to assert it in an Article III court. How much further this principle extends as to the president in non-habeas claims is only speculative. But as discussed earlier in this article, agents of the executive branch, state and federal, are subject both to injunctive relief and damage awards for interfering with court access.<sup>303</sup>

One notable executive interference with the judiciary—Franklin Roosevelt’s court-packing plan—was an attempt to stack votes in the Supreme Court to ensure favorable judicial review for New Deal reforms.<sup>304</sup> Undoubtedly an interference that exceeds other presidents’ traditional attempts to appoint litmus-satisfactory justices, Roosevelt’s plan nonetheless affirmed the importance of court access by trying to load the Court rather than circumvent or stifle adjudication.

Even if Roosevelt’s attempts cannot be labeled as supportive of the judicial function, actions by some American presidents can be best illustrated by the expansion of court-access rights in international matters. The rise of civil and political rights in the 20th century included a number of treaties establishing, among other rights, the right to a forum not only for criminal defense but for certain civil claims specific to each treaty. These include the Universal Declaration of Human Rights,<sup>305</sup> the International

No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); see SULLIVAN & GUNTHER, *supra* note 36, at 370 (discussing the Joint Resolution).

303. See discussion *supra* notes 121-76 and accompanying text (explaining the Constitutional requirements and remedies for court access).

304. See generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 82-162 (1995) (discussing Roosevelt’s court-packing plan).

305. G.A. Res. 217A (III), arts. 8, 10, U.N. Doc. A/810 (Dec. 12, 1948) (providing, respectively, that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” and that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.”).

Covenant on Civil and Political Rights,<sup>306</sup> the Protocol to the Convention Relating to the Status of Refugees,<sup>307</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>308</sup> the Convention on the Elimination of All Forms

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306. Article 3 provides that:

Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

International Covenant on Civil and Political Rights, Art. 3, *opened for signature* Oct. 5, 1977, S. Exec. Doc. No. 102-23, 999 U.N.T.S. 171 (signed by the United States on Oct. 5, 1977, ratified on June 8, 1992, and entered into force on Sept. 8, 1992).

307. The Protocol Relating to the Status of Refugees incorporates Articles 2 through 34 of the Convention Relating to the Status of Refugees. Protocol Relating to the Status of Refugees, art. 1(1), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967; for U.S., Nov. 1, 1968). Article 16(1)-(3) of the Convention Relating to the Status of Refugees states that:

- (1) A refugee shall have free access to the courts of law on the territory of all Contracting States;
- (2) A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*; and
- (3) A refugee shall be accorded in the matters referred to in paragraph 1 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

*Id.*

308. Article 3 provides that:

State's Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of

of Discrimination Against Women,<sup>309</sup> the American Convention on Human Rights,<sup>310</sup> and the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>311</sup>

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such discrimination.

International Convention on the Elimination of All Forms of Racial Discrimination, art. 3, *opened for signature* March 7, 1966, S. Exec. Doc. C, 95-2, at 3 (1978), 660 U.N.T.S. 195, 218 (entered into force Jan. 4, 1969; for United States Nov. 20, 1994).

309. Convention on the Elimination of All Forms of Discrimination Against Women, art. 2(c), July 17, 1980, 19 I.L.M. 33 (1979) (entered into force Sept. 3, 1981) (providing that “[t]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”).

310. Article 25 provides that:

(1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

(2) The States Parties undertake:

- (a) to ensure that any person claiming such remedy shall have his rights thereto determined by the competent authority provided for by the legal system of the state;
- (b) to develop the possibilities of judicial remedy; and
- (c) to ensure that the competent authorities shall enforce such remedies when granted.

American Convention on Human Rights, art. 25 (1)-(2), Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

311. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (providing in Article 6 (Right to a Fair Trial) that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . .”).

#### IV. THE CONSTITUTIONALLY-IMPAIRED FORUM AND PLAINTIFFS' RIGHT TO LITIGATE IN STATE COURTS

##### A. *The Forum-Furnishing Duty Applied to Budget Cuts*

The duty to exercise jurisdiction—*Colorado River's* unflagging obligation—is not merely a judicial duty but derives from a governmental duty to furnish a forum. Dating back to the barons' confrontation with King John in 1215, Anglo-American rights have included the government's duty to provide court access for the resolution of public and private disputes, a duty that continues in our own Constitutional history and interpretive case law<sup>312</sup> and now appears in treaties affirming the right of access to courts. The right is not absolute. It is subject to limits and exceptions and like other areas of law, sometimes has vague boundaries. In spite of those limits, exceptions, and vagaries, the right of court access is fundamental and at some basic point, non-derogable. It is a legal constant whose exceptions are based on ameliorating factors such as the existence of an alternative forum, a plaintiff's error in petitioning the wrong court, or in a delay that prejudiced the opposing party. The duty is imposed not only on governmental functionaries whose actions might require judicial review, but on government actors who impede court access. The duty applies to singular entities like King John and to each branch in a tripartite structure like the United States government.

Going back to the nation's founding, the United States has

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312. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."); *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."); *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."); *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983) (citing *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972)) ("Of what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom can be hermetically sealed against him . . .").

faced court-access crises with governmental actors denying or attempting to deny a forum. But where ultimate court access was at issue, access won. The few instances where access lost were short-lived and stand out as exceptions underscoring the rule. Until recently, forum-denial crises had not been caused by systematic short funding. Although court funding is a recurring problem in government administration, the issue has been one of management difficulty and short-term docket delays until the 1970s and 80s. Budgeting is now in the crisis stage and court access is threatened, particularly for civil cases.

In implementing austere operating budgets and conducting studies to find further efficiencies, the judiciary has acted in the best of faith even while declaring its crisis.<sup>313</sup> Vital court functions are now impaired and in some districts, some functions are ending. At the same moment that vital functions are in jeopardy, Congress is crowding the courts with more cases and more categories of cases, using preemption to federalize former state law matters, and requiring minimal diversity to qualify many of the largest state court actions for federal jurisdiction. Increasing numbers of state-court plaintiffs will be forced into federal court by Congress's "astonishing" and ongoing expansion in the regulation of former state-law rights and the expansion of federal court jurisdiction.<sup>314</sup> Preemption and removal are not inherently unfair, but will become unfair when the plaintiff's lawsuit languishes in federal court.

The duty to furnish a forum compels the conclusion that if Congress eliminated lower federal courts, as it has the power to do, its power to regulate lower federal court jurisdiction would be ineffective and the statutes would become dormant until the courts re-opened. Litigation would then be in state courts with appellate review of constitutional and certain federal questions by the Supreme Court.<sup>315</sup> But is full closure required to trigger this default to state

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313. See *Judiciary Asks Congress to Ease Financial Hardships of Courts*, News Release, Admin. Off. U.S. Courts, April 12, 2005, [http://www.uscourts.gov/Press\\_Releases/index.html](http://www.uscourts.gov/Press_Releases/index.html) (quoting Judge Julia Gibbons as stating, "At the present time, the judiciary is in a most difficult and paradoxical situation."); see also *supra* notes 17, 21-27, 29-31, 33-34 and accompanying text (supporting the general proposition that the judiciary has acted with the best of faith while declaring its crisis).

314. See *supra* note 82 (arguing that the amount of criminalized citizen behavior has increased "in astonishing proportion" over the past few decades).

315. See Hart, *supra* note 119, at 1362-64 (discussing the argument that

courts? If the right of court access is a limit on Congress's power to eliminate the federal courts, then the duty is surely implicated at some point well short of total elimination. The Constitution requires Congress to pay the judges,<sup>316</sup> and Congress requires the judiciary to pay rent which is set unilaterally by the landlord-executive-branch at rates termed confiscatory—rates far exceeding that of any other government entity.<sup>317</sup> But nothing requires Congress to fund the courts sufficiently to pay the rent, or the light bill or phone bill,<sup>318</sup> or the salaries of the people who investigate crimes, or supervise felons, or defend indigents, or, more importantly in civil cases, pay the people who process the papers or electronic documents that are the all-important record of adjudication on original jurisdiction.<sup>319</sup> If the Constitution lacks this protection, then the judicial branch is left with only the voting public to protect it. Life-tenured judges and other safeguards are meaningless if Congress can merely turn off the lights. If Congress cannot eliminate lower federal courts while insisting on the continuation of preemption and removal, how much can Congress impair those courts while expanding their function and compelling plaintiffs to litigate in federal court? Short of total darkness, how dim must the lights be to trigger a breach?

### B. *The Moment of Breach*

The Supreme Court has held that the right of court access must be “adequate, effective, and meaningful”<sup>320</sup> and that litigants

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Congress has the power to limit federal jurisdictions to force proceedings to be brought in state court).

316. U.S. CONST., art. III, § 1; *see also* 28 U.S.C.A. § 461 (1993 & Supp. 2005) (preventing salary adjustment statute from reducing judicial compensation protected by the Constitution).

317. *See supra* note 11 and accompanying text (“Even though the judiciary receives only two-tenths of one percent of the federal budget, the courts must pay more rent in total dollars than any department or agency in the federal government . . .”).

318. *See* Chorney, *supra* note 25 (reporting that pretrial services officers were using their own cell phones because the budget could not cover the bill).

319. *Judicial Business—2004*, *supra* note 61, at 1 (“The courts were forced to slash six percent of their workforce in 2004”); *see also* *Judicial Business—2004*, *supra* note 61, at 8 (“Courts already in a money crunch slashed 1,350 jobs in the preceding months”).

320. *Bounds v. Smith*, 430 U.S. 817, 822 (1977); *see also* *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1972) (stating that “[a] mere formal right of access to

must be afforded “some real opportunity”<sup>321</sup> to protect rights. What is “adequate, effective, and meaningful”? Assume that federal courts were operating at fifty percent efficiency. The Speedy Trial Act prioritizes criminal cases and in many districts, all of the courts’ remaining time would be spent on the criminal docket.<sup>322</sup> Is fifty percent operating strength the point of breach? It may be for civil claimants. Remember that the judicial budgeting process must distinguish between mandatory and discretionary costs. Mandatory costs—judicial salaries and rent—presently consume fifty-nine percent of the budget, and, in the current budgeting formula, will consume seventy-two percent in five years. The remaining “discretionary” functions—the clerks’ offices, probation officers, technology costs, and so on—will suffer reductions even in the face of modest budget increases that do not keep pace with the quickly-rising mandatory costs, the increased discretionary costs such as salary and benefits increases, rising technology costs, and newly-implemented security costs. Federal courts are currently operating at less than capacity, and that capacity reduction will accelerate.

Some districts are contemplating four-day weeks, while others are furloughing so many support personnel that the effect will be partial closure.<sup>323</sup> Closing one day a week is a twenty percent cutback in a district’s functioning. Assuming that the time allocation between civil and criminal is even (and in some districts criminal cases take up more than half the courts’ time),<sup>324</sup> a one-day-a-week closure is a forty percent cutback in those courts’ availability for

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the courts does not pass constitutional muster. Courts have required that the access be ‘adequate, effective, and meaningful.’”) (quoting *Bounds*).

321. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) (quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930)).

322. *See* 18 U.S.C.A. § 3161 (West 2000 & Supp. 2004) (prioritizing criminal cases). In spite of their smaller filings numbers compared to civil cases, criminal cases take up a significantly disproportionate time. *See generally* Cook, *supra* note 82, at 1581 (noting that federal judges spend a disproportionate amount of their time on criminal cases, “due to the increase in defendants, trials, motions, hearings, and sentencings”).

323. *See supra* notes 23, 29-30 and accompanying text (supporting the general proposition that U.S. courts are facing a severe budget crisis and may be forced to go to a shorter work week in order to remain operational).

324. *See* Cook, *supra* note 82 and accompanying text (discussing how criminal cases consume a disproportionate amount of time compared to the number of civil cases on the courts’ docket).



civil cases. Some will argue that partial closing might involve only the closing of nonjudicial functions, allowing judges and their immediate staffs to function throughout the traditional five-day week. This assumes that the court needs no assistance from the clerk's office or other personnel on those days. Marshalls and other security personnel would of course have to be there, and the utilities would have to function, resulting in less savings on the "closed" days. That lesser savings would have to be made up, perhaps by having the clerk's office closed two days a week. This may well be the case in less than five years.<sup>325</sup>

With the criminal docket having priority over civil cases, would due process permit us to assess the courts' aggregate performance, civil and criminal, and ignore the growing backlog of civil cases? If so, if civil cases can be forced from state court into federal court with the knowledge that they will not be heard, then there is no remedy for methodical defunding, and there is no right to court access. If the budget impact is sufficient to make federal civil filings greatly exceed case resolutions for an extended period, those cases will not have an adequate, effective, and meaningful remedy. Civil defendants would lose incentive in the all-important pretrial phase. Discovery would be less compelling with courts unavailable to hear the disputes, and those discovery disputes would in turn increase without fear of sanction, or even orders to compel. The prospect of litigation pressures settlement, which would abate as cases sat idle. With lower-incentive defendants, a paradox would occur with some plaintiffs, or at least their lawyers. To the extent that dispute resolution shifted even more heavily from litigation to mediation and other out-of-court procedures, some plaintiffs would increasingly file frivolous cases without the fear of facing the burden of even summary judgment, let alone trial, looking instead for an opportunity to mediate a profit.

This is not to suggest that we need a Speedy Civil Trial Act. Civil litigation has always been tedious and lengthy, and delays must be endured. Rather, it is to suggest that if the elimination of lower federal courts would abate their jurisdiction, then a significant partial closing (where criminal trials would take up most judicial resources)

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325. Marcia Coyle, *Courts on the Edge of Financial Crisis*, THE NATIONAL LAW JOURNAL, Nov. 12, 2004, <http://www.law.com/jsp/article.jsp?id=1100136999310>.

would necessarily have the same effect of making civil jurisdiction constitutionally questionable.

If impaired federal courts do breach a duty that breach occurs with more impact for litigants who would prefer state courts. The current crisis demonstrates the reason why courts of general jurisdiction—state district courts—are essential to democratic society, not to mention society's freedoms. Federal courts have never had a function of general jurisdiction, but are being given something close to that role by Congress's increasing use of removal jurisdiction and the preemption of state law remedies. These expansions have *prima facie* constitutional validity, but to the extent that Congress is advancing its tort reform agenda by stripping the federal courts' operating budget and undermining the same civil litigation it has pushed from state courts into federal courts, the due process clause and the Tenth Amendment compel the conclusion that Congressional power has been exceeded.

It is difficult to fashion an appropriate test for breach, at least this breach involving economic data, in an academic format. The test must be devised in an adversary setting based on both national and local data and the injury to the parties. Two sufficient grounds come to mind. First, if Congress is shown to have intentionally impaired the federal forum to achieve policy goals (something simple like tort reform, or complex like re-defining the judicial function)<sup>326</sup> unrelated to budget concerns, its jurisdictional expansions such as the minimal diversity statutes arguably breach the court-access duty and are unconstitutional. This is an unlikely result because courts may not ordinarily inquire into Congressional motives and must instead rely on the legislative language and record.<sup>327</sup>

Second, without speculating about Congressional intent, if essential judicial branch functions are undermined to the extent that litigants no longer have an "adequate, effective and meaningful" forum, the duty is breached. Breach would not be triggered by simple docket backlog, particularly if the backlog is specific to some districts and not others, or by short-term backlog primarily caused by

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326. See *supra* notes 33 & 34 and accompanying text (regarding public positions attributable to House Majority Leader Tom DeLay and Senate Majority Leader Bill Frist).

327. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into Congressional motives are a hazardous matter.").

non-funding factors such as judicial vacancies. It would be triggered where Congressional funding cutbacks have a substantial and nationwide impact on court functions to the extent that the districts' collective dockets are growing. Thus, the standard might be based on a nationwide problem (although the problem would not have to be acute in every district), based on systemic problems rather than a series of locally-occurring problems, that were ongoing rather than short-term, and that affect essential court functions. One possible standard, then, is if the federal backlog reaches the point that over a sustained time it is adding civil cases significantly faster than it disposes of them, and does so systematically rather than in isolated districts, it will be in breach. Congress's current funding approach may reach that point soon.

One additional factor in determining the moment of breach will be backlogs in various state courts, which are historically more crowded than federal courts. Moreover, some state courts are facing their own funding crises, although not with the dire predictions accompanying the federal forecasts.<sup>328</sup> Some will argue that if state and federal backlogs are similar, then neither can be deemed to have breached a duty of court access. That argument, put in its best light, is like saying that the standard of care is determined by prevailing practices in the locale of the negligence. Put in its worst light, it is the equivalent of saying that if two defendants are grossly negligent, then neither is negligent. Under this view, if both state and federal judiciaries are compromised to the extent that criminal trials largely displace the courts' ability to deal with civil dockets, then both systems will have been breached. In this event, where neither system is providing any remotely meaningful access, plaintiffs with claims litigable in state court ought to be able to choose where to stand in line. Another possibility, however, is that federal court access for civil cases will become much worse than state court

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328. See, e.g., Brennan, *supra* note 1 (noting earlier funding shortages for state courts); Hazard, *supra* note 1 (same); G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 87 JUDICATURE, July-Aug. 2004 at 12 (noting the power struggle between heads of the state legislatures and state supreme courts); see generally Symposium, *Justice in Jeopardy: The State Court Funding Crisis*, 43 JUDGES' JOURNAL 5-43 (American Bar Ass'n., 2004) (discussing methods taken by courts to address budget problems); Symposium, *The Co\$T of Ju\$Tice: Funding State Courts*, 88 JUDICATURE 152, 155-71 (Jan.-Feb. 2005) (recommending strategies to address budget problems).

access—that Congressional underfunding and executive overbilling for rent, combined with Congress’s expansion of federal jurisdiction (both criminal and civil), and the priority for criminal cases, may push the federal backlog well beyond the waiting time in the states.

C. *The Remedy for Congress’s Funding Breach*

Two remedies have been suggested for underfunded courts. One is the inherent power doctrine that courts—state or federal—have an inherent power to raise revenue.<sup>329</sup> The second is that courts have the power to compel Congress to pay, or even that a single federal district court can send Congress the bill.<sup>330</sup> While those arguments are not examined here, both are constitutionally doubtful in regard to federal courts. A more plausible remedy is the one argued for throughout this article—that Congress’s regulatory power over the lower federal courts is tied, at least loosely, to its funding. Because of the forum-furnishing duty, an enabling budget is just as important as an enabling statute. If either fails, Congress’s judicial regulation must fail with it. If Congress used its Article III discretion to eliminate lower federal courts entirely, then the Congress’s jurisdictional regulation of those courts would be dormant. To argue otherwise would be to argue that Congress could authorize defendants to remove cases from state court for litigation in a nonexistent court, or require plaintiffs with employee benefit claims to file them in nonexistent federal courts. In every instance, this would violate due process and the first amendment petition clause, and in other instances would violate other clauses as explained in this article. Without this constitutional solution, a solution that necessarily follows from the cases discussed here, the judiciary is at the mercy of Congress and the President.

Congress’s current attitude toward federal courts—stripping funds while piling on new cases—will breach Congress’s duty at some point. In more than two centuries of democracy that included a

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329. See Hazard, *supra* note 1, at 1287-91 (providing sources for the doctrine and doubting the doctrine’s validity); see also, Webb & Whittington, *supra* note 328, at 12 (endorsing the doctrine and describing recent examples such as the 2002 revenue-raising order from the Kansas Supreme Court).

330. See Bunge, *supra* note 1, at 272 (“[F]ederal courts should remedy these constitutional violations by empanelling civil juries and sending the bill to Congress.”).

civil war, a court-blocking crisis has never occurred on the level that could occur in this fact setting. If Congress pursues the paradox of increased jurisdiction with fewer personnel and less equipment, courts will not be able to fix the problem by raising their own funds or ordering Congress to pay. However, courts can determine that they lack jurisdiction, based on Congress's failure to provide an adequate, effective and meaningful forum.

What jurisdiction is lost? One answer is that, like Oliver Wendell Holmes's "Wonderful One-Hoss Shay," the whole system breaks down at once and all jurisdiction is impaired at the point of breach, when a sufficient number of courts cease functioning as traditional fully-operational courts. That answer is as severe as Congress's attitude toward the judiciary. A more reasoned answer is that because part of the problem is the Congress's astonishing expansion of federal judicial jurisdiction, that the more recent and exorbitant exercises of that jurisdiction fail.

But compromise answers may be inappropriate for jurisdictional questions. The right of court access compels a third answer for a specific class of plaintiffs—those who prefer to litigate in state courts. If federal courts cannot function with the growing docket and shrinking budget that Congress has given them, then plaintiffs who have claims capable of adjudication in state courts have a right to choose state court over federal court. Congress's efforts to deny that choice and force those plaintiffs into partially-functioning federal courts is a further breach. Any statute compelling this result is unconstitutional, violating due process and the other court-access guarantees discussed here. Specifically, Congress loses the power to preempt state law remedies and compel exclusive jurisdiction in federal courts; it loses the power to authorize the removal of claims from state to federal court;<sup>331</sup> and it loses the power to authorize putative defendants to sue for declarations of nonliability regarding claims for which true plaintiffs prefer state court. *Marbury's* holding that a right entails a remedy

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331. In *Thermtron Products, Inc. v. Hermansdorfer*, the Supreme Court held that docket backlog was inappropriate grounds for remanding a removed case. 423 U.S. 336, 351-52 (1976). The proposition that court underfunding at some point renders removal jurisdiction unconstitutional does not violate *Thermtron*, which held that Congress did not intend docket backlog as grounds for denying removal. *Id.* at 351. Congress's intent in authorizing and regulating removal jurisdiction becomes irrelevant if their underlying action violates due process.

has been eroded by Congress's creation of public rights that lack a private remedy.<sup>332</sup> *Marbury* and its progeny have not been eroded, however, for the concept that courts of general jurisdiction have the power and the duty to adjudicate legal claims that do have a private remedy. Congress may not federalize those claims by exclusive preemption or removal and then close the federal courthouse doors.

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332. See *supra* note 180 and accompanying text (commenting on a case where Congress created a right to accurate labeling of pharmaceutical drugs but withheld a private remedy in preference for enforcement by government agencies).

