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JURISDICTION STRIPPING CIRCA 2020: WHAT *THE DIALOGUE* (STILL) HAS TO TEACH US

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ABSTRACT

Since its publication in 1953, Henry Hart's famous article, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, subsequently referred to as simply "*The Dialogue*," has served as the leading scholarly treatment of congressional control over the federal courts. Now in its seventh decade, much has changed since Hart first wrote. This Article examines what lessons* The Dialogue *still holds for its readers circa 2020.*

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INTRODUCTION

> *It seems that we—we've been replicating what, among lawyers anyway, is a famous dialogue between Professors Wechsler and Hart about whether Congress can achieve unconstitutional objectives by preventing federal courts from adjudicating claims that those provisions are unconstitutional.*[1]
>
> *—Chief Justice John Roberts*

A. 1953 and Beyond

1953 was a remarkable year for federal courts scholarship. Hart and Wechsler's *The Federal Courts and the Federal System*—"probably the most important and influential casebook ever written"—was published.[2] That work still shapes the field of federal courts scholarship.[3] Earlier in the year, Henry Hart published his famous article *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic* (universally referred to as "*The*

1. Transcript of Oral Argument at 16–17, Patchak v. Zinke (*Patchak II*), 138 S. Ct. 897 (2018) (No. 16-498).

2. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 688 (1989) (book review); *id.* at 690 n.11 ("This extraordinary work is perhaps the most influential casebook ever written." (quoting P. BOBBITT, CONSTITUTIONAL FATE 43 (1982))); *see also id.* at 689–91 (collecting accolades). The casebook is now in its seventh edition. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015) [hereinafter HART AND WECHSLER]. All casebook references are to the current edition unless otherwise noted.

3. One of its current editors wrote that he could "claim no credit for the book's most extraordinary influence, which flows predominantly from the first edition . . . and from the first edition's success in defining the field as we now conceive it." Richard H. Fallon, Jr., *Why and How to Teach Federal Courts Today*, 53 ST. LOUIS U. L.J. 693, 696 (2009) (footnote omitted); *see also* Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 960 (1994) (discussing Hart and Wechsler's "[p]uzzling [p]ersistence").

Dialogue") in the *Harvard Law Review*, which had appeared earlier as part of the casebook.[4] My project is to examine just what *The Dialogue*'s central legal ideas have to teach us after more than six-and-one half decades.[5]

Hart (like Wechsler) had god-like status in the middle of the last century. As a student of Felix Frankfurter, a law clerk to Justice Brandeis, and an anti-positivist (in the late 1950s debate between Lon Fuller and H.L.A. Hart), he was—and still is—the acknowledged standard bearer for the Legal Process School of statutory interpretation.[6] For decades of law school students, Chapter Four of the Hart and Wechsler casebook, which addresses the general topic of congressional control over Article III court subject-matter jurisdiction, has been the casebook's *sanctum sanctorum*. *The Dialogue* long stood at its very center. It was reprinted in the book's second (1973) and third (1988) editions, with citations added and some footnotes annotated, modified, or eliminated. Subsequent editions have drawn upon *The Dialogue* extensively.

Congress, Hart believed, had wide latitude in prescribing the subject-matter jurisdiction of the Article III courts. But it was not unlimited. Hart's specific concern was with congressional misuse of its authority to "regulate rights — rights to judicial process, whatever those are, and substantive rights generally."[7] It was, Hart insisted, "monstrous illogic . . . . [t]o build up a mere power to regulate jurisdiction into a power to affect rights having nothing to do with jurisdiction."[8] Yet, Hart said, Supreme Court opinions seemingly endorsed such freewheeling authority: "[They] are full of what may be thought to be *injudiciously unqualified* statements of [such a] power."[9] "[T]aken at face value," he asked, how can such statements be "reconciled with the basic presuppositions of a regime of law and of

4. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) [hereinafter *The Dialogue*].

5. Since Hart wrote *The Dialogue*, there has been a scholarly outpouring bearing upon this topic, which includes my own work. *See, e.g.*, Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983) [hereinafter Monaghan, Marbury].

6. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–80 (William N. Eskridge Jr. & Philip P. Frickey eds., 1994).

7. *The Dialogue*, *supra* note 4, at 1371.

8. *Id.*

9. *Id.* at 1362 (emphasis added).

constitutional government?"[10] *The Dialogue* set out to examine these problems.

The question is what *The Dialogue* still has to teach us generations after it was written. That inquiry remains important. To be sure, the current horizon portends no large-scale, rights-altering legislative attacks on Article III subject-matter jurisdiction nor major limitations on the Supreme Court's appellate jurisdiction over the state courts or on district court jurisdiction in school desegregation, school prayer, or abortion cases.[11] Nonetheless, Hart's concerns remain constants on the legal landscape, now appearing, we might say, at the retail level. For example, in *Felker v. Turpin*, the Supreme Court rejected an attempt by Congress to eliminate the Court's review of court of appeals rulings denying second or successive habeas corpus applications for leave to appeal.[12] In *Boumediene v. Bush*, the Court likewise rejected an effort to limit Article III courts' habeas jurisdiction.[13]

The recent 2017 Supreme Court Term was quite literally filled with decisions central to *The Dialogue*. In the second iteration of *Patchak v. Zinke*, mentioned in the epigraph, a splintered Court sustained a congressional limitation on the district court's (and ultimately on the Court itself) ability to hear cases about a particular piece of land, with a four-member plurality characterizing the limitation as permissible jurisdiction stripping.[14] In *Jennings v. Rodriguez*, a divided Court addressed another topic dear to *The Dialogue*—administrative detention in the immigration and removal context.[15] In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, the Court, again divided, upheld administrative, rather than judicial, revocation of a patent.[16] In *Ortiz v. United States*, the Justices debated at length whether the Court's appellate jurisdiction could constitutionally attach to judgments of the Court of Appeals for the Armed Services.[17] Finally, despite numerous opportunities to do so,

10. *Id.* at 1363.

11. While such legislation has been frequently proposed in Congress, it rarely passes. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895–97 (1984) (listing examples).

12. Felker v. Turpin, 518 U.S. 651, 658 (1996).

13. Boumediene v. Bush, 553 U.S. 723, 796–98 (2008).

14. Patchak v. Zinke (*Patchak II*), 138 S. Ct. 897, 907–08 (2018).

15. Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018).

16. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1374–75 (2018).

17. Ortiz v. United States, 138 S. Ct. 2165, 2173–78 (2018).

no decision during either the 2017 or the 2018 Term accorded actual deference to administrative law formulation; a result that would have, I believe, pleased Hart.

B. The Dialogue*: A Preliminary Look*

Looking back at *The Dialogue*, a reader would start from the realization that Hart's world now has many new dimensions.[18] But far more importantly for our purposes is another realization: although separately published, *The Dialogue* was never intended to be a comprehensive, stand-alone treatment of its subject matter. It was designed simply to be a *part*—and I emphasize part—of a single casebook chapter that contained extensive materials on Congress and the federal courts.[19] Indeed, *The Dialogue* itself can be described as largely an annotated review of several then-recent Supreme Court decisions, discussed below, assessing their cogency against a few strongly held, bedrock convictions. And, while universally characterized as "*The Dialogue*," it, like many other "dialogues," was in no sense a real colloquy. Rather, it was an interior monologue, a conversation Hart was having with himself. A conversation, ultimately, about important and enduring legal issues that will perhaps always escape final closure. Hart himself was certainly under no illusion that he had "worked it all out," which accounts for *The Dialogue*'s frequently tentative, exploratory, tension-filled, and often obscure nature.[20]

Hart's inquiry was undertaken against the then-existing legal landscape. By 1953, the basic structure of our regulatory, welfare, contract, and grant-awarding administrative state was in place. There existed, however, a parallel, deeply ingrained recognition of the judicial role in protecting traditional conceptions of liberty and property against unlawful executive and administrative deprivation. Recognition of that judicial role was real then and is still real now. An important aspect of the modern administrative state consists of federal

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18. For example, whole new areas have come into focus, such as the relationship between the Article III courts and supranational tribunals. *See generally* Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007) (discussing whether supranational judicial review runs afoul of Article III).

19. Hart's course on federal courts was taught at noon on Friday and Saturday. It was fondly referred to as "Darkness at Noon."

20. *The Dialogue* does not "proffer final answers but . . . ventilate[s] the questions," and it takes "full advantage . . . of the ambivalence of the dialogue form." *The Dialogue*, *supra* note 4, at 1363.

"adjudication" imposing duties on private parties that, at least in significant part, occurs outside of Article III tribunals in administrative agencies and "legislative" courts.[21] This development was—and still is—seen by many as threatening the traditional judicial rule-of-law role in protecting liberty and property rights from unjustifiable governmental invasion.

In the end, *The Dialogue* made no fundamental challenge to the then-emergent administrative state. Hart accepted its main outlines. His understanding of Article III and other potential constitutional limits on administrative adjudication was largely akin to Justice Brandeis's dissent in *Crowell v. Benson*[22] and his concurrence in *St. Joseph Stock Yards Co. v. United States.*[23] However, Hart famously postulated a constitutionally mandated "essential role" for the Supreme Court.[24] Moreover, he strongly resisted various formulations of the "public rights" doctrine regarding the finality of executive or administrative (hereinafter collectively "administrative") deprivations of liberty and property.[25]

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21. Notice-and-comment rulemaking as a mode of imposing duties on private parties, so important in the current administrative state, largely postdates *The Dialogue*.

22. Justice Brandeis's view of the limitations on non-Article III courts was based on constitutional due process, rather than on Article III:

> There is in [Article III] nothing which requires any controversy to be determined as of first instance in the federal District Courts. The jurisdiction of those courts is subject to the control of Congress. . . . If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of [non-Article III courts], it is . . . because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

Crowell v. Benson, 285 U.S. 22, 86–87 (1932) (footnote omitted) (Brandeis, J., dissenting).

23. Justice Brandeis drew a distinction between questions of law and questions of fact for judicial review of non-Article III courts:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied . . . . But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court.

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). Hart was law clerk to Justice Brandeis in the 1935–36 Term.

24. *The Dialogue*, *supra* note 4, at 1365.

25. Recently, there has been an attempt to widen the focus of American constitutional law development through the lens of the distinction between law and conventions. Conventions are treated as "obligatory" norms governing the conduct of public officials, but norms that are not judicially enforceable. *See, e.g.*, Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1854 (2013). The English origin is, of course, A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION, first published in 1885. *See generally* MARTIN LOUGHLIN, THE BRITISH CONSTITUTION 31–33, 41, 53 (2013) (discussing obligatory constitutional norms in Britain). I put this discussion to the side because Hart's focus was wholly court centered. But for a recent discussion of the intersection between conventions and the actual development of constitutional

In what I hope provides greater clarity, I have slightly rearranged and recaptioned *The Dialogue*'s headings and set out Hart's central conclusions.

I. Introduction
    1. The "essential role" of the Supreme Court
    2. Congressional latitude with respect to matters such as the decision to employ the Article III courts, control over remedies, and the timing of judicial review
II. Limitation on the Jurisdiction of Enforcement Courts and Courts in the Position of Enforcement Courts: The Possibility of Judicial Control
III. Limitations on the Jurisdiction of Enforcement Courts: Their Validity
    1. Civil Defendants—*Crowell*
    2. Criminal Defendants—*Yakus*, *Falbo*
IV. Denial of Jurisdiction: Withholding from Plaintiffs Affirmative Governmental Aid
    1. Plaintiffs Wanting to Enforce Other Private Persons' Duties
    2. Plaintiffs Complaining About Decisions in Connection with Non-Coercive Governmental Programs
    3. Plaintiffs Complaining of Extra-Judicial Governmental (i.e. Administrative) Coercion
V. Conclusion—The constitutional importance of the state courts

The Dialogue yoked together several separate topics. This Article will focus on its three main conclusions. Although each presented distinctive issues, Hart apparently understood all three to present a danger of impermissible jurisdictional and remedial manipulation by Congress.

1. *The Essential Role of the Supreme Court.* Hart famously but quite summarily asserted (and this Article will more elaborately defend) the claim that the Supreme Court has a constitutionally mandated "essential role" in the constitutional system.

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law doctrine, see Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1432–35 (2018), and Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920–26 (2018).

The central concern of *The Dialogue*, however, was not the Supreme Court; rather, it focuses on governmental, particularly administrative, interference (in Hart's phrase, "coercion") with traditional—and perhaps evolving—forms of liberty and property. When an Article III court was asked to play a role in enforcing that coercion, Hart characterized the court as an "enforcement court," and he focused on the court's duties, including those specifically derived from Article III. When administrative agencies sought to impose such coercion and to bypass altogether the Article III courts in that process (for Hart, "extra-judicial coercion"), Hart addressed the possibility of judicial access.

2. *Article III Court Coercion: Herein of Enforcement Courts*. Hart saw no constitutionally mandated "essential role" for the inferior Article III courts. When, however, those courts were asked to enforce legislatively or administratively imposed duties or obligations with respect to liberty or property, which Hart assumed would be the standard case, then they had to disregard any impairment of their "essential attributes," in particular the "judicial duty to say what the law is," at least when deprivations of common law liberty or property are at issue. He rejected judicial deference to administrative law formulation. For him, Article III courts must *independently determine* the applicable rule of law on statutory (as well as constitutional) issues.[26] Hart's view finds much favor today, but for a majority of the present Court, it is not a constitutional imperative.

In an ordinary case, the court, with the assistance of jurors and special masters, decides all the issues in a case. Nonetheless, following the entire Court in *Crowell v. Benson*, Hart agreed that in the context of reviewing administrative adjudication, Article III itself imposed no "internal" obligation on an enforcement court to engage in ordinary fact finding. And following Brandeis, Hart thought that the same was true with respect to "constitutional" or "jurisdictional" facts, although "external" limits derived from the Due Process and Suspension Clauses might impose such a duty. These issues remain unsettled today. On the question of remedies, Hart assumed the need for

26. Hart included here courts in the "position" of an enforcement court—courts where a prospective defendant is the plaintiff. Hart believed (and I agree) that such courts should presume that the issues open to a defendant in an enforcement proceeding were also open in an advance challenge. *The Dialogue*, *supra* note 4, at 1373–74 ("What you have to keep your eye on, when a plaintiff is attacking governmental action, is whether the action plays a part in establishing a duty which later may be judicially enforced against him.").

constitutionally adequate remedies. But he had nothing concrete to say except that injunctions were "exceptional" and that access to habeas corpus probably could not be barred for federal detainees. Hart's passing glances at the issue of remedies have not withstood the passage of time.

3. *Extra-Judicial Coercion: Herein of Administrative Deprivations of Liberty or Property*. *The Dialogue* was strongly animated by very traditional concerns about an arbitrary, unchecked bureaucracy, particularly when it interfered with traditional liberty or property in a coercive manner through the imposition of duties or obligations.[27] Hart insisted that our conceptions of limited government require that *some* court must be available when a person alleges an illegal (perhaps unconstitutional only?) administrative deprivation of liberty or property. His central focus, which occupies much of *The Dialogue*, was on the possibility of *access* to Article III court relief under general jurisdictional statutes (such as habeas corpus), despite apparent congressional restrictions on those statutes.[28] Questions concerning the *scope* of judicial review were left largely underdeveloped.

* * *

As will be seen, Article III has from the beginning been—and still is—read by many to dictate the conclusion that federal court subject-matter jurisdiction, including that of the Supreme Court, rests entirely in congressional hands. In significant measure, this is surely true. However, also in significant measure, it is an over-simplification.[29] To begin with, even for ardent originalists, Article III's original meaning

27. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320–94 (1965); Monaghan, Marbury, *supra* note 5, at 17–19.

28. Hart has nothing directly to say about governmental violations of other legal "rights," unless they could be characterized as involving deprivations of liberty or property. *E.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021–22 (2017) (invalidating discriminatory denial of benefits on the basis of religious status); *see* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1109–15 (2010) [hereinafter Fallon, *Jurisdiction-Stripping Reconsidered*].

29. Simply as a matter of logic, for Congress to deny subject-matter jurisdiction to the Article III courts is one thing; it is quite another to confer it with "strings on it." *The Dialogue*, *supra* note 4, at 1372. Hart's observation was not a novel one. *See* Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them.").

must be understood against the then-existing and important background understandings which do *not* support unlimited congressional power.[30] Moreover, for many (and certainly this author), no such historically confined inquiry could conclude Article III's present "meaning." Like other constitutional provisions, Article III should now be understood in the light of our whole constitutional history—past and present.[31] (On the latter claim: this position is advanced as a theory of constitutional, not statutory, interpretation.)

As noted, this Article follows Hart's three main conclusions outlined above. Except for slightly over one page specifically addressing the Supreme Court's "essential function," *The Dialogue* focused upon the Article III courts generally. But that one-page discussion appears early in *The Dialogue*, and it is by far its best known and most controversial aspect. Accordingly, in Part I, we start there. Next, Part II looks at Article III enforcement courts, a focus that took center stage in *The Dialogue*. Part III then examines judicial control of administrative deprivations of liberty and property, a topic whose importance has only grown with the proliferation of the administrative state since Hart first wrote in 1953. Finally, I offer some brief concluding reflections.

I. THE ESSENTIAL ROLE OF THE SUPREME COURT

A. Hart and the Court's Essential Role

The Supreme Court's appellate review could be formulated in very modest terms: "The interpretation of the laws is the proper and peculiar province of the courts."[32] On this account, judicial review in

30. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 568–69 (2007) [hereinafter Nelson, *Adjudication in the Political Branches*].

31. Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1158–59. Like Professor Fallon, I too would "rely openly on such considerations as consistency with judicial precedent and functional desirability." *Id.* at 1048; *see also* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727–39 (1988) [hereinafter Monaghan, *Stare Decisis*]; Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 781–96 (2010) [hereinafter Monaghan, *Supremacy Clause Textualism*]. For me, "it is in fact easy to discern . . . the alternative to originalism. . . . [It] is pluralism." Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 151 (2016).

32. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

the Supreme Court is seen as nothing more than error correction[33]—no different in kind from that of any appellate court's "ordinary and humble" duty to "say what the law is" when deciding cases or controversies properly before it.[34] Of course, from the very beginning much larger ideas were in play. The Constitutional Convention, undoubtedly influenced by federalism concerns, emphasized that Supreme Court review was necessary to ensure the supremacy of federal law.[35] This helps explain why § 25 of the Judiciary Act of 1789 limited, but nonetheless made mandatory, the Court's review over state-court *denials* of a claim of federal right.[36] In *Martin v. Hunter's Lessee*, Justice Story proffered a different rationale for judicial review: the Court's settlement and coordination function.[37] In his mind, the Court needed to review denials in order to provide clarity, consistency, and uniformity to federal law.

Whether the Court can now effectively discharge either function is open to doubt. The inferior federal courts have long since assumed the frontline burden of ensuring state compliance with federal law, and it is their rulings that the Court usually reviews.[38] The Court's capacity to provide unity and coherence to the now-vast body of federal law is also surely limited.[39] In any event, however, the central theoretical

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33. Needless to say, it is a rare case now that error correction alone will provide a basis for a grant of review.

34. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138–39 (1893); *see also* Monaghan, Marbury, *supra* note 5, at 12 (quoting Thayer, *supra*, at 138–39).

35. *See* Alison L. LaCroix, *On Being "Bound Thereby,"* 27 CONST. COMMENT. 507, 508 (2011) (arguing that the Supremacy Clause, not congressional veto, would ensure the supremacy of federal law); Monaghan, *Supremacy Clause Textualism*, *supra* note 31, at 748–53.

36. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 79–80. Review was on a writ of error which, in theory, reached only errors on the face of the record. And, of course, except for a brief flicker of time, the federal courts had no general "arising under" jurisdiction until 1875. HART AND WECHSLER, *supra* note 2, at 296.

37. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816). Hamilton, too, had earlier claimed that the function of Supreme Court was "to unite and assimilate . . . the rules of national decisions." THE FEDERALIST NO. 82, at 556 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Although criticized as lacking a firm historical foundation, *see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1618–26 (2008), the settlement rationale was reiterated in *James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (per curiam) (citing *Martin*, 14 U.S. (1 Wheat.) at 348). For recent expression of such views by individual members of the Court, see Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1360–61 (2018).

38. With some notable exceptions, the Court's direct review over the state courts is in practice generally limited to federal issues that arise in state-court criminal proceedings.

39. Peter L. Strauss offers a defense of the *Chevron* doctrine along this point:

> [I]t is helpful to view *Chevron* through the lens of the Supreme Court's severely restricted capacity directly to enforce uniformity upon the courts of appeals in those

difficulty confronting both explanations is, of course, Article III's "Exceptions Clause," which many believe gives Congress a freestanding power over what the Court can hear.[40]

Rejecting such a view of the Exceptions Clause, Hart simply announced—almost in the form of a ukase—that the Constitution did not contemplate that Congress could "destroy the essential role of the Supreme Court in the constitutional plan."[41] The long and acrimonious history surrounding this issue, of which Hart was no doubt aware, was not adverted to in this pronouncement.[42] Moreover, Hart's fundamental claim was not framed in terms of concern about congressional manipulation, although that may have been an implicit premise. Rather, Hart advanced a straightforward "legal process" argument: no sensible person would "read[] the Constitution as authorizing its own destruction."[43]

This is the crux of what *The Dialogue* has to say:

> Q. The *McCardle* case says that the appellate jurisdiction of the Supreme Court is entirely within Congressional control.
>
> A. You read the *McCardle* case for all it might be worth rather than the least it has to be worth, don't you?
>
> * * *

> courts' review of agency decisionmaking. When national uniformity in the administration of national statutes is called for, the national agencies responsible for that administration can be expected to reach single readings of the statutes for which they are responsible and to enforce those readings within their own framework. A demonstrated failure to do so would itself be grounds for reversal on judicial review.

Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987). *But see* Frost, *supra* note 37, at 1588–89 (suggesting that *Chevron* casts doubt on whether there is a uniform meaning to be had). But the Court continues to reiterate its coordination function. *See, e.g.*, *James*, 136 S. Ct. at 686.

40. Article III, § 2, clause 2 provides:

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

U.S. CONST. art. III, § 2, cl. 2; *see also* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1087–93.

41. *The Dialogue*, *supra* note 4, at 1365.

42. Chapter 4 of the first edition of the casebook did refer to the issue of state court resistance to Supreme Court mandates. HART AND WECHSLER, *supra* note 2, at 418–19.

43. *The Dialogue*, *supra* note 4, at 1365.

> A. You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether? How preposterous!
>
> * * *
>
> A. It's not impossible for me to lay down a measure. The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan. *McCardle*, you will remember, meets that test. . . .
>
> Q. The measure seems pretty indeterminate to me.
>
> A. Ask yourself whether it is any more so than the tests which the Court has evolved to meet other hard situations. But whatever the difficulties of the test, they are less, are they not, than the difficulties of reading the Constitution as authorizing its own destruction?[44]

I think Hart got it right.

B. The Critical Responses and the Apparently Dominant View

Hart's claim met sharp and sustained challenge. His casebook co-author, Herbert Wechsler, believed that all federal court subject-matter jurisdiction rested entirely with Congress. Strongly reflecting the "ordinary and humble" "dispute resolution" model of constitutional adjudication,[45] Wechsler wrote in his piece *The Courts and the Constitution*:

> Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. That is, at least, what *Marbury v. Madison* was all about. I have not heard that it has

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44. *Id.* at 1364–65 (footnotes omitted).

45. HART AND WECHSLER, *supra* note 2, at 73–77 (contrasting the dispute resolution of adjudication with a law-declaration model). The dispute resolution model argues that courts, including the Supreme Court, declare law only to the extent necessary to resolve the cases before them. *Id.* Courts have no special function to police or advise other organs of government. *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1370 (1973) [hereinafter Monaghan, *The Who and When*]; Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669–78 (2012) [hereinafter Monaghan, *On Avoiding Avoidance*].

> yet been superseded, though I confess I read opinions on occasion that do not exactly make its doctrine clear.[46]

Earlier in that article, Wechsler applied this analysis to the Exceptions Clause:

> There is, to be sure, a school of thought that argues that "exceptions" has a narrow meaning, not including cases that have constitutional dimension; or that the supremacy clause or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts . . . .[47]

For Wechsler, the Exceptions Clause should not be read narrowly. Rather, it provided Congress with quite broad authority to regulate federal court subject-matter jurisdiction.

Wechsler's criticism of Hart found support in Charles Black's rejection of the so-called counter-majoritarian objection to judicial review.[48] That objection was misplaced, Black argued, because the Court's appellate authority depends entirely upon popular consent, which is expressed in the acts of Congress governing the Court's appellate jurisdiction.[49] Indeed, Black insisted, congressional control is "the rock on which rests the legitimacy of the judicial work in a

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46. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) [hereinafter Wechsler, *The Courts and the Constitution*] (footnote omitted).

47. *Id.* at 1005 (footnote omitted); *see also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959).

48. This objection to judicial review is, of course, most famously associated with Alex Bickel. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–20, 65–72, 259–65 (1st ed. 1962); *see also* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 259 (2009) ("The constant theme of the Court's prominent critics in the legal academy after 1957 was that majority will is frustrated when unelected and unaccountable judges strike down legislative and executive acts.").

49. Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975) [hereinafter Black, *The Presidency*]; *see also* PAUL M. BATOR , DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 382 n.29 (3d ed. 1988) [hereinafter HART AND WECHSLER, 3d Edition]; CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES 19, 37–39 (1981). Along a somewhat different plane, there is now a body of scholarship that argues that the Court is in fact a significantly majoritarian institution, or is at least significantly limited by what the majority will accept. For an endorsement of this school of thought, see Joseph Landau, *New Majoritarian Constitutionalism*, 103 IOWA L. REV. 1033, 1037 (2018). *See also* David A. Strauss, Fisher v. University of Texas *and the Conservative Case for Affirmative Action*, 2016 SUP. CT. REV. 1, 20–24 (arguing that the Court's affirmative action cases in the education area rest on such a foundation).

democracy."[50] And Gerry Gunther defended jurisdiction stripping as a legitimate way to discipline the Court for "over-reaching" substantive decisions.[51] Gunther viewed jurisdiction stripping as a useful balancing component in our system of separation of powers.[52]

The "traditional"[53] and "conventional"[54] opinion is that neither Article III itself nor separation of powers more generally impose limits on the congressional power to fashion subject-matter limitations on the Court's appellate jurisdiction. For that position, impressive academic support exists, including not only Wechsler, Black, and Gunther but also William Van Alstyne, Paul Bator, and Martin Redish.[55] To that list we must now add Tara Grove, and perhaps Aziz Huq.[56]

And, I would add, that position certainly finds early historical support wholly apart from the assumptions underlying the numerous jurisdiction-stripping proposals that have failed in Congress. First, of course, is the example of § 25 of the Judiciary Act of 1789, which confined Supreme Court review over state courts only to instances in which the federal claim had been *denied*; and (with a brief exception) there was no statutory general "arising under" jurisdiction until 1875. Second, until the end of the nineteenth century, the Court's review of federal criminal convictions was only permissible upon a certificate of

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50. Black, *The Presidency*, *supra* note 49, at 846.

51. Gunther, *supra* note 11, at 919–20.

52. *Id.*

53. *See* PETER L. STRAUSS, TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON & ANNE JOSEPH O'CONNELL, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1384 (12th ed. 2018).

54. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 258 (2017).

55. *See* Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038 (1982); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 915 (1982); William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 257–60, 269 (1973); *see also* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 875–78 (2011) [hereinafter Grove, *Structural Safeguards*] (focusing on the Supreme Court but also noting commentators who denied plenary congressional power).

56. Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 517–38 (2018) (examining and explaining the lack of a political norm against jurisdiction stripping); Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1435–36 (2016) ("[I]n the absence of a definitive statement to the contrary from the Court it would seem that the text of Article III . . . vests the legislature with tolerably broad authority to determine which constitutional questions of national import end up on the judiciary's agenda.").

division or upon an "original" writ of habeas corpus.[57] Finally, there is the Court's early, little-noticed decision in *United States v. More*, where the Court dismissed an appeal from a decision of the Circuit Court for the District Court of Columbia for want of appellate subject-matter jurisdiction.[58] By a 2–1 vote, the circuit court had held unconstitutional a congressional attempt to reduce the compensation of one of Mr. Marbury's fellow justices of the peace.[59] In the Supreme Court, Chief Justice Marshall, repeating themes he stressed in the oral argument, said that no statute authorized the Court's appellate jurisdiction.[60] What strikes me most is how entirely unperturbed the Court seemed by the fact that it could not review a lower-court determination invalidating an act of Congress.[61]

All said, a great many lawyers and political actors throughout our constitutional history have believed in the existence of an unfettered congressional power over the Court's appellate subject-matter jurisdiction. For me, that history counts—and it counts against Hart (and me).[62]

C. Textual and Other Ambiguities

Now to the other side. First, let us clearly frame the issue. Subsequent to *The Dialogue*, scholars began to distinguish between limits "internal" to Article III and separation of powers and limits "external" thereto.[63] On the "external" side, few (I suppose) would

57. *E.g.*, United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (reviewing upon certificate of division); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 92 (1807) (reviewing upon "original" writ of habeas corpus).

58. United States v. More, 7 U.S. (3 Cranch) 159, 168 (1805).

59. *Id.* at 160 n.2.

60. *Id.* at 173–74.

61. Michael Collins and Ann Woolhandler argue that the Marshall Court—unlike the Taney Court—faced a hostile political environment and thus was particularly reluctant to challenge jurisdictional limitations. *See* Michael Collins & Ann Woolhandler, *Judicial Federalism Under Marshall and Taney*, 2017 SUP. CT. REV. 337, 339–40 (2017). For an additional reference, see Professor Fallon's discussion of Jefferson's 1802 repeal of the short-lived Federalist legislation of 1801 in Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1073.

62. *See, e.g.*, Grove, *Structural Safeguards*, *supra* note 55, at 888–916. On the history of jurisdiction-stripping proposals directed at the Supreme Court, see Bradley & Siegel, *supra* note 54, at 287–311, which provides a valuable historical account of this controversy, both before and after Hart. On executive department resistance to jurisdiction stripping, see Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 268–86 (2012).

63. The classic exposition of this distinction is by Gunther, *supra* note 11, at 900 ("[T]he 'internal' restraints are those arguably implied by article III itself; the 'external' ones are those inferable from other provisions of the Constitution.").

now dispute, for example, that many litigant-framed limits on an Article III court's jurisdiction (e.g., discriminating against black or Catholic litigants) are invalid and would be disregarded. *The Dialogue*'s distinction between limitations imposed by Article III itself and those imposed by the Due Process and the Suspension Clauses shows Hart's awareness of the point.[64] We can put that whole discussion to the side, however. Subject-matter limitations on the Court's appellate jurisdiction is where the real controversy still lies.

I disagree with Wechsler and company. Even from a strictly originalist or textualist point of view, the "plain meaning" argument drawn from the Exceptions Clause is unpersuasive. In fact, the textual argument is quite weak if one reads the clause in the context of the overall structure and relationships created by the Constitution.[65] Unlike the inferior federal courts, the Constitution itself establishes the Supreme Court, and it invests that Court with some mandatory share of "the judicial power of the United States."[66] Moreover, in 1789, it was almost universally understood that the Court would review the validity of legislation.[67] (The scope, not the existence, of judicial review was the contested matter, as it remains to be now.) And finally, for what it is worth, Professor Birk notes that clauses creating "exceptions" to the jurisdiction of the superior and supreme courts of England and Scotland did not reach matters of fundamental importance.[68]

Given all of this, the Exceptions Clause, which as a textual matter seems to connote something of relatively minor importance, is a strikingly oblique way to endow legislators with the expansive

64. *The Dialogue*, *supra* note 4, at 1365, 1373.

65. The Court frequently reminds us to take the whole text into account in the statutory context. *E.g.*, Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 632 (2018) ("As this Court has noted time and time again, the Court is 'obliged to give effect, if possible, to every word Congress used.'" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979))).

66. U.S. CONST. art. III, §§ 1–2. I recognize that early decisions read the Exceptions Clause to mean that Congress had denied subject-matter jurisdiction if it had not expressly conferred it. *See* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 312 (1810). That reading seems to me wrong, but it is now too late in the day to challenge.

67. *See, e.g.*, HART AND WECHSLER, *supra* note 2, at 71–73.

68. *See* Daniel D. Birk, *The Common-Law Exceptions Clause: Congressional Control of Supreme Court Appellate Jurisdiction in Light of British Precedent*, 63 VILL. L. REV. 189, 196 (2018). ("In addition, and more intriguingly, a robust and well-developed line of precedent in British case law establishes that even statutes removing the power of King's Bench or the Court of Session to exercise discretionary appellate review were always understood to leave intact the jurisdiction of these supreme courts to correct jurisdictional excesses and obvious errors or denials of due process by inferior courts and tribunals through the writs of prohibition, mandamus, and habeas corpus (and their Scottish equivalents).").

authority to eviscerate completely a central responsibility of another constitutionally ordained branch of government! On this point, I invoke James Madison: "An interpretation that destroys the very characteristic of the government cannot be just."[69] Hart's interpretive philosophy sounds exactly like Madison!

Other sources of support for congressional control over Article III courts are simply unable to bear the weight put on them, particularly the decisions at the end of the Civil War. The *Ex parte McCardle* statement that the Court was "not at liberty to inquire into the motives of the legislature" regarding subject-matter restrictions occurred in the same opinion in which the Court also explicitly recognized that another avenue of review was available.[70] That avenue was subsequently invoked in *Ex parte Yerger*.[71] Moreover, shortly after *McCardle*, *United States v. Klein* invoked congressional purpose to invalidate a subject-matter limitation on the Court's appellate jurisdiction.[72] As Professor Nelson reminds us, "purpose" inquiries, while not common during this period, were available at least when an impermissible purpose seemed facially apparent, as was the case in *Klein*.[73] Lastly, there is the

69. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *in* JAMES MADISON: WRITINGS 480, 482 (Jack N. Rakove ed., 1999); *cf.* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994) (holding that the word "modify" in section 203 of the Communications Act could not be interpreted in a way that effected "basic and fundamental changes" to the statutory scheme). One source of our present difficulty is *Marbury* itself, which concluded that the Court's original jurisdiction could not be enlarged. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175–76 (1803). While that view still has strong supporters, I am not among them. An equally plausible construction would have been to say that the Exceptions Clause simply permitted Congress to redistribute the Constitution's original assignment of the Court's appellate jurisdiction with respect to any case that falls within Article III. Under that view, Congress could not deprive the Court of any right to hear a denial of a federal claim—a result arguably most consistent with the Madisonian Compromise, which established the Supreme Court but postponed any decision on whether there should be lower federal courts. Be that as it may, *Ortiz v. United States*, 138 S. Ct. 2165 (2018), makes plain that the Court now will not revisit that holding. *Id.* at 2173; *see also* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1089 n.215.

70. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869). Specifically, the alternative avenue existed in the form of original writs of habeas corpus. *See id.* ("The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."). This rationale was to reappear in *Felker v. Turpin*, 518 U.S. 651 (1996), which stated: "No provision of [the Antiterrorism and Effective Death Penalty Act of 1996] mentions our authority to entertain original habeas petitions . . . ." *Id.* at 660.

71. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 104–06 (1869) (affirming the Court's jurisdiction to issue a writ of habeas corpus under the Judiciary Act of 1789, notwithstanding the repealing legislation of 1868).

72. United States v. Klein, 80 U.S. (13 Wall.) 128, 145–46 (1872).

73. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790 (2008) [hereinafter Nelson, *Judicial Review*].

troublesome question of how much weight should be given to the various opinions written during the turbulence of the Civil War era. To borrow Richard Fallon's felicitous language, I believe that arguments from those sources need to be "decentered."[74]

At this point, attention must turn to a troubling footnote in the 2017 Term's decision in *Patchak v. Zinke* ("*Patchak II*").[75] David Patchak challenged the Interior Secretary's authority to invoke the Indian Reorganization Act in taking into trust certain property ("Bradley Property") on which an Indian tribe wished to build a casino.[76] In the first iteration of *Patchak* ("*Patchak I*"), the Court sustained Patchak's right to sue, and it also held that the suit was not barred by sovereign immunity.[77] While the litigation was pending on remand, Congress enacted legislation that "reaffirmed [the Bradley Property] as trust land."[78] Of importance here is § 2(b) of that legislation, which provided that "an action . . . relating to [that] land . . . shall not be filed or maintained in a Federal court and shall be promptly dismissed."[79]

In *Patchak II*, a divided Court affirmed dismissal of the suit.[80] Interestingly, every member of the Court focused only on § 2(b).[81] A four-Justice plurality, in an opinion by Justice Thomas, read § 2(b) as jurisdiction stripping and held that it was valid because it simply changed the substantive statutory law applicable in the case.[82]

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74. Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1048. I do not deny, however, that our history provides support for jurisdiction stripping focused on the Supreme Court. But history is seldom plain vanilla. And our history, taken as a whole over time, does not provide solid and incontrovertible support for jurisdiction stripping, and the line of development of our legal traditions runs against it. Of course, hypothetically, Congress could completely "destroy" the Supreme Court if it wished. It could, for example, decide to fund only the Justices' salary. But, in those circumstances, the whole constitutional order will have broken down, and constitutional law will be completely irrelevant. We get little help in focusing on such a scenario.

75. Patchak v. Zinke (*Patchak II*), 138 S. Ct. 897 (2018).

76. *Id.* at 903.

77. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak (*Patchak I*), 567 U.S. 209, 212 (2012).

78. Gun Lake Trust Land Reaffirmation (Gun Lake) Act, Pub. L. No. 113-179, § 2(a), 128 Stat. 1913, 1913 (2014).

79. *Id.* § 2(b).

80. *Patchak II*, 138 S. Ct. at 910; *see The Supreme Court, 2017 Term—Leading Cases*, 132 HARV. L. REV. 277, 297 (2018) [hereinafter *Leading Cases*].

81. I myself would have read § 2(b) as surplusage and would have treated § 2(a) as having worked the relevant change in the law.

82. *Patchak II*, 138 S. Ct. at 905–06 (plurality opinion). Justice Breyer joined the plurality but also wrote separately. *Id.* at 911–12 (Breyer, J., concurring).

Concurring opinions by Justices Ginsburg and Sotomayor understood § 2(b) as simply restoring the bar of sovereign immunity.[83]

While one should resist overreading *Patchak II*, Justice Thomas authored two tantalizing footnotes, and until we are instructed otherwise, judges, lawyers, and academics cannot dismiss them as unimportant dicta.[84] In footnote three, Justice Thomas indicated that jurisdiction stripping is simply a method for changing the applicable statutory law whenever Congress has the constitutional power to do so.[85] But in footnote four, Justice Thomas articulated a much broader rationale for jurisdiction stripping.[86] He maintained that *United States v. Klein* had effectively modified any anti-jurisdiction-stripping implications of *Ex parte McCardle*, indirectly and erroneously citing Hart and Wechsler in support.[87] Justice Thomas then went on to characterize the discussion of *Ex parte Yerger* as involving concern over limitations on habeas corpus rather than concerns about Article III.[88] That point clearly has merit,[89] but it ignores both the historically tight nexus between habeas and the courts,[90] as well as the implications of *Felker v. Turpin*.[91] Moreover, it entirely ignores the complex role of

83. *Id.* at 912–13 (Ginsburg, J., concurring in the judgment); *id.* at 913–14 (Sotomayor, J., concurring in the judgment).

84. *See* Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 2 (1979).

85. *Patchak II*, 138 S. Ct. at 906 n.3 (plurality opinion). Justice Breyer's separate opinion agreed on that point. *Id.* at 911–12 (Breyer, J., concurring). This, of course, clearly suggests that jurisdiction stripping is inapplicable when constitutional provisions are involved.

86. *Id.* at 907 n.4 (plurality opinion).

87. *Id.* (quoting Bank Markazi v. Peterson, 136 S. Ct. 1310, 1324 (2016) (quoting HART AND WECHSLER, *supra* note 2, at 324)). The HART AND WECHSLER citation is to a different point: a statement in *Klein* that Congress can't prescribe applicable rules in pending cases—a legislative competence that, as Hart and Wechsler note, has often been recognized.

88. *Id.*

89. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 102–03 (1868) (discussing the consequences of limiting appellate jurisdiction over habeas cases).

90. *Patchak II*, 138 S. Ct. at 907 n.4.

91. *Compare Yerger*, 75 U.S. (8 Wall.) at 103, *with* Felker v. Turpin, 518 U.S. 654 (1996) (construing a statute so as not to bar review of constitutional claims in the habeas context). *See* Daniel J. Meltzer, *The Story of* Ex parte McCardle*: The Power of Congress to Limit the Supreme Court's Appellate Jurisdiction*, *in* FEDERAL COURTS STORIES 57, 77 (Vicki C. Jackson & Judith Resnik eds., 2010); *see also* Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, *in* FEDERAL COURTS STORIES, *supra*, at 108–13. An essay by Mark Tushnet also contains an illuminating discussion of *Crowell v. Benson*. Mark Tushnet, *The Story of* Crowell*: Grounding the Administrative State*, *in* FEDERAL COURTS STORIES, *supra*, at 359. I discuss this topic in more detail below. *See infra* text accompanying notes 210–12.

purpose analysis in constitutional adjudication during that period,[92] as well as the extent to which the Civil War precedents should hold influence in our time. Interestingly, Justice Thomas's most provocative point in footnote four is very close to Hart: Article III is empty unless Article III court jurisdiction is invoked.[93] While Justice Breyer joined the plurality, he clearly is not of that view, nor is Justice Sotomayor or the dissent.[94]

In the end, I think the Court will not consider *Patchak II* to have authoritatively resolved a fundamental constitutional issue in a less-than-pellucid footnote in a plurality opinion relying upon difficult Civil War precedents. Since, for me, neither text nor long-standing authority decisively resolves the jurisdiction-stripping issue, I turn to our whole constitutional history, past and present, to inform an appropriate, current understanding of separation of powers. Article III's reference to the "judicial power" and one "supreme Court" should be understood as placeholders for inferences drawn from the overall structure and relationships created by the original Constitution and from the evolution of those conceptions over time.

D. The Supreme Court, Limited Government, and the Rule of Law

The authoritative status of our written Constitution has never been in doubt.[95] But the Justices of the Supreme Court did not assume

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92. *See* Nelson, *Judicial Review*, *supra* note 73, at 1790.

93. *Patchak II*, 138 S. Ct. at 907 n.4 (plurality opinion). Perhaps Justice Thomas meant to confine this point to non-constitutional cases. Interestingly, Justice Thomas makes no mention of his plurality opinion in *Oil States* or his concurrence in *Ortiz*. *Id.*

94. *Id.* at 911–12 (Breyer, J., concurring); *id.* at 913–14 (Sotomayor, J., concurring in the judgment); *see also Leading Cases*, *supra* note 80, at 305–06.

95. This is something I have written about at length before:

> One can acknowledge not only that the idea of a written constitution is unclear (case-law rules are also written), but also that in theory it would seem to be a meaningless circumstance. Nonetheless, history asserts a powerful claim here, and in that light the written quality of the Constitution counted a great deal. The American Constitution was a watershed in the evolution of thinking about the meaning of a constitution: it culminated a shift from viewing a constitution as simply a description of the fundamental political arrangements of the society to a conception that the constitution stood behind, or grounded and legitimated, those arrangements—and of course constrained them. In this development, the "writtenness" of the American Constitution was crucial. . . . And of course *Marbury v. Madison* itself placed considerable emphasis upon the written nature of the Constitution, stating that the Constitution must be enforced by the courts, otherwise the result would "reduce to nothing what we have deemed the greatest improvement on political institutions—a written constitution."

Monaghan, *Stare Decisis*, *supra* note 31, at 769 (footnotes omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)).

an unchallengeable final interpretive role until after the Civil War.[96] (And this is Hart's starting point.) In the antebellum era, most of the great constitutional debates occurred in Congress, especially in the Senate. After the war, however, the Justices emerged as the Constitution's priestly custodians. And, in achieving that status, they have now fashioned a thick and imposing doctrinal corpus.[97] The long drive towards both enlarging and giving the Court control over its own docket confirms the Court's unique status in our constitutional polity. That has been clear for at least a century. Speaking of the 1925 "Judges' Bill,"[98] for example, Frankfurter and Landis long ago wrote:

> At the heart of the proposal was the conservation of the Supreme Court as the arbiter of legal issues of national significance. But this object could hardly be attained so long as there persisted the obstinate conception that the Court was to be the vindicator of all federal rights. This conception the Judges' Bill completely overrode. *Litigation which did not represent a wide public interest was left to state courts of last resort and to the circuit courts of appeals, always reserving to the Supreme Court power to determine that some national interest justified invoking its jurisdiction*.[99]

For me, the Court's "essential role" finds its deep roots in *Marbury v. Madison*'s emphasis on limited government and rule-of-law principles.[100] "*Marbury*'s repeated emphasis that a written constitution imposes limits on every organ of government . . . . welded judicial

96. In a recent article, Professor Fallon makes substantially the same point about the Court's interpretive role. Although, with his customary modesty, he advances it in a less categorical manner. *See generally* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487 (2018).

97. Henry P. Monaghan, *The Constitution of the United States and American Constitutional Law*, *in* CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 175 (Eivind Smith ed., 1995), *reprinted in* HENRY PAUL MONAGHAN, AMERICAN CONSTITUTIONAL LAW 613 (2018).

98. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (codified as amended in scattered sections of 28 U.S.C.).

99. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 260–61 (1927) (emphasis added) (footnotes omitted); *see also* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1962–63 (2003). For other expressions of this point of view, see HART AND WECHSLER, *supra* note 2, at 572; William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 9–10 (1986). Unsurprisingly, the Court's ability to reshape norms is most effective when it or the lower courts can directly implement the Court's holdings. *See generally* MATTHEW E.K. HALL, THE NATURE OF SUPREME COURT POWER (2011) (identifying the circumstances under which the Court has been successful at altering the conduct of both private and public actors).

100. Monaghan, Marbury, *supra* note 5, at 32.

review to the political axiom of limited government."[101] That emphasis was no accident. "Limited government," then particularly a fear of legislative (not administrative) abuse, "was the common bond uniting political discussion about the meaning of such diverse concepts as a written constitution, fundamental law, social contract, separation of powers, and federalism."[102] Following the tradition exemplified by Hart, his colleague Louis Jaffe, and many others, I understand limited government not as freedom from legislation and regulation, but rather in terms of checking our vast (and necessary) bureaucracy.[103] Our belief in the rule of law means that individuals and corporations may be subject only to properly enacted and authorized regulatory limits on their constitutionally protected liberty and property, as these rights are *now* understood!

Earlier, I had posited—contrary to Wechsler—that Article III courts had a "special function" to implement the axioms of limited government.[104] Perhaps the matter is more complex as to the inferior federal courts. But not as to the Supreme Court. This is a Court established by the Constitution itself, and the line of our constitutional development—to be sure messy, sharply contested, and by no means always one directionally forward—makes clear that the Court has *now* emerged as a tribunal different in kind from all others. In our current separation of powers framework, the Court has a unique and essential role in maintaining the idea of the limited government contemplated by the written 1789 Constitution. Hart believed that the Constitution itself instantiated some such conception. Perhaps; perhaps not. But history, if not original understanding, has vindicated Hart, not Wechsler. This country has long since understood that it needs a supreme constitutional court. For me, the ultimately prevailing line of development in our constitutional history has crucial, normative

101. *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803) (footnote omitted)); *id.* at 32 n.187 ("At the end of the nineteenth century, judicial emphasis on enforcing constitutional limits to achieve limited government was commonplace."); *see also* David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 677–78 (2018) (book review) (emphasizing the important connection between the Constitution and popular sovereignty in eighteenth-century political thought); Monaghan, *The Who and When*, *supra* note 45, at 1370.

102. Monaghan, *The Who and When*, *supra* note 45, at 1371 n.47.

103. *See generally, e.g.*, JAFFE, *supra* note 27 (exploring the relationship between administrative agencies and the courts).

104. Monaghan, Marbury, *supra* note 5, at 32–33.

significance.[105] The historical tradition I invoke is, of course, not the plain-vanilla, unbroken line so favored by the Court.[106] Far from it. The evolving tradition upon which I draw has from the beginning been a contested one, with its very foundational premises open to challenge and reformulation.[107] But in my view, it is nonetheless a valid source to be considered in the formulation of constitutional doctrine.[108]

The Court itself, I would add, quite understands its own importance in our constitutional order. It is, shall we say, "reluctant"

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105. I fully recognize that history is often messy and, in any event, not self-interpreting. Moreover, "history," however ascertained, can normatively bear only so much controlling authority as we think appropriate to accord it. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 662–68 (1987). The appropriate role for nonjudicial sources in interpreting the meaning of a constitutional provision is the subject of debate—a topic recently explored in William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019). But my focus is not on a specific clause but on the current understanding of the essential role of one of the three national institutions created by the Constitution. The public frenzy over Supreme Court nominations from Judge Bork to Justices Gorsuch and Kavanaugh reflect the fact that, to a degree not characteristic of the past, the public is aware of the unique importance of the Court in our political and constitutional order. *E.g.*, Mark Landler & Maggie Haberman, *Former Bush Aide is Trump Pick for Court*, N.Y. TIMES, July 10, 2018, at A1 (describing President Trump's nomination of Justice Kavanaugh).

106. The role of history in constitutional interpretation was most recently on display in *Department of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) ("Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that "has been open, widespread, and unchallenged since the early days of the Republic." (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment))).

107. Justice Holmes elaborated on that line of development in *Missouri v. Holland*, 252 U.S. 416 (1920):

> [W]hen we are dealing with words [in] the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Id. at 433.

108. Jeff Powell articulates this point aptly:

> Intellectual traditions differ in the way they cohere over time. As the great philosopher Alasdair MacIntyre said years ago, a tradition of rational inquiry does *not* maintain its continuity through the simple repetition of what has been thought and said in the past. What gives life to such a tradition is not so much agreement about answers as it is agreement about questions. In MacIntyre's words, an intellectual 'tradition is an argument extended through time in which [even its] fundamental agreements are defined and redefined . . . [through] conflict.' An intellectual tradition, unless it goes dead, is a continuity of conflict, and debate and disagreement are its lifeblood. The emergence of the American constitutional law tradition, then, is the story of an ongoing debate, an endless argument over, among other things, what constitutional law is about.

H. Jefferson Powell, *The Emergence of the American Constitutional Law Tradition*, 103 JUDICATURE, no. 1, Spring 2019, at 24, 25 (quoting ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 12 (1988)) (alterations in original) (footnote omitted).

to read any statute as shutting off its authority to review constitutional issues.[109] And it now displays an avid propensity to assume that if any other court gets to decide a federal issue, it should have the last word on the matter.[110] Contrary to Wechsler's belief in a uniform case-or-controversy jurisprudence applicable to all Article III courts, the Supreme Court now aggressively displays a broad and unique array of "agenda control" devices, which exist wholly apart from the highly important and now largely discretionary decision whether or not to grant review. These devices are employed in making limited grants of certiorari, reformulating the questions presented, injecting new questions into cases, invoking forfeiture rules, appointing amici to defend positions abandoned by litigants, and strategically accepting or rejecting party stipulations, waivers, or concessions.[111] Law declaration (or its avoidance), not dispute resolution, is the Court's current hallmark.[112]

Of course, both heuristic "models" are reflected in the Court's jurisprudence. The pull of the older, Wechslerian dispute-resolution

109. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 366–67 (1974) (holding that 38 U.S.C. § 211 (2018), which prohibited judicial review of the decisions of the Administrator of Veterans Affairs concerning veterans' benefits, does not bar federal courts from considering constitutional claims); INS v. St. Cyr, 533 U.S. 289, 314 (2001) (concluding that habeas-corpus jurisdiction was not repealed by the Antiterrorism and Effective Death Penalty Act of 1996 or the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); Felker v. Turpin, 518 U.S. 651, 654 (1996) (holding that the Antiterrorism and Effective Death Penalty Act of 1996 "does not preclude this Court from entertaining an application for habeas corpus relief"); Webster v. Doe, 486 U.S. 592, 603 (1988) (reading the National Security Act of 1947 to apply only to statutory, not constitutional, claims so as "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim" (quoting Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 677, 681 n.12 (1986))). For a more recent example, see *Abbott v. Perez*, 138 S. Ct. 2305 (2018), where all nine members of a divided Court seemed to agree to sustaining review of an appeal of an order by a three-judge court in the Western District of Texas directing Texas not to conduct elections using certain congressional districting plans. *Id.* at 2319–21. What advocate would now like to argue to the Court that "Oh yes, the statute does raise a major constitutional issue affecting liberty (and/or property), but Congress does not want you to hear that issue?"

110. *See* Monaghan, *On Avoiding Avoidance*, *supra* note 45, at 683–89 (arguing that the Court seeks to play a superintendent role over courts deciding issues of federal law).

111. *See id.* at 689–707 (observing these practices). For another recent example, see *Lucia v. SEC*, 138 S. Ct. 2044 (2018), where the Court appointed an amicus to defend a judgment that one of the original litigants—the United States government—would not defend. *Id.* at 2050–51.

112. Illustrative of the Court's ability to address only what it wants to address are *Azar v. Garza*, 138 S. Ct. 1790 (2018), *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and *Hughes v. United States*, 138 S. Ct. 1765 (2018), all decided on the same day. One should also see *Madison v. Alabama*, 139 S. Ct. 718 (2019), where Justice Alito sharply charged the Court with deciding an issue not fairly presented in the grant of certiorari. *Id.* at 731–32 (Alito, J., dissenting).

jurisprudence still remains, and many decisions perhaps could still be fairly described within that framework. But, for many other cases, such a descriptive model would surely offer an impoverished account. And while the legacy of the dispute resolution model also insists upon case-or-controversy constraints, such as standing and mootness, these constraints are now of a rather diluted nature because of the pressures exerted by the law-declaration model.[113] But a perhaps insufficiently appreciated feature of the older conception of the judicial office is that it imposes an additional and important restraint: bounded rationality. Judicial lawmaking proceeds when uncertainty often exists as to the consequences of a ruling, hence the considerable utility of knowledgeable amici briefs. Wechsler's common-law-infused methodology thus underpins the strong judicial impulse to say no more than is necessary to dispose of the issue before the court. That constraint applies to the Supreme Court with special force, given the important and difficult issues that the Court constantly faces. More accurately stated then, law declaration, constrained by bounded rationality and other pragmatic considerations, is the Court's current hallmark.

The underlying controversy concerning congressional power remains a contested one.[114] Perhaps we should acquiesce in the "dominant" view, observing that strong political, institutional, and cultural "protections" safeguard maintenance of the Court's "essential role."[115] These arguments have real force. But if now confronted on grounds of first principle, I am of a different opinion.

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113. For a highly visible recent example, which I do not pursue here, see *Trump v. Hawaii*, 138 S. Ct. 2392, 2415–16 (2018) (declining to decide the plaintiffs' primary standing argument that the Presidential Proclamation imposing entry restrictions on aliens from certain countries created a dignitary injury and instead finding standing in a more concrete injury).

114. According to Bradley and Siegel's recent uncovering of a fascinating exchange in the U.S. Department of Justice over jurisdiction stripping, Ted Olson defended Hart while John Roberts defended the Wechsler model. *See* Bradley & Siegel, *supra* note 54, at 302–11. I should add that I can think of no member of the Court since Hughes more committed to protecting the institutional independence of the Court against congressional interference than Chief Justice Roberts. *See, e.g.*, Patchak v. Zinke (*Patchak II*), 138 S. Ct. 897, 914 (2018) (Roberts, C.J., dissenting) (refusing to "cede unqualified authority to the Legislature to decide the outcome of [a single pending] case" because "Article III of the Constitution vests that responsibility in the Judiciary alone"); Bank Markazi v. Peterson, 136 S. Ct. 1310, 1332 (2016) (Roberts, C.J., dissenting) (lamenting "unconstitutional interference with the judicial function, whereby Congress assumes the role of judge and decides a particular pending case in the first instance").

115. *See* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 948–78 (2013) (observing these protections throughout American history). *See generally* Tara Leigh Grove, *Article III in the Political Branches*, 90 NOTRE DAME L. REV. 1835 (2015) (arguing that this security against jurisdiction stripping rests entirely on a "convention,"

E. Purpose and Jurisdiction-Stripping

My (and Hart's) viewpoint requires the resolution of a fundamental question: What is the Supreme Court's "essential role"? Fleshing out the Court's "essential role" at first blush seems a difficult and controversial matter. And it is.[116] For me, the relevant factors include intuitions on the Court's role in maintaining the constitutional vision of a limited and stable government; on a belief that some legal decisions simply require final determination by a "supreme" court;[117] and the need to maintain a strong government, one capable of restraining governmental abuses by both the national government and the states.

Underlying these intuitions is a simple idea: necessity. Our current constitutional order requires a functioning, fully effective Supreme Court. Operationalizing that belief, however, invites contest. Am I prepared to say that no "Exceptions" are valid, particularly given the long history to the contrary? No. What, then, is the standard? Any proposed standard is likely to wind up with difficulties. So be it. Perfection is not to be attained, but we must proceed as best we can.

One could (arbitrarily? contestably?) refine Hart's "essential role" theory along various substantive stopping points.[118] For example,

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but unlike enlarging the membership of the Court or disobeying Court orders, the convention does not have the security of an unassailable constitutional "canon"). Moreover, jurisdiction stripping may generate unbearable systemic costs, as Herbert Wechsler long ago pointed out, which of course serves as a powerful deterrent to such action. Wechsler, *The Courts and the Constitution*, *supra* note 46, at 1006–07.

116. Hart himself recognized the difficulties. In response to Hart laying out his "essential role" standard, his hypothetical sparring partner in *The Dialogue* retorted: "The measure seems pretty indeterminate to me." *The Dialogue*, *supra* note 4, at 1365.

117. For a potential contemporary counterexample of my second claim, see generally Emily Buss, *The Divisive Supreme Court*, 2016 SUP. CT. REV. 25, which decries Supreme Court intervention in the same sex marriage dispute and contends that the matter was being ably handled by the lower federal courts, who are more responsive to state and local sentiments. The Court, in fact, understood that and repeatedly denied review when the marriage claims were sustained. It granted certiorari only after the Sixth Circuit created a circuit split. I think Professor Buss's discussion on that point is unconvincing because it included overturning an important prior merits holding by the Court. *See id.* at 73–75. But her main point concerning "bottoms-up" lawmaking is well taken. *See generally* DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW (2016) (arguing that many changes in the law are instituted by the citizenry rather than the judiciary). Still, as time passes, I believe that the "lawful" character of gay marriage will be seen to have been greatly enhanced because it had the imprimatur of the Supreme Court.

118. The most prominent of such efforts were by Professor Ratner. *See* Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960) (arguing that the Court must be able to maintain the supremacy and uniformity

perhaps the Court cannot be shut out from review of decisions *denying* a claim of constitutional right by a private litigant,[119] from adjudicating questions of structure and relationship, or from a general supervisory or *ultra vires* superintendency of the conduct of the inferior federal courts.[120] One might also argue that "Our Federalism"[121] requires that the Court possess at least the jurisdiction conferred by § 25 of the 1789 Judiciary Act, which allowed review of state-court action denying federal claims.[122] Many pages of a very long article examining each of these stopping points and their variations can be imagined. For me, none would sufficiently protect the core constitutional values of limited and stable government.

I am inclined to move along a different front, persuaded by Richard Fallon that:

> [N]otwithstanding contrary language in the 1869 case of *Ex parte McCardle*, Congress's purpose or motive in enacting jurisdiction-stripping legislation *may sometimes* bear crucially on such legislation's constitutionality.[123]

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of a federal law); Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 935 (1982) ("The purposes of judicial review cannot be effectively implemented without uniformity as well as supremacy of federal law."); *see also* Grove, *Structural Safeguards*, *supra* note 55, at 877–78 (collecting sources opposing restrictions on the Supreme Court's appellate jurisdiction).

119. The petitioner advanced a form of this argument in *Felker v. Turpin*. *See* Brief for Petitioner at 26, Felker v. Turpin, 518 U.S. 651 (1996) (No. 95-8836), 1996 WL 272389.

120. *See, e.g.*, James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1685 (2011) (restating Professor Pfander's earlier claim that the Supreme Court must be able to supervise the inferior federal courts). For further discussion of Professor Pfander's views, and for an argument that *Felker v. Turpin* provides some support for Professor Pfander's argument, see Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1089–93.

121. Younger v. Harris, 401 U.S. 37, 44 (1971).

122. Alison LaCroix advances such an argument. *See* LaCroix, *supra* note 35, at 511; *see also* OLIVER WENDELL HOLMES, *Law and the Court: Speech at a Dinner of the Harvard Law School Association of New York on February 15, 1913*, *in* COLLECTED LEGAL PAPERS 291, 295–96 (1920) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."). For an interesting discussion of *Coleman v. Miller*, 307 U.S. 433 (1939), along this line, see Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1944–46 (2015).

123. Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1133 (emphasis added) (footnote omitted). Fallon advances this principle as applicable in all subject-matter jurisdiction cases. Perhaps I misread him, but I would not agree with Professor Fallon's belief that the constitutionality of statutes stripping the Supreme Court's appellate jurisdiction may turn on whether other federal courts are open. *See id.* at 1087–93, particularly 1089.

At least with respect to constitutional claims, Professor Fallon states a minimum baseline.[124] For anyone brought up in the Legal Process School, purpose inquiries constitute an important ingredient of adjudication, the importance of which may vary with the context.[125] (Three decisions of the Court in the 2017 Term decided on the same day make that vividly clear!)[126] Accordingly, I submit that our current (and historical?) understanding of separation of powers should be understood to mean that the Court—a coordinate branch of the national government—will excise subject-matter limitations on its appellate jurisdiction when a substantial, undefended purpose of such jurisdiction-stripping legislation is to limit the Court's ability to consider a properly preserved constitutional claim.[127]

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124. With respect to statutory claims, it is possible to characterize jurisdiction stripping as the equivalent of a change in the applicable substantive law and thus subject to those principles that govern retroactive changes in the applicable law. *See* HART AND WECHSLER, *supra* note 2, at 355. *See generally* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365 (2018) (considering an issue of jurisdiction stripping with respect to revocation of a patent under the Patent Act).

125. HART & SACKS, *supra* note 6, at 1374–80. The role of legislative purpose and motive inquiries in constitutional adjudication has varied over time. Professor Nelson notes the early reluctance of courts to go behind the legislatively declared purpose, and the significant decline of that approach over the now last fifty years. *See generally* Nelson, *Judicial Review*, *supra* note 73 (providing a comprehensive account); *see also* Douglas Laycock, *Churches, Playgrounds, Government Dollars—And Schools?*, 131 HARV. L. REV. 133, 166–68 (2017) (observing the process through which courts find facially neutral laws discriminatory if they were enacted with a bad legislative motive). For a recent examination of the complexities of motive or purpose analysis—albeit mainly in the non-constitutional context—see generally Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018). The author seeks to navigate among concepts such as motive, intent, and purpose. *See id.* at 1122. Professor Verstein focuses upon mixed motive cases—cases on which the governmental conduct is premised on both permissible and impermissible motives. As to motive, the author lists four major categories: primary, but-for, sole, and any. *Id.* at 1134–43; *see also* Andrew Verstein, *The Failure of Mixed Motive Jurisprudence*, 86 U. CHI. L. REV. 725, 728 (2019) (discussing the difficulties of the "but-for" standard).

126. *See* Abbott v. Perez, 138 S. Ct. 2305, 2324–26 (2018) (addressing the burden of proof governing an allegation of discriminatory legislative intent motivating the enactment of a state redistricting plan); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729–31 (2018) (discussing the respondent's discriminatory motive in ruling against the petitioner earlier in the case). And, in particular, there has been a spate of writing on the role of purpose in constitutional adjudication after *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). *See generally, e.g.*, Joseph Landau, *Process Scrutiny: Motivational Inquiry* and *Constitutional Rights*, 119 COLUM. L. REV. (forthcoming 2019) (analyzing the issue and collecting other sources).

127. This reminds me of Equal Protection Clause cases, where purpose analysis plays a significant role. *See, e.g.*, *Abbott*, 138 S. Ct. at 2313 (referencing the "taint" of discriminatory intent). Excising limits on its subject-matter jurisdiction allows the Court to discharge its role as an equal branch of the government.

This means that the jurisdiction-stripping restriction itself may prove to be valid. For example, consider the limited review in state-prisoner habeas cases.[128] But the judicial inquiry would ordinarily trigger scrutiny.[129] And the Court cannot be foreclosed from considering the validity of the restrictions. Moreover, I submit, a "naked" or even a substantial congressional purpose to bar the Court from considering constitutional challenges should not be sustained.[130]

Suppose that Congress were to enact legislation that would restrict the right to an abortion beyond what the Constitution would presently allow. On the next day, it enacts legislation depriving only the Supreme Court—a constitutionally created, coordinate branch of the national government—of subject-matter jurisdiction over any abortion related matters.[131] How should the present Court react? Should it not excise the restriction on subject-matter jurisdiction, just as it did in *Boumediene* with respect to the district court's habeas corpus authority? For me, the answer is clearly yes.[132] Hart's position is vastly more consonant with contemporary understandings of separation of powers than Wechsler's.[133] And, as Holmes put it, "the present has a right to govern itself so far as it can."[134]

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128. 28 U.S.C. § 1441 (2018). Indeed, it may be that Congress could bar any federal collateral attack on a state prisoner's conviction. *See also Trump v. Hawaii*, 138 S. Ct. at 2408–09 (applying limited motive review of alleged impermissible presidential motives).

129. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. at 2409 (applying limited motive review based on the "assum[ption] that some form of review is appropriate"); Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1134 ("In any event, scrutiny of legislative motivation is now the norm, not an anomaly, in constitutional law."). The key issue is the scope of the judicial inquiry.

130. I should stop here. But, drawing on our history, one could go further and add "or effect" to "purpose." I have not thought that out. My intuition is that purpose-based limitations on Congress's jurisdiction-stripping authority should be reasonably effective in vindicating the Court's essential role in our system of separation of powers. Indeed, it may in fact amount to a new *per se* rule.

131. Arguably, there is no congressional "aggrandizement" of judicial decision-making authority because other courts remain open.

132. Another view—one which runs somewhat against the grain of the case law—would be to stress that the appellate jurisdiction is conferred by Article III itself, and it cannot be subject to unconstitutional regulation under the Exceptions Clause. Still another view would emphasize that no "inferior" court can be superior to the Supreme Court.

133. I use "legitimation" in a loose sociological or legal sense. *See generally* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (describing various theories of legitimacy). Professor Fallon has further developed his analysis in his new book, RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018), reviewed in a book essay by Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019).

134. OLIVER WENDELL HOLMES, *Learning and Science, Speech at a Dinner of the Harvard Law School Association in Honor of Professor C.C. Langdell, June 25, 1895*, *in* COLLECTED

F. The Hatter

An essential-function position is surely open to challenge, and by no means would it be implausible to argue for the position held by Wechsler and company. Perhaps, therefore, we should take particular comfort in the fact that, for more than two centuries, we have muddled along without definitively resolving this highly charged constitutional issue.

Consider, in this regard, the relevance (if any) of the exchange between Alice and the Mad Hatter:

> "Have you guessed the riddle yet?" the Hatter said, turning to Alice again.
>
> "No, I give it up," Alice replied: "what's the answer?"
>
> "I haven't the slightest idea," said the Hatter.[135]

Having no definitive resolution to some of our own constitutional riddles may itself be a success story. I have long believed that our polity should not confront and resolve too many matters of first principle.[136] But, should the necessity arise, the time has long passed when the Supreme Court can be sensibly understood as simply an institution that humbly and necessarily declares law only as an incident to resolving a dispute.

II. ARTICLE III AND ENFORCEMENT COURTS

While Hart's essential-functions thesis regarding the Supreme Court is *The Dialogue's* most well-known component, it occupies a mere two pages in his forty-two-page article. Hart spent much more time discussing Article III courts in general. Of particular concern to

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LEGAL PAPERS, *supra* note 122, at 138–39. Holmes's specific reference was to legislation, but I would apply it to all the units of government.

135. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 100–01 (Macmillan & Co. 1867).

136. David Strauss recognized the difficulty in striking a balance between ambiguity and specificity in the Constitution:

> It takes a certain kind of genius to construct a document that uses language specific enough to resolve some potential controversies entirely and to narrow the range of disagreement on others—but that also uses language general enough not to force on a society outcomes that are so unacceptable that they discredit the document. The genius of the U.S. Constitution is precisely that it is specific where specificity is valuable and general where generality is valuable—and it does not put us in unacceptable situations that we can't plausibly interpret our way out of. There is reason to think that the framers were self-conscious about this.

DAVID A. STRAUSS, THE LIVING CONSTITUTION 71–72 (2010).

Hart was when lower federal courts operated as "enforcement courts" employed to implement government policy. It is to these problems we now turn.

A. The Possibility of Judicial Control

While Hart saw no constitutionally mandated "essential function" for the inferior Article III courts, he was fully aware of the reality of their importance—a reality which time has greatly intensified. These courts have now assumed enormous legal, political, and cultural significance.[137] They are the front line in enforcing federal law, and are now a part of our "common intellectual heritage."[138] Indeed, their existence is now widely perceived to be a necessary ingredient of a legitimate constitutional order.[139]

Rather than explore these broad aspects of our constitutional polity, *The Dialogue*'s focus was much more limited: the *constitutional* status of the inferior Article III courts. Although significantly resisting such a conclusion in actual practice, Hart believed that Congress (perhaps habeas aside) was constitutionally free to bypass these tribunals.[140] But if they were employed to enforce governmental policy, whether determined legislatively or administratively (the usual situation, he assumed), Article III itself mandates judicial inquiry into the validity of any legislative restriction on their authority.[141] If the

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137. In a penetrating book review (ostensibly of the third edition of the casebook but actually of the first edition), Professor Amar argued that the casebook's "hands off the states" theme had been eviscerated only a year later by *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). *See* Amar, *supra* note 2, at 702–06.

138. Daniel J. Meltzer, *The Judiciary's Bicentennial*, 56 U. CHI. L. REV. 423, 427 (1989); *see also* Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1847–52 (2016) (discussing Meltzer's article); *cf. The Dialogue*, *supra* note 4, at 1397 (remarking on the practical need of the federal government for courts to vindicate its policies).

139. *Cf.* Buss, *supra* note 117, at 44–45 (observing that the inferior Article III judges are closer to the people of the several states than are the members of the Supreme Court). All that said, the fact remains that we have no clear idea about their indispensable legal role. Monaghan, *On Avoiding Avoidance*, *supra* note 45, at 684–85.

140. *See The Dialogue*, *supra* note 4, at 1362 (confirming Congress's authority to limit the jurisdiction of the lower federal courts with regard to certain civil cases (citing, *inter alia*, Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850)); *see also id.* at 1365 ("As to civil plaintiffs, no. Congress has plenary power to distribute jurisdiction among such inferior federal constitutional courts as it chooses to establish."); Bradley & Siegel, *supra* note 54, at 258.

141. *The Dialogue*, *supra* note 4, at 1372 (observing "a necessary postulate of constitutional government—that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained"). A "total denial of jurisdiction" is one thing; granting jurisdiction "but put[ting] strings on it" is quite another. *Id.*;

limitation is invalid, Hart assumed that the normal judicial response would simply be to excise it.[142]

Hart's approach has explanatory power well beyond the enforcement-court context. Consider, for example, plaintiffs who are neither defendants nor potential defendants. The well-known portal-to-portal cases—a Hart and Wechsler casebook staple[143]—are illustrative. To the surprise of many, the Supreme Court construed the term "work week" in the Fair Labor Standards Act to include travel time and other preliminary activities for iron-ore miners. The result was to impose a massive, unanticipated cost on coal companies. In response, Congress retroactively abrogated the Court's holding. By way of precaution, Congress also deprived all federal and state courts of subject-matter jurisdiction over suits seeking to enforce the judicially defined obligation. Beneficiaries of the Court's prior ruling assailed that legislation as an unconstitutional deprivation of vested property rights. Hart thought it quite clear that state courts could not be prevented from examining the validity of a congressional limitation on their subject-matter jurisdiction.[144] Applying severability analysis, therefore, a federal court could fairly conclude that, in such circumstances, Congress would not have intended that the subject-matter limit on its jurisdiction should survive if the state court could address the merits.

This, however, is decidedly *not* how Hart himself approached the severability problem.[145] He focused entirely on the legislation's

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see also id. at 1373 ("I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide the case."). Hart cites Chief Justice Hughes in *Crowell*, but Hughes also invoked the Due Process Clause.

142. *Id.* at 1372 ("[A] court must always . . . provide [judicial] process if the claim [of constitutional right to judicial process] is sustained."). Applying severability analysis, however, an enforcement court could conclude that it must decline jurisdiction entirely.

143. HART AND WECHSLER, *supra* note 2, at 326 (discussing Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948)). For further consideration of *Battaglia*, see Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1101–04.

144. *The Dialogue*, *supra* note 4, at 1401. Hart adds: "In the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones." *Id.* For recent discussion, see generally Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1 (2018).

145. The First Edition makes no suggestion of a mode of analysis that focused on the restriction of state-court jurisdiction. *See* HART AND WECHSLER, *supra* note 2, at 325–26. Neither did the Second Edition. *See* PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND FEDERAL SYSTEM 313–22 (2d ed. 1974). A state-court-focused analysis is suggested in the Third Edition. *See* HART AND WECHSLER, 3d Edition, *supra* note 49, at 377.

limitation on federal-court jurisdiction.[146] Hart argued that if, as a substantive matter, the federal legislation constituted an unconstitutional deprivation of liberty or property, the jurisdictional limitation fell with it on inseparability grounds.[147] Summarily advanced in the portal-to-portal cases,[148] this mode of analysis received fuller elaboration later in *The Dialogue*. Hart's clearest exposition is as follows:

> A. You sound as if you thought you finally had me in a corner. But after what we've been through the answer to this one is easy, isn't it—so long as there is any applicable grant of general jurisdiction?
>
> Obviously, the answer is that the validity of the jurisdictional limitation depends on the validity of the program itself, or the particular part of it in question. If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction.[149]

Relief, for Hart, would still then be appropriate under the statutes that granted general jurisdiction, such as 28 U.S.C. § 1331 and the habeas statute.[150] (This approach to severability seems to have been the view taken by the courts of appeal that considered the portal-to-portal controversy.[151])

At first blush, Hart's analysis seems at variance with the Court's holdings that justiciability questions must be addressed before the merits are reached.[152] But, as a logical matter, any such conclusion is not clear. Hart seems to have viewed the right holder as seeking relief

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146. *The Dialogue*, *supra* note 4, at 1383–88.

147. At least in our legal order, "no workable system of judicial review could function without a large role for severability." Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 370 (2007).

148. *The Dialogue*, *supra* note 4, at 1383.

149. *Id.* at 1387; *see also* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1104 (observing that "jurisdictional questions" cannot be disentangled from "questions involving substantive rights to relief").

150. *The Dialogue*, *supra* note 4, at 1397. Hart, of course, fully understood that the federal court could not entertain the case unless some statute authorized jurisdiction. Hart does not discuss the possibility that severability analysis might dictate dismissal of the litigation rather than a decision on the merits.

151. *Id.* at 1383 n.67.

152. The landmark here is, of course, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) (rejecting hypothetical jurisdiction). *See* HART AND WECHSLER, *supra* note 2, at 55–56 & n.3. For a collection of recent materials exploring this topic, see generally *First Amendment—Freedom of Speech—Commercial Speech:* Expressions Hair Design v. Schneiderman, *in Leading Cases: Constitutional Law*, 131 HARV. L. REV. 223 (2017).

under the existing general jurisdictional grants, with the jurisdictional limitation appearing as a sort of (invalid) defense to the exercise of that jurisdiction. Under this conception, the limitation fell with the Act's substantive invalidity.[153] The source and scope of Hart's severability analysis remains puzzling, however. Is it beyond congressional control or the states' reach?[154] Could it be overcome by a clear congressional statement? Does it matter if the state courts are free to address the issues? Or is his severability principle rooted somewhere in the specific substantive constitutional provision under attack? These questions are left unexplored. Moreover, Hart ultimately backed away from his own analysis: "Well, now, I'll have to stall a little. Habeas corpus aside, I'd hesitate to say that Congress couldn't effect an unconstitutional withdrawal of jurisdiction—that is, a withdrawal to effectuate unconstitutional purposes—if it really wanted to."[155]

Hart's approach is troubling at a deeper level. It is at least suggestive of, or may indeed prefigure, a general constitutional rule that mandates the inseparability of state (and federal) statutes when the significant purpose (or perhaps even the effect?) of the statute is to obstruct the vindication of a constitutional right.[156] Hart and Wechsler suggest[157] that, despite the Court's reliance on the effects of the regulation, this is how that we might understand the Court's recent inseparability holding in *Whole Women's Health v. Hellerstedt*, which involved a detailed state statute clearly designed to restrict abortion

153. *Boumediene* seems to have taken this approach: Newly enacted statutory limits on the prior habeas statutory grant were held to be invalid. *See* Boumediene v. Bush, 553 U.S. 723, 733 (2008) (invoking the Suspension Clause).

154. At one point, Hart quite unconvincingly suggests that this approach expresses probable legislative intent. *The Dialogue*, *supra* note 4, at 1387. Quite the contrary, of course. Jurisdiction stripping sends quite the opposite signal.

155. *Id.* at 1398–99. Hart recognized that for Congress to close access to the federal courts would be very difficult unless it were prepared to do considerable on-the-ground damage to federal-court jurisdiction. *See id.* at 1396–1401.

156. *See* HART AND WECHSLER, *supra* note 2, at 177–95. This is a doctrine that I have resisted in other contexts. *See generally* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (discussing the separability doctrine in the context of First Amendment overbreadth-doctrine cases). *See also* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1104 (discussing this topic). And, of course, see also *Boumediene*, 553 U.S. at 776 ("Unlike in *Hayman* and *Swain*, here we confront statutes, the DTA and the MCA, that were intended to circumscribe habeas review."). This treats separability as only a matter of legislative intent.

157. RICHARD H. FALLON, JR., JACK L. GOLDSMITH, JOHN F. MANNING, DAVID L. SHAPIRO & AMANDA L. TYLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 14–16 (7th ed. Supp. 2019).

access.[158] Severability of state statutes is generally understood to be a matter of state law. Considered separately, many of the act's substantive provisions seemed facially valid; moreover, the state statute contained a sweeping severability clause. But taken together, the ostensibly separate provisions were clearly and closely united by a single purpose to obstruct the underlying constitutional right. This form of analysis is not grounded in Article III but in the specific constitutional provision that is at issue. The Court's even more recent and controversial separability analysis in *Murphy v. National Collegiate Athletic Association*, involving a federal statute, might also be recast along these lines.[159]

Hart's purpose-focused separability analysis is, I believe, not a typical "undue burden on the right" analysis, which is generally more context-specific and limited in scope. It is a *per se* rule—one independent of such variables as whether the state courts are open. Indeed, it could be framed as a claim that the legislation, taken as a whole, lacked a valid legislative purpose.[160] And since such a purpose-oriented severability rule would apply generally, it would largely pretermit any discussion of whether, unlike other Article III courts, the Supreme Court has a separate and uncompromisable "essential role."

B. Article III Courts and "Public Rights"

Hart fully endorsed the conventional understanding that the Constitution endows Congress with large discretion to shape the actual institutions of our government. Congress, therefore, is free to confer upon the inferior Article III courts such subject-matter jurisdiction as

158. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318–20 (2016) (finding that no provision of H.B. 2 was severable from the unconstitutional provision at issue); *see also Ex parte* Young, 209 U.S. 123, 147 (1908) (finding draconian penalties to be a separate violation of due process when their purpose was to discourage a judicial challenge asserting that legislatively prescribed rates were confiscatory).

159. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1482–84 (2018) (finding, over a sharp dissent, that no provision of PASPA was severable from the unconstitutional provision at issue). This is a topic that requires further thought although this might be one question that remains ambiguous. *See supra* note 136 and accompanying text. For an incisive criticism of the Court's severability analysis, see *Leading Cases*, *supra* note 80, at 392–96 (criticizing the Court in *Murphy* for adopting a "coherence" approach rather than assessing whether the separate provisions were independently viable).

160. *See* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1080–81 (observing the Court's use of motive or purpose tests in contemporary constitutional law to "stop legislatures from achieving indirectly aims that the Constitution would forbid the government to pursue directly").

it deems appropriate.[161] But that freedom is not boundless. When Hart wrote, the generally accepted understanding was that *some* types of "adjudication," were they to occur at the *national* level, could take place only in Article III tribunals.[162] *The Dialogue* itself makes no direct effort to engage with that tradition; indeed, it has quite an ahistorical cast to it. Standing alone, however, *The Dialogue* cannot sensibly be understood without understanding the background of the debate about Article III tribunals. To that background we now turn.

Trials for federal crimes within a state provided a clear example of the need for adjudication by Article III courts,[163] but these cases were not the only examples. In *American Insurance Co. v. 356 Bales of Cotton (Canter)*, a federal territorial court in Florida had exercised admiralty court prize court jurisdiction.[164] Within one of the states, Chief Justice Marshall acknowledged, such adjudication would have violated Article III.[165] But such tribunals were not required in the territories;[166] nor, the Court subsequently held, were they required when military tribunals are properly convened.[167] *Palmore v. United States* extended the territorial ruling from *Canter* to the District of Columbia.[168] In *Ortiz v. United States*, the entire Court reaffirmed this line of authorities, stressing that "exceptional [congressional] powers" were at play in the territories and the District of Columbia.[169] But

161. The standard citation is *Sheldon v. Sill*, 49 U.S. (8 How) 441 (1850). For a recent discussion, see *Home Depot U.S.A. v. Jackson*, 139 S. Ct. 1743, 1746 (2019).

162. The judges of the Article III courts were thought to be sufficiently insulated from congressional or executive control. So, too, were the state courts. Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 299–300 (1990).

163. *The Dialogue*, *supra* note 4, at 1365–66; *see* Martin S. Lederman, *The Law (?) of the Lincoln Assassination*, 118 COLUM. L. REV. 323 (2018) (examining the constitutionality of military trials for individuals other than members of the armed forces). The extent to which state courts must or could exercise jurisdiction over federal criminal offenses has a long and controversial history that I have no need to pursue here.

164. Am. Ins. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 513–14 (1828).

165. *Id.* at 545.

166. *Id.* at 546.

167. Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

168. Palmore v. United States, 411 U.S. 389, 390 (1973). In *Palmore*, the Court held that criminal trials in the District of Columbia do not require an Article III court. *Id.* Such trials can occur in legislative courts created under Article I. *Id.* The assimilation of the status of the District of Columbia to that of the territories is strongly criticized in James Durling, *The District of Columbia and Article III*, 107 GEO. L. REV. 1205 (2019).

169. Ortiz v. United States, 138 S. Ct. 2165, 2178 (2018) (quoting N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982)); *id.* at 2196–97 (Alito, J., dissenting). I agree with the result, but the exceptional power rationale leaves me unpersuaded. But, for the purposes of this Article, that disagreement is not important.

Justice Alito, in a dissent joined by Justice Gorsuch, concluded that the Court's appellate jurisdiction over military courts was lacking because military tribunals exercised "executive," not judicial, power.[170] Relying heavily on the existing case law, and more specifically its own history of reviewing such tribunals, the majority disagreed.[171] So too did Justice Thomas in a separate concurrence.[172] Of course, the underlying premise of these holdings was that, exceptions for special tribunals aside, national adjudication *must* take place only in Article III courts.[173] This is not the end of the debate, however. The Court has fashioned a third, and by far the most important, exception to Article III adjudication: the "public rights" doctrine, customarily associated with *Murray's Lessee v. Hoboken Land & Improvement Co.*[174]

What, then, are public rights? This category has not proved to be altogether stable.[175] Throughout the nineteenth century, it typically referred to "rights" held by the general public *in gross* rather than by any specific individuals. The question often involved discerning under what circumstances members of the general public could sue to vindicate such rights.[176] Caleb Nelson describes the early understanding:

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170. *Id.* at 2198–2202 (Alito, J., dissenting). I would note that Supreme Court review was not of the decision of the courts-martial but of the Court of Appeals for the Armed Forces. Justice Kagan elides the two (as I would not), and Justice Alito seems to give the distinction no real attention. *See id.*

171. *Id.* at 2178 (majority opinion) (acknowledging that "we have lumped the three together" in reference to the military, territories, and District of Columbia).

172. *Id.* at 2186–88 (Thomas, J., concurring).

173. They are usually characterized as "exceptions." *See, e.g.*, *id.* at 2178 n.7; Stern v. Marshall, 564 U.S. 462, 489–90 (2011); HART AND WECHSLER, *supra* note 2, at 296–98. Professor Nelson would prefer to characterize them as simply not involving the exercise of the Article III judicial power. Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 574–77. Building on the prior work of his colleague, Professor Harrison, Nelson asserts that nineteenth-century conceptions of what constituted an exercise of the "judicial power" in a separation-of-powers framework were dependent upon the nature of the claims before the Court. *Id.* at 590.

174. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

175. The central division in *Oil States*, discussed *infra* notes 186–93 and accompanying text, was over whether, after its issuance, a patent over an invention was a public or a private right. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1381–85 (2018) (Gorsuch, J., dissenting) (arguing that a patent is a private right).

176. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004) ("Public rights are those that belong to the body politic. They may include interests generally shared, such as those in the free navigation of waterways, passage on public highways, and general compliance with regulatory law." (footnote omitted)); *see also* Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 563 (speaking of "nineteenth-century precedents" distinguishing between public and private rights).

> From the outset, American lawyers thought it "quite natural" to distinguish legal interests that were vested in discrete individuals from legal interests that belonged to the public as a whole. . . .
>
> To illustrate the category of "*public* rights belonging to the people at large," early American lawyers tended to point to three different kinds of legal interests: (1) proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury; (2) servitudes that every member of the body politic could use but that the law treated as being collectively held, such as rights to sail on public waters or to use public roads; and (3) less tangible rights to compliance with the laws established by public authority "for the government and tranquility of the whole." At any given time, the law recognized many such "public rights"—interests that enjoyed legal protection, but that belonged to "the whole community, considered as a community, in its social aggregate capacity."[177]

Thus, a suit involving a "public right" necessarily dealt with issues affecting the community at large rather than merely the individual.

Nineteenth-century legal thought was even more complex. In addition to the public rights described above, nineteenth-century governments (like those of the twentieth and twenty-first centuries) awarded contracts, franchises, licenses, and other "privileges."[178] While often folded within the third category of Nelson's public rights,[179] these interests were sufficiently distinctive to merit separate consideration. For some purposes, they were treated as full-fledged property; for others, they were something less.[180] The fundamental inquiry here often was to ascertain when, if ever, these kinds of property interests became sufficiently "vested" so as to be entitled to the protections accorded to common law liberty or property.[181]

Subject to unending criticism along the lines of coherence and, more importantly, utility, the public rights doctrine nonetheless still

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177. Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 566 (footnotes omitted) (first quoting Lansing v. Smith, 4 Wend. 9, 21 (N.Y. 1829) (Walworth, C.); then quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *7; and then quoting *id.* at *5).

178. *Id.* at 567–68, 571–72, 578–79.

179. For a recent example, see *Oil States*, 138 S. Ct. at 1375.

180. Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 567–68.

181. *Id.* at 569. Moreover, even with respect to franchises and privileges, "executive officials had to respect statutory privileges that [Congress] had . . . granted to private individuals and that Congress had not authorized the [executive] official[] to abrogate." *Id.* at 581 (emphasis omitted).

looms large over the legal landscape.[182] Indeed, Caleb Nelson insists that the doctrine now "is so deeply ingrained in American-style separation of powers, and so fundamental to our system of government, that it cannot plausibly be excised."[183] As will appear below, to the extent that Nelson's point is that courts can be expected to be more receptive to some claims than to others, I agree.

The important issue now is determining what falls within the compass of the public rights doctrine. That can matter quite considerably when the administrative adjudication claims legal finality.[184] *Murray's Lessee* (dicta?) stated that Article III courts could be *entirely* excluded from any role in public rights cases.[185] And the

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182. *See, e.g.*, *Oil States*, 138 S. Ct. at 1370; HART AND WECHSLER, *supra* note 2, at 354.

183. Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 565. He is, of course, fully aware of the doctrine's critics. *Id.* at 564 nn.16–17 (collecting sources). His concern is with the scope current of "public rights," which he sees as now extending to what is historically understood as private rights. Much of the current public rights doctrine now seems counterintuitive. A private litigant seems in need of the protection of a constitutionally independent Article III judge when facing a government action seeking to enforce a deprivation of liberty or property far more when an adjudicator is simply asked to umpire a dispute between private parties. But here, as elsewhere, "a page of history is worth a volume of logic." N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.); *see also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of law has not been logic: it has been experience."). And the distinction was far less indefensible in nineteenth-century political thought.

184. Professor Nelson describes his own project as follows:

> Under what circumstances does the Constitution permit adjudicative decisions made by Congress or executive agencies to enjoy the sort of finality that is typically associated with judicial decisions? In particular . . . to make factual findings that courts are bound to accept in subsequent litigation, or to resolve legal disputes involving private individuals in a way that will itself have legal consequences? This question goes to the heart of the modern administrative state . . . .

Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 563.

185. Specifically, it states:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855). *The Dialogue*, *supra* note 4, at 1368 n.26, also quotes this language. So does the Court in *Stern v. Marshall*, 564 U.S. 462, 488 (2011). Justices Alito and Gorsuch may be of the same view. *See* Ortiz v. United States, 138 S. Ct. 2165, 2202 (2018) (Alito, J., dissenting) ("[P]ublic rights disputes are exceptions to Article III: the Federal Government can adjudicate [them] without exercising its judicial power."). The suggestion, however, was a casual one in the course of lengthy opinion, and Hart and Wechsler submit that *Murray's Lessee*'s sweeping statement may be somewhat overbroad. *See* HART AND WECHSLER, *supra* note 2, at 354–55.

Court's decision in the 2017 Term in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* drew heavily upon the public-versus-private rights framework to uphold administrative revocation of a patent because the patent had been invalidly issued.[186] While patents may very well be private property vis-à-vis third parties, the Court noted that against the government they "convey only a specific form of property right—a public franchise."[187] And, to the Court, the process of administrative patent revocation seemed not meaningfully different from that of patent issuance. Accordingly, patent revocation fell "squarely within the public-rights doctrine."[188] Once determined to be a matter of public right, *Murray's Lessee* made plain that improperly issued patents could be administratively revoked without violating Article III (or the Seventh Amendment).[189]

Considerable uncertainties still remain in the wake of *Oil States*, however. The Court carefully noted that Article III judicial review (apparently Administrative Procedure Act-style) of the administrative revocation decision was available, and it declined to opine on whether that was constitutionally required.[190] Moreover, in rejecting the argument that patent revocation constituted an exercise of Article III "judicial power," the Court said that only the rights of the government and the patent holder were at issue; the patent revocation "does not make any binding determination" regarding a then-pending patent infringement suit between the patent holder and an alleged infringer.[191] Justice Gorsuch's dissent insisted that, after its issuance, a patent became a private right. Relying on history and nineteenth-century precedent, he said that only a court could invalidate it.[192]

Whether *Oil States* is a harbinger of change is difficult to gauge. There is an air of quite astonishing unreality to the decision. Despite extended briefing on the matter, no opinion considered how the patent system was, and is, actually administered or whether administrative patent revocation subject to APA-style review made contemporary

186. *Oil States*, 138 S. Ct. at 1365.

187. *Id.* at 1375.

188. *Id.* at 1373. The Court apparently believes that any government franchise should be treated as a qualified one. *See id.* at 1375.

189. *Id.* at 1379. No opinion mentioned 35 U.S.C. § 294 (2018), which allows an arbitration to decide, as between the parties, patent validity.

190. *Oil States*, 138 S. Ct. at 1379. The Court also noted that an existing (valid?) patent could constitute property for purposes of the Due Process and Takings Clauses. *Id.*

191. *Id.* at 1378.

192. *Id.* at 1381–85 (Gorsuch, J., dissenting).

sense. At the end of the day, all that the Court did was uphold the now-familiar APA pattern of agency fact-finding and judicial law declaration. But the heavy emphasis in both the majority and dissent on the need to frame the analysis within the public-versus-private-rights landscape could lead to greater judicial involvement when "private" rights are involved. Moreover, the strong grip of the resolving power of these categories on the current Court is itself arresting.[193]

C. Public Rights and Judicial Review

Nineteenth-century separation of powers theory required intensive judicial involvement with any governmental interference with what were then understood as a limited (Lockean) category of private rights. That meant, Professor Nelson apparently insists, that nineteenth-century courts decided *all* questions of law and of adjudicative fact *de novo*.[194] No finality could attach to either administrative determination. Substantively, however, judicial protection was apparently quite limited, barring only imposition of retroactive liability.[195] This is consistent with the early- and mid-nineteenth-century conception that the Contract Clause provided the principal federal constitutional barrier against retroactive state legislation.[196]

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193. *See Leading Cases*, *supra* note 80, at 312 ("The groundwork for *Oil States* was laid by the Court's recent attempts to wall off a core set of issues for Article III courts without greatly disturbing its previous accommodations to modern government."). In a brief opinion by Justice Breyer, three Justices rejected such a rigid framework. *Oil States*, 138 S. Ct. at 1379–80. *But see* Ortiz v. United States, 138 S. Ct. 2165, 2185 (2018) (Thomas, J., concurring) (relying on that framework).

194. Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 590–93, 597–98. Private rights were "natural rights that individuals would enjoy even in the absence of political society." *Id.* at 567. Nelson lists possible exceptions to this framework, such as claims on the public treasury, tax collection, eminent domain, and immigration matters. *Id.* at 582–90. I should add here that Professor Nelson believes that I am overreading him on the scope of judicial review. He believes that his article expresses more uncertainty on this issue than I recognize.

195. *Id.* at 598.

196. Professor Nelson has nothing to say about the displacement of the Contracts Clause by the Due Process Clauses at the end of the nineteenth century as the principal source of protection for liberty and property. *See* Robert L. Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 852, 890–91 (1944). Those Clauses reach both retrospective and prospective interferences with liberty and property. Should Professor Nelson's private-right-driven conception of separation of powers no longer turn on retroactivity? Arguably not, of course, for an originalist who believes that substantive due process is an improper doctrine. On the current languid status of the Contracts Clause, see generally Sveen v. Melin, 138 S. Ct. 1815 (2018)

Fast forward! Hart and Wechsler inform us that the current public rights doctrine now embraces *all* federal governmentally enforced administrative action, whether retrospective or prospective, that would impose obligations on private persons, so long as such enforcement existed outside of the criminal-law context.[197] The nature of the private-party interest affected by the governmental conduct is immaterial. Such an expansive reading, Professor Nelson maintains, sharply extends *Murray's Lessee* itself as well as the nineteenth-century case law.[198] "Core" (a characterization greatly favored by Professor Nelson) private rights were *not* embraced within the nineteenth-century understanding of public rights, whether the source of the interference was by another private party or by the government.[199] As I have previously written on the subject:

(holding that the retroactive application of a Minnesota statute that says divorce revokes a beneficiary designation does not violate the Contracts Clause).

197. *See* HART AND WECHSLER, *supra* note 2, at 354 (listing three categories falling within the public rights doctrine: "[C]laims against the United States for 'money, land or other things'"; "disputes arising from coercive governmental conduct outside of the criminal law"; and "immigration cases " (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 452 (1929))). The Court has expanded the concept of public rights to include suits by one private party against another when the right asserted is "integrally related to particular Federal Government action." Stern v. Marshall, 564 U.S. 462, 490–91 (2011). I do not explore the significance of this expansion. But reconsider *Crowell* in this regard, as my colleague Jeremy Kessler pointed out to me. The impressions created by various opinions give plausibility to this claim because a reader might well assume that the entire process contemplated by the legislation was quite formal. The reality was quite otherwise:

> The federal statute was administered by the United States Employees' Compensation Commission, created in 1916 to administer the workers' compensation program for federal employees. The Commission's work quickly became consumed by maritime workers' claims. Hearings were held before Deputy Commissioners, but hearings were rare: In 1928 there were 32,000 reported maritime injuries, of which 338 were set for a hearing, and only fifteen reviewed in court. The administrative hearings were "extremely informal," with the hearing commissioner depending on "speed, and thorough inquiry into the facts rather than upon procedural regularity."

Tushnet, *supra* note 91, at 362 (quoting Theodore Baytop Stubbs, Longshoremen's and Harbor Workers' Compensation: A Study of the U.S. Employees' Compensation Commission in the Administration of the Longshoremen's and Harbor Workers' Compensation Act (1930) (unpublished LL.M. thesis, Harvard Law School)). The *Crowell* claimant was injured in July of 1927. *Id.* at 359.

198. Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 567–69. *Murray's Lessee* was in fact a land-title dispute between two private parties. But the ultimate question of title turned on the validity of a prior governmental seizure and sale of the land without the participation of an Article III court. Moreover, some judicial review of the government's action was in fact available. *Id.* at 586–88.

199. *Id.* at 566–68. Historically, this was a narrow set of rights that was thought to be "pre-political" and therefore not dependent on the government. *Id.* at 567.

> [T]here has always been in our traditions particular concern with the judicial role where governmental interference with the "private rights" of "liberty" and "property" was involved. This linkage is reflected in *Marbury*'s declaration that the "province of the Court is, *solely*, to decide on the rights of individuals," and it constituted a vital component in nineteenth- and early twentieth-century efforts at demarcating the permissible limits of administrative power. So long as public administration made few demands on private persons (apart from taxes and custom duties) no threat was posed to the "sacred" rights of liberty and property. But with the advent of the regulatory administrative state in the late nineteenth century, judicial concern grew. It was a widely shared belief that disputes arising from the application of congressional regulatory power must ultimately be resolved in article III courts and thus could not be left for final administrative determination.[200]

While he does not explicitly refer to it, Hart's thinking was firmly set within the old rule-of-law tradition.[201] So too was that of his eminent colleague Louis Jaffe. Writing a dozen years after Hart, Jaffe explored the topic more extensively. Administrative interference (Hart's "coercion") with traditional conceptions of liberty or property required judicial supervision, he insisted, although not quite to the extent supposed in the nineteenth century.[202]

Essentially, and without any explanation, Hart bypassed the public-versus-private rights framework. His starting point was different. For him, what was crucial was the distinction between enforcement and nonenforcement courts. Was the court being asked to enforce governmentally prescribed duties, whether defined by Congress or an agency, in a suit by the government or a private

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200. Monaghan, Marbury, *supra* note 5, at 17 (footnotes omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

201. *Murray's Lessee* is laconically dismissed, with the observation that the Court "upheld a summary procedure, without benefit of the courts, for the collection by the United States of moneys claimed to be due from one of its customs collectors." *The Dialogue*, *supra* note 4, at 1368 n.26. Hart also believed that a taxpayer has a right to a judicial hearing to contest the legality of a tax. *Id.* at 1369. And, as I shall show, he recoiled against judicially unchecked administrative deprivations of liberty or property.

202. Jaffe addresses this issue in Chapter 9 of JUDICIAL CONTROL OF ADMINISTRATIVE ACTION. JAFFE, *supra* note 28, at 320–94. A particularly relevant discussion of the need for judicial supervision when the deprivation of liberty or property is at issue begins on page 383. *Id.* at 383. Professor Jaffe insisted that the Constitution required judicial review of the legality—not just the constitutionality—of governmental conduct imposing restraints and obligations. *Id.* at 394.

party?[203] Article III itself was empty, however, unless the jurisdiction of those courts was actually invoked. This was essentially Justice Brandeis's position in *Crowell v. Benson*.[204] Hart put the point this way:

> It's hard, for me at least, to read into Article III any guarantee to a civil litigant of a hearing in a federal constitutional court (outside the original jurisdiction of the Supreme Court) if Congress chooses to provide some alternative procedure. The alternative procedure may be unconstitutional. But, if so, it seems to me it must be because of some other constitutional provision, such as the Due Process Clause.[205]

In the pre-modern nineteenth-century administrative state, when core private rights were at stake, Hart's formulation could have passed unnoticed, because "[j]udicial power and due process rationales were tightly joined."[206] But for us, Article III and due process are no longer tightly linked. And as Professor Jaffe noted, that separation can matter:

> The proposition that due process may require a certain measure of judicial process may be thought just another way of saying that the judiciary is the constitutional organ for the determination of questions of legal power. Each does, however, approach the question from a somewhat different direction, and may in some cases give different answers. Due process emphasizes the protection of individual rights or interests. Judicial power emphasizes the control of executive action and can be used to support judicial intervention even when individual rights are not involved. Due process is thus a narrower, more limited rationale. It could be argued that, at least under our American version of separation of powers, a constitutional power in the judiciary to check the executive is historically validated

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203. To the maximum extent possible, Hart would apply the same principles when pre-enforcement challenges were before the court. *See supra* note 24 and accompanying text.

204. In his dissenting opinion in *Crowell v. Benson*, 285 U.S. 22 (1932), Justice Brandeis wrote:

> There is . . . nothing [in Article III] which requires any controversy to be determined as of first instance in the federal District Courts. The jurisdiction of those courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is . . . because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

Id. at 86–87 (Brandeis, J., dissenting) (footnote omitted).

205. *The Dialogue*, *supra* note 4, at 1372–73.

206. Monaghan, Marbury, *supra* note 5, at 17. "[I]n fact, the first decision imposing due process constraints on the states required judicial review of a claim that administratively prescribed rates were confiscatory." *Id.* Nelson, *Adjudication in the Political Branches*, *supra* note 30, demonstrates this point exhaustively.

> only when personal rights are in question, and that to carry judicial power beyond this contravenes the doctrine of separation.[207]

Nelson's nineteenth-century judicial world hinges entirely on the nature of the claims (i.e., rights or privileges) asserted. That determination, in turn, defines the nature of the judicial duty.[208] Hart began from a different starting point: conceptions of limited government and the rule of law.[209] When Hart wrote, administrative-fact-finding cases, even in the classic case of private right (A v. B), had become commonplace. *Crowell v. Benson* and its predecessors accorded finality to those findings if supported by substantial evidence. In so doing, *Crowell* established (or at least confirmed) the foundation of the modern administrative state. It is a bit dismissive, I believe—albeit technically correct—to say that all that was at stake in *Crowell* was the status of "jurisdictional facts" and whether the court has to create its own record on these facts.[210] The elaborate opinions suggest otherwise. I agree with Professor Tushnet that:

> [Hughes's] opinion became one of the foundations of modern administrative law . . . . As in other areas of the law, Hughes played a transitional role. Here as elsewhere he developed constitutional doctrine that acknowledged the force of an older tradition while opening the path for doctrines that would support newer institutions. Unsurprisingly, then, in the decision's immediate aftermath, critics emphasized its backward-looking features and failed to emphasize enough its forward-looking ones.[211]

He concluded that "[m]ore broadly, it validated the modern administrative state."[212] *Crowell*, in fact, is a flagship in our administrative state.

Nonetheless, Hart's view that Article III is entirely empty unless its jurisdiction is actually engaged was and, as *Oil States* reminds us,

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207. JAFFE, *supra* note 27, at 379–80.

208. Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 590.

209. *The Dialogue*, *supra* note 4, at 1390.

210. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 981 (2011). For Professor Merrill, *Crowell* is, despite its centrality in chapter 4 of the casebook, in fact something of a poster child. Precedents originating under the Hepburn Act had effectively established the appellate (i.e., APA) style of judicial review. *Id.*

211. Tushnet, *supra* note 91, at 360.

212. *Id.* at 388.

still remains a minority one.[213] "Almost no one disputes the highly general principle that Article III imposes some limits on Congress' authority to vest judicial power in non-Article III federal tribunals, but there is much less consensus or certainty concerning precisely what those limits are."[214] Hart's focus, however, was on the government's practical need to use the Article III courts when imposing obligations on private parties.[215] For him, that would be the standard situation, and at that point, Article III itself fastened duties on those courts.

D. Limitations on Enforcement Courts: Their Validity

Murray's Lessee stated that Article III courts could be excluded entirely in cases of public rights, a category now seemingly including *any* governmental action against private individuals outside of the criminal law context.[216] But giving *complete* finality to administrative deprivation of common law liberty and property rights (and other "rights") would run sharply counter to our entire constitutional history.[217] No federal legislation of which I am aware has wholly excluded Article III courts from examining administrative deprivations of traditional liberty or property rights.[218]

Nor did Hart endorse any such sweeping public rights finality doctrine. He insisted that, at least in an enforcement proceeding, Article III itself required that the court review *de novo* administrative determinations of the controlling law.[219]

1. *Civil proceedings*. In an ordinary civil proceeding, the court, sometimes with the aid of jurors and masters, resolves every issue in

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213. In *Oil States*, most of the members of the Court assumed that if private rights were involved, they could be adjudicated only in an Article III court. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018).

214. HART AND WECHSLER, *supra* note 2, at 36.

215. *The Dialogue*, *supra* note 4, at 1397 ("Remember the *Federalist* papers. Were the framers wholly mistaken in thinking that, as a matter of the hard facts of power, a government needs courts to vindicate its decisions? Is there some new science of government that tells how to do it in some other way?").

216. *See Oil States*, 138 S. Ct. at 1374; HART AND WECHSLER, *supra* note 2, at 354. *Oil States* could be grounded in a similar premise. But that is quite unclear given the concurrence, the dissent, and the relatively unproblematic nature of the case to most members of the Court. *See also* Ortiz v. United States, 138 S. Ct. 2165, 2184–89 (2018) (Thomas, J., concurring) (expressing concern for judicial protection of private rights).

217. *See* Monaghan, Marbury, *supra* note 5, at 21–22, 22 n.126.

218. *Oil States* expressly reserves opining on the validity of any such legislation, even with respect to governmentally granted franchises. *Oil States*, 138 S. Ct. at 1379.

219. *The Dialogue*, *supra* note 4, at 1375–79.

the case before it. But what if some or all of these issues are assigned to an administrative agency for determination, with limited (i.e., partial "jurisdiction stripping") Article III court review? In civil enforcement proceedings, Hart believed that Article III was implicated. He endorsed the entire Court's stance in *Crowell*. Law declaration was an independent obligation of Article III enforcement courts.[220] But like Brandeis, Hart believed that questions of fact, whether "ordinary" or "jurisdictional," could legitimately be resolved elsewhere, even in private right cases, at least so long as nothing analogous to a common-law right requiring a jury was involved.[221] Any requirement of independent judicial fact-finding or of independent judicial judgment, whether on its own or in an administrative record, must find its roots in other provisions of the Constitution, not in Article III.[222] And no such requirement ordinarily existed, except perhaps in cases of personal liberty.[223] This leaves me with the conviction that Hart would

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220. Brandeis's due-process-based reference to the requirements of the "supremacy of the law" seems to describe the duty of all courts. *See* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). Hart's analysis is more clearly tethered to Article III. In *Crowell*, the Justices, it should be noted, endorsed error correction—not *ultra vires* review—of legal issues.

221. *The Dialogue*, *supra* note 4, at 1375–77. Hart cited *Crowell v. Benson*, 285 U.S. 22 (1932), with approval on this point. *See The Dialogue*, *supra* note 4, at 1373. Hart thought that the Seventh Amendment would rarely be implicated in administrative adjudication. *Id.* at 1375. This observation is confirmed by the plurality opinion in *Oil States*, 138 S. Ct. at 1379.

222. *Crowell*, 285 U.S at 51. Professor Jaffe agreed: "[F]act finding by a judge is not a basic premise of our system of justice." JAFFE, *supra* note 27, at 89; *see also id.* at 595–96. Interestingly, Professor Nelson (an ardent originalist scholar) seems to accept administrative fact finding, acquiescing in *Crowell*'s "somewhat artificial" description of administrative agencies as judicial "adjuncts" in private right cases. Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 601. This concession, I believe, is a setback for his efforts to reconcile originalism with our modern legal order. *See also* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 124 n.377 (gently chiding Nelson).

223. *The Dialogue* discusses this, stating:

> Q. Where does the *Ben Avon-Crowell-St. Joseph* rule stand now?
>
> A. Most commentators question its present vitality, at least in the field of civil liability. Certainly, the recent decisions on rate-making, to which the commentators point, reflect such altered views of the applicable constitutional restraints as to leave little room for the *Ben Avon* question to arise within its original field. The same thing is true in other areas of administrative action. Putting aside questions of personal liberty where the governing criteria are likely to be more rigorous, constitutionality, as distinguished from statutory authority, will rarely turn upon the concrete factual situation sought to be reviewed.

The Dialogue, *supra* note 4, at 1376–77 (footnotes omitted). The Suspension Clause, the First Amendment, and other constitutional guarantees may also impose such a requirement. *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233, 232–35 (1985) [hereinafter Monaghan, *Constitutional Fact Review*]; Henry P. Monaghan, *First Amendment "Due Process*,*"* 83 HARV. L.

have little trouble sustaining the considerable expansion of the dispute-resolving authority of the magistrate judges, even in cases of private right.[224] Hart basically endorsed what is now commonly referred to as the appellate review model of Article III, of which *Crowell v. Benson* is the standard bearer.[225]

2. *Criminal proceedings*. Hart was even more greatly troubled by shutting off review of any legal question from an Article III criminal enforcement court even though alternative Article III review was, or had been, at least ostensibly available elsewhere.[226] *Yakus v. United States* was a focus.[227] To summarize briefly, during the Second World War, Congress imposed price controls. The legislation channeled all challenges to the administrative regulations and orders to a special emergency court composed of Article III judges. *Yakus* upheld this framework, holding that Congress could effectively bar any challenge to the question of whether a particular price regulation violated the statutory mandate (and/or was confiscatory) in a criminal enforcement proceeding.[228] Greatly troubled, Hart seemed somewhat mollified

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REV. 518, 550–51 (1970) [hereinafter Monaghan, *First Amendment "Due Process"*]. For a vigorous defense of constitutional fact review, see generally Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289 (2017).

224. HART AND WECHSLER, *supra* note 2, at 390–94 (describing expansion). I doubt that Hart would find objectionable the line of decisions leading up to *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014). Of the consent-based theory of adjudication by a non-Article III judge elaborated upon in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015), I am less sure. But if litigants are prepared to waive the protections of Article III, Hart advances no reason and I myself see none to object. I recognize, of course, that there is a real danger that the "consent" will not in fact be voluntary. For a more detailed analysis, see HART AND WECHSLER, 2019 supplement, at 52–53.

225. HART AND WECHSLER, *supra* note 2, at 389–90 n.8 (discussing Merrill, *supra* note 210, which it describes as "provid[ing] a careful historical study of the origins of the appellate review model"). Merrill shows that the appellate-review model had taken firm hold well before *Crowell* and traces its immediate origins to the Court's reaction to passage of the Hepburn Act governing railroad rates. The term appellate-review model itself seems to have originated with Professor Fallon. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 933 (1988).

226. *The Dialogue*, *supra* note 4, at 1379–83. Whether an adequate alternative channel of review in fact existed in *Yakus* is open to serious doubt. *See* JAFFE, *supra* note 27, at 391.

227. Yakus v. United States, 321 U.S. 414 (1944).

228. *Id.* at 429–31. The Court did allow a challenge to the entire underlying legislative framework and a meaningless facial challenge to the validity of the specific administrative rate regulation. *See id.* at 419–27, 446–47. The enforcement court, however, could not examine the legislative facts underpinning the administrative regulation. *Id.* at 425.

because review of those issues could be had in another Article III court "and everybody assumed it had to be."[229]

The precise scope of *Yakus* continues to vex the Supreme Court.[230] Suffice to say, however, that jurisdiction splitting in the enforcement context faces a hostile Court, as a judicial decision at the end of the 2018 Term illustrates. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.* apparently presented a *Yakus* issue, albeit in the civil context.[231] The relevant statutes could be read to limit the review of the legality of certain Federal Communications Commission ("FCC") "orders" to the "exclusive jurisdiction" of the appropriate court of appeals, thereby foreclosing any such review by the district court in a civil enforcement proceeding.[232] The FCC order at issue in *PDR Network* had not been reviewed, and the time limit for such review had expired.[233] In a four-person concurrence, Justice Kavanaugh insisted that in those circumstances *Yakus* could have no applicability in a district court civil-enforcement proceeding unless the relevant statutes explicitly withdrew legality review from the district court.[234] There is no doubt that this view would apply *a fortiori* in the criminal context. The Court remanded the case to determine, in effect, whether the statutory scheme did in fact raise a *Yakus* problem.[235]

The selective-service-draft cases troubled Hart even more. *Estep v. United States*, a laconic opinion by Justice Douglas, said that, in a criminal proceeding for violating an induction order, "Congress enlisted the aid of the federal courts only for enforcement purposes."[236] Apparently, an Article III court was simply to rubber stamp the administrative order. Heresy, of course! *Estep* "explained" the Court's prior decision in *Falbo v. United States*,[237] which foreclosed judicial review of the validity of the induction order, as turning on the failure to exhaust available remedies.[238] But *Estep* then went on to say that

229. *The Dialogue*, *supra* note 4, at 1380.

230. *See* United States v. Mendoza-Lopez, 481 U.S. 828, 842 (1987) (finding no finality to an administrative order in a subsequent criminal proceeding based upon violation of the order when no judicial challenge to the order had been realistically available).

231. PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051 (2019).

232. *Id.* at 2053.

233. *Id.* at 2058 (Kavanaugh, J., concurring in the judgment).

234. *Id.* at 2064–65.

235. *See id.* at 2056 (majority opinion).

236. Estep v. United States, 327 U.S. 114, 119 (1946).

237. Falbo v. United States, 320 U.S 549 (1944).

238. *Estep*, 327 U.S. at 123.

draft board exemption denials could be examined only for jurisdictional error.[239] In other words, the only judicially examinable question was whether the decision had any basis in fact.[240] Without explanation, Hart insisted that this standard of review was insufficient, and thus, an Article III court was asked to enforce an administrative order without it—or any other court—examining the legality of the order. He was decidedly not mollified by subsequent judicial efforts to explain *Estep* as a failure to exhaust administrative remedies with judicial review of the induction order postponed until the habeas corpus stage.[241]

E. The Enforcement Court's Law Declaration Duty

In *Crowell*, Brandeis said that the supremacy of the law requires that Article III enforcement courts independently determine all legal questions. Error correction, not *ultra vires* or *Chevron* deference review, was the appropriate role for these courts.[242] The entire Court was agreed on that point.[243] And Hart strongly insisted on that proposition:

> Q. The *Crowell* case also has a dictum that questions of law, including the question of the existence of evidence to support the administrative decision, *must be open to judicial consideration*. And you quoted Brandeis as saying *that* was necessary to the supremacy of law. Have those statements stood up?
>
> A. If I can speak broadly and loosely, I'll say yes—they *have* stood up.
>
> Shutting off the courts from questions of law determinative of enforceable duties was one of the things *Yakus* assumed that Congress could *not* do. To be sure, that was a criminal case; but there's no reason to suppose the Court would have made a different assumption if the sanction had been civil.[244]

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239. *Id.* at 122. The "exhaustion" requirement of *Estep* and *Falbo* has had little generative effect. *See* HART AND WECHSLER, *supra* note 2, at 359 n.9 (noting that this requirement "will be only selectively enforced").

240. *Estep*, 327 U.S. at 122–23; HART AND WECHSLER, *supra* note 2, at 322–23. For additional criticism of *Estep*, and particularly of Justice Frankfurter's concurrence, see JAFFE, *supra* note 27, at 392.

241. *The Dialogue*, *supra* note 4, at 1382.

242. Crowell v. Benson, 285 U.S. 22, 89 (1932) (Brandeis, J., dissenting).

243. *Id.* at 46, 49–50 (majority opinion).

244. *The Dialogue*, *supra* note 4, at 1377 (first emphasis added) (footnote omitted).

For Hart, the phrase "must be open to judicial consideration" seemed to mandate *de novo* determination, at least when judicially enforced obligations involving liberty or property were involved.

How well has Hart's claim held up? Hart wrote in 1953, well before the rise—let alone the explosion—of agency rulemaking, and of course, well before *Chevron* took formal hold.[245] But even in Hart's time, the difficulties of his position were apparent.[246] Several adjudicatory labor law cases apparently held that agencies could formulate some legal propositions to which an Article III enforcement court would defer. Hart's response is well worth quoting:

> Q. How do you explain cases like *Gray v. Powell*, and *NLRB v. Hearst Publications, Inc.*? Or, for that matter, *O'Leary v. Brown-Pacific-Maxon, Inc.*? Didn't these cases allow the agencies to make final determinations of questions of law?
>
> A. That depends on how you define "law." I think Professor Davis is right in saying that the term "law" in the first sentence I quoted from Justice Brandeis has to be read "as excluding the body of rules and principles that grow out of the exercise of administrative discretion"—at least while the rules are in process of crystallizing.
>
> In recent years we've recognized increasingly a permissible range of administrative discretion in the shaping of judicially enforceable duties. How wide that discretion should be, and what are the appropriate ways to control it, are crucial questions in administrative law. But so long as the courts sit to answer the questions, the spirit of Brandeis' statement is maintained. And, since discretion by hypothesis is not law, the letter of it is not in question.
>
> Q. But it's notorious that there are all kinds of administrative decisions that are not reviewable at all. Professor Davis devotes a whole fat chapter to "Nonreviewable Action" of administrative agencies.
>
> A. Administrative law is a relatively new subject. Naturally there have been a number of ill-considered decisions. But if you look closely at Professor Davis' cases you'll find that almost all of them are

245. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (setting forth the *Chevron* two-step analysis).

246. As noted earlier, agency lawmaking by notice-and-comment rulemaking is a development that occurred after *The Dialogue*. *See supra* note 21. The decisions that troubled Hart were agency lawmaking through administrative adjudication.

> distinguishable. Many of them don't involve judicially enforceable duties of the complaining party at all.[247]

Then comes Hart's classic claim:

> Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I'm going back to re-think *Marbury v. Madison*.
>
> Q. You put a lot of weight on the point of whether an enforceable legal duty is involved, don't you?
>
> A. Yes.[248]

As I observed, shortly before *Chevron* was decided, "[t]he opposition of 'discretion' to 'law' cannot dissolve Hart's problem," since "the result of the exercise of discretion is, as it was in *Hearst*, an administrative formulation of a rule of law."[249]

Of course, *Marbury* could have been read as recognizing a freestanding duty for an Article III court to determine for itself *all* of the applicable law in any case properly before it, or in Hart's narrower formulation, it could at least be read to require such determinations in an enforcement proceeding. But our jurisprudence simply did not develop along those lines. In constitutional cases, the Court (along with Hart?) seems to have assumed that constitutional meaning is always open to it whenever the case is properly before it.[250] When it comes to statutory interpretation, however, I have written: "[T]here has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply *all* of the relevant meaning of

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247. *The Dialogue*, *supra* note 4, at 1377–78 (footnotes omitted).

248. *Id.* at 1378–79 (footnotes omitted). This follows Brandeis in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied . . . ."); *see also* JAFFE, *supra* note 27, at 381–85.

249. Monaghan, Marbury, *supra* note 5, at 29.

250. *Id.* at 24. Consider, for example, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). Neither fits Hart's definition of an enforcement court. The plaintiffs were not making a challenge to the legality of governmentally imposed legal duties. Rather, both cases were about correcting extra-judicial coercion. Both cases involved a plaintiff seeking judicial assistance to vindicate their property rights from prior administrative wrongdoing. Nonetheless, had Congress explicitly barred the *Marbury* Court from considering the constitutionality of the mandamus statute, the congressional barrier would have been ineffective, just as it was in *Klein*.

statutes. Rather, the judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act."[251] Professor Bamzai's recent article extensively documents the Court's practice of deferring to customary interpretation as well as to the contemporary understanding of those charged with the statute's administration.[252] This, he insists, was not the result of the modern idea of judicial "deference" to administrative interpretation but rather stems from reliance on judicially-developed conventions of statutory construction.[253] That description has met sharp challenge by Craig Green.[254] But however described, the convention in fact reflects deference to administrative construction. Moreover, the older cases had no occasion to think deeply about the basis and structure of the appropriate judicial-administrative relationship in our now vast, complex, and modern administrative state. I do not pursue the matter further, however. For me, what is important is that there never has been an unbroken history of courts independently determining all the meaning of administrative statutes.

I have elsewhere also argued that Hart's enforcement–non-enforcement court dichotomy lacked justification: "[S]o long as the court has general jurisdiction . . . why should the permissible limitations on the [Article III] court's law-declaring competence vary with whether the private litigant is asserting rights rather than defenses [or, I might add, privileges rather than rights]?"[255] In each instance, the

251. Monaghan, Marbury, *supra* note 5, at 33 (emphasis added); *see also* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143, 1145 (2012) (explaining that *Chevron* "empower[s]" agencies "to act in a manner that creates legal obligations"). Note that the context is civil, not criminal, cases.

252. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 930–65 (2017). Erwin Griswold had made essentially this same point before Hart wrote *The Dialogue*. Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 404 (1941); *see also* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007).

253. Bamzai, *supra* note 252, at 930, 941, and especially 987 (arguing that deference was given only when the interpretive canons were involved).

254. In two articles, Craig Green provides a challenge to Professor Bamzai's reading of history in *Constitutional* Chevron *Debates and the Transformation of American Law*, 88 GEO. WASH. L. REV. (May 2020) (on file with the *Duke Law Journal*), and goes on to provide a valuable political history of *Chevron*, from Justice Scalia to Justice Gorsuch, in Deconstructing the Administrative State: *Chevron* Debates and the Transformation of Constitutional Politics, 126–41 (unpublished manuscript) (on file with the *Duke Law Journal*).

255. Monaghan, Marbury, *supra* note 5, at 24 (emphasis omitted).

judicial power "is brought to bear to resolve the controversy in an authoritative manner."[256]

But that analysis may have understated Hart's point. Further reflection convinces me that what really drove Hart's analysis was not Article III or, more broadly, separation of powers concerns. Rather, it was the distinction between coercive and non-coercive governmental action. So understood, Hart drew upon our historical tradition, which required a significant judicial role when there has been administrative interference with traditional common-law rights.[257] Professor Jaffe developed this point in considerable detail in his splendid work, arguing that due process requires a judicial determination of the "legality" of any administrative deprivation with respect to common law liberty or property.[258] And (*pace* Professor Nelson) our legal tradition has not been a static one, where the rights protected are a closed nineteenth-century set.[259] We would now enlarge nineteenth-century understandings of liberty and property to include all the interests that are now constitutionally embraced by the clauses and other constitutional provisions.

Interestingly, Hart himself never actually explains why an Article III enforcement court must independently review *all* the relevant legal questions, including evidentiary sufficiency. Rather, he seems to have believed that this requirement self-evidently inheres in Brandeis's notion of "the supremacy of the law." Maybe it does. But if so, all sorts of questions abound. Are Article III courts unique in this law-declaration responsibility? Are they unique only when acting as an enforcement court? And in any event, why isn't *ultra vires* review constitutionally sufficient, at least with respect to non-constitutional

256. *Id.*

257. This, of course, is the central thrust of Professor Nelson's article. *See* Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 572. Professor Jaffe makes the same point with great force. JAFFE, *supra* note 27, at 382, 387–88. But he seems generally to require no more than *ultra vires* review.

258. JAFFE, *supra* note 27, at 388.

259. Hart's conception of property seems to have rested on then-conventional common-law conceptions, although he perceptively noted that it might be expanded to include denial of benefits, entitlements, etc.: "[P]laintiffs complaining about governmental decisions which do not involve the direct coercion of private persons." *The Dialogue*, *supra* note 4, at 1386. But formulating constitutional rules and standards beyond the area of administrative coercion of non-common law, liberty and property has been, and is, a vexatious problem. *See* JAFFE, *supra* note 27, at 382, 387–88. Statutes governing judicial review have largely made it unnecessary to confront constitutional issues.

questions?[260] Why doesn't the "supremacy of the law" also require that an Article III enforcement court examine all questions of jurisdictional fact, as *Crowell* held? Hart insists that any such demand must come from the Due Process or Habeas Clauses, not Article III. They may indeed contain such a demand,[261] but why does Article III itself not also contain some such requirement?

None of these questions is addressed, and so we are left with puzzles about the roots of Hart's own thinking, an unsurprising result when one recalls that *The Dialogue* was prepared only as part of one casebook chapter topic.[262] Like the rest of the chapter, *The Dialogue* aimed to present a set of difficult inquiries.

Finally, I must add that I am not sure exactly where Hart ultimately stood.[263] In 1958, the celebrated "tentative edition" of Hart & Sacks's *The Legal Process* appeared.[264] The final chapter is devoted to statutory interpretation. Its final two paragraphs read:

> A uniform interpretation by an administrative agency charged with official responsibility of any kind under the statute should be given weight by a court.
>
> An interpretation by an administrative agency charged with first-line responsibility for the authoritative application of the statute should be accepted by the court as conclusive, if it is consistent with the purpose properly to be attributed to the statute, and if it has been arrived at with regard to the factors which should be taken into account in elaborating it.[265]

This doesn't sound much like *The Dialogue*.

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260. *Compare* Monaghan, Marbury, *supra* note 5, at 33–34, *and* Merrill, *supra* note 210, at 1001, *with* 5 U.S.C. § 706(1) (2018) (seeming to demand more than *ultra vires* review of legal questions). Professor Jaffe seems to believe that generally *ultra vires* review, not independent judgment on legal questions, is all that is constitutionally required. JAFFE, *supra* note 27, at 570, 573.

261. Monaghan, *Constitutional Fact Review*, *supra* note 223, at 243.

262. Perhaps he believed that some matters were so obviously engrained by our legal traditions that they needed no elaboration.

263. In *The Dialogue*, there is no real discussion of the distinction between independent judgement and *ultra vires* review.

264. HART & SACKS, *supra* note 6, at cxxxvii.

265. *Id.* at 1380.

III. JUDICIAL CONTROL OF ADMINISTRATIVE DEPRIVATIONS OF LIBERTY OR PROPERTY

As mentioned in the Introduction, Hart was deeply concerned with administrative deprivations of liberty or property. Accordingly, *The Dialogue* spends a good deal of time discussing possible access to an Article III court to review such interferences, especially in situations in which Congress has ostensibly restricted the courts' jurisdiction. Hart, however, focused less on the *scope* of judicial review of administrative actions and more with garnering access to an Article III court. With the growth of the administrative state since *The Dialogue*, coupled with recent calls for less judicial deference to agency action, this issue deserves more treatment than Hart gave it. To that we now turn.

A. Necessity and the Administrative State

The door through which one enters is very frequently the same door from which one exits. Professor Nelson's description of the nineteenth-century judicial duty turns entirely on an antecedent background of Lockean rights, public rights, etc.—a background in which the judicial function depends on the kind of claim before the court.[266] Hart's view, I believe, stems from a conception of limited government that prohibits arbitrary governmental conduct. My entry point is somewhat different from Hart's in emphasis: the complexity of modern government requires the administrative state.[267] That recognition, in turn, entails acceptance of some administrative norm-setting authority, which further mandates some judicial deference to administrative-law formulation.[268] Professor Jaffe seems to me correct when he wrote that "[i]f we admit that the administrative as well as the judiciary can, and within limits should, make law, our analytic problem is much simplified."[269] Nonetheless, as Professor Jaffe also pointed out

266. Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 590.

267. For more discussion on this topic, see the elaborate presentation by my colleague, Gillian Metzger, in *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). Similarly, see Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599 (2018).

268. That view was—and is—widely shared. In addition to Metzger, *supra* note 267, see also, for example, Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1418 (2017).

269. JAFFE, *supra* note 27, at 547 (emphasis omitted); *see also id.* at 570, 573 (stating that an agency should generally be permitted to choose among reasonable interpretations of a statute). "By the 1920s, courts consistently deferred to agency actions with respect to public health,

in a widely admired observation, "judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."[270] Where core private rights are implicated that proposition has long been recognized by a wide and diverse range of writers.[271]

The precise level of judicial control is, however, another matter.[272] It may very well be that, habeas aside, *ultra vires* review of administrative lawmaking is all that is constitutionally necessary in the statutory context. The APA, however, arguably required more extensive judicial control, essentially codifying the doctrine laid down by Chief Justice Hughes in *Crowell v. Benson*.[273] Such a codification would have reflected the view of the New York Bar that developed during the rise of the New Deal. Led by Hughes and John Laird O'Brian, that Bar accepted administrative adjudication, but it believed that the administrative process required significant judicial supervision.[274] (It is fair to note, however, that the problems facing our own "administrative state" are far more complex than theirs.)

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customs and postal regulations, the administrative of veterans' pensions, and various licensing regimes," but were more skeptical about state-level agencies that set rates that public utilities could charge. Schiller, *supra* note 252, at 408 (footnotes omitted); s*ee also* Tushnet, *supra* note 91, at 368 (quoting Schiller).

270. JAFFE, *supra* note 27, at 320. On the influence of this remark, see Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 VA. L. REV. 703, 787–88 (2019). For a brief and illuminating discussion of Jaffe and of other approaches to the legitimacy of the administrative state, see Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2463 n.1, 2465 n.3 (2017) (discussing briefly other approaches to the legitimacy of the administrative state).

271. *See* Monaghan, Marbury, *supra* note 5, at 1 n.6, 3 n.17 (collecting sources).

272. Nelson, *Adjudication in the Political Branches*, *supra* note 30, at 604–05, laments the reduced level of judicial protection accorded to property rights which he thinks reached its nadir in *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

273. *See* 5 U.S.C. § 706 (2018). *But see* Kisor v. Wilkie, 139 S. Ct. 2400, 2418–20 (2019) (rejecting petitioner's contention that *Auer* deference, whereby courts defer to an agency's interpretation of its *own* ambiguous regulation, was inconsistent with § 706's requirement that reviewing courts should "determine the meaning or applicability of the terms of an agency action" (quoting 5 U.S.C. § 706)).

274. The story is splendidly told in DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014). Progressives feared that the term "jurisdictional fact" in *Crowell* would mean any "significant" fact. Tushnet, *supra* note 91, at 376. If so, that would have crippled the process of administrative adjudication because the reviewing courts would need to redetermine all such facts de novo and on their own record.

As I write, the modern administrative state is now under sustained attack.[275] A major focus of that attack centers upon administrative adjudication, and there, Hart's insistence on a judicial duty of law declaration is making a significant modern-day comeback. "Restricted" (i.e., APA-type) judicial review of administrative action is, of course, the norm in all sorts of areas.[276] But the Justices are clearly uncomfortable with binding deference to agency law formulation, and *Marbury v. Madison* is sometimes (incorrectly, I believe) invoked in support.[277] Moreover, the Court itself has significantly backed away from *Chevron* deference.[278] In *United States v. Mead Corp.*, the Court imposed formal constraints on *Chevron* deference.[279] In *Michigan v. EPA*, it rejected *Chevron* because of agency structural error in failing to consider all the relevant factors.[280] And in *King v. Burwell*, the Court seemed to hold that *Chevron* deference was inapplicable to major legal questions.[281] Moreover, *Chevron* has no purchase in the criminal context.[282] Justice Thomas and Justice Gorsuch were (and are) clearly willing to go further in rolling back *Chevron*.[283]

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275. Gillian Metzger's recent Harvard Foreword, discussed *supra* note 267, provides a comprehensive account and rejection of the wide range of political, legal, and rhetorical attacks employed in that service. *See also* Beermann, *supra* note 267, at 1599.

276. *See* 5 U.S.C. § 706; Monaghan, Marbury, *supra* note 5, at 23.

277. *See, e.g.*, Bank Markazi v. Peterson, 136 S. Ct. 1310, 1322 (2016).

278. Much—very much—ink has been spilled on *Chevron*, as everyone knows. For a comprehensive survey of the case law both at the Supreme Court and circuit level, as well as an excellent review of the literature, see Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2437–38 (2018).

279. United States v. Mead Corp., 533 U.S. 218, 226–30 (2001). For a vigorous recent defense of *Chevron*, see Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 992–93 (2018) (arguing that deference is not a result of a congressional delegation of "interpretive" authority to agencies but rather a delegation of policymaking authority).

280. Michigan v. EPA, 135 S. Ct. 2699, 2706–07 (2015).

281. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015); *see also* Smith v. Berryhill, 139 S. Ct. 1765, 1773–77 (2019) (declining to apply *Chevron* in the context of what constituted "final" agency action). *But see* City of Arlington v. FCC, 569 U.S. 290, 296–97 (2013) (holding, in a 5–4 opinion authored by Justice Scalia, that *Chevron* deference should be accorded to an agency's interpretation of the scope of its own regulatory authority).

282. *See* Whitman v. United States, 135 S. Ct. 352, 352–53 (2014) (detailing a statement of Scalia, J., with Thomas, J., respecting the denial of certiorari). For an argument that *Chevron* deference should apply to Department of Justice interpretations of criminal statutes, see Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470–71 (1996). And what of statutes that are enforced both civilly and criminally? For more information, see DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES 880–83 (2d ed. 2018) (carefully exploring this topic).

283. *See Michigan v. EPA*, 135 S. Ct. at 2713 (Thomas, J., concurring) ("These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142,

Chevron's decline was particularly evident in the Court's 2017 Term. Despite apparent opportunities to do so, no decision applied the doctrine. In *SAS Institute Inc. v. Iancu*, for example, decided along with *Oil States*, four dissenting Justices invoked *Chevron* to resolve what they thought was an ambiguity in the patent statute.[284] The Court, however, in an opinion written by Justice Gorsuch, held that the agency rule was clearly contrary to the statute.[285] There was no need, Justice Gorsuch said, to resolve a conflict between the parties, which he described as involving *Chevron* deference on the one hand and pre-*Chevron* cases that stood for the proposition that the courts decide legal issues on the other.[286] Later in the 2017 Term, the Court, with Justice Gorsuch again authoring the opinion, found another statutory issue too clear for *Chevron* deference, but the opinion went out of its way to note that no litigant had sought the doctrine's reconsideration.[287] The Court's complete failure to apply *Chevron* during the Term elicited comments from Justices Kennedy and Alito.[288]

1149 (10th Cir. 2016) (Gorsuch, J., concurring); *id.* at 1158 (Gorsuch, J., concurring) ("We managed to live with the administrative state before *Chevron*. We could do it again."); *see also* Heather Elliott, *Justice Gorsuch's Would-Be War on* Chevron, 21 GREEN BAG 2d 315, 319–20 (2018). Outside of the D.C. Circuit, there is reason to believe that many circuit judges find *Chevron* troubling. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Court of Appeals*, 131 HARV. L. REV. 1298, 1348 (2018).

284. SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1360 (2018) (Ginsburg, J., dissenting).

285. *Id.* at 1355 (majority opinion)

286. *Id.* at 1358. For an even more recent example of an allegedly "clear" statute, see *Sturgeon v. Frost*, 139 S. Ct. 1066, 1080 n.3 (2019) (rejecting contrary administrative construction).

287. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1629–30 (2018). Justice Gorsuch added that deference was also inappropriate when "reconciliation" of two federal statutes was at issue. *Id.* at 1629.

288. *E.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (noting his "concern with the way in which the Court's opinion in [*Chevron*] has come to be understood and applied"); *id.* at 2121 (Alito, J., dissenting) (accusing the Court of "simply ignoring *Chevron*"); *see also* Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (concluding there is "no ambiguity for the agency to fill" under *Chevron* deference); *id.* at 2078 (Breyer, J., dissenting) (noting he "would give weight to the interpretation of the Government agency"); Scenic Am., Inc. v. Dep't of Transp., 138 S. Ct. 2, 3 (2018) (Gorsuch, J., with Roberts, C.J., and Alito, J., respecting the denial of certiorari) (strongly suggesting that *Chevron* has no place in administrative agency contract disputes with private parties); Garco Constr., Inc. v. Speer, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., with Gorsuch, J., dissenting from the denial of certiorari in a case involving *Auer* deference). The attack on *Chevron* is shared by various legal academics as well. *See, e.g.*, Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 750–51 (2014); Philip Hamburger, Chevron *Bias*, 84. GEO. WASH. L. REV. 1187, 1249 (2016) (noting the difficulty of determining statutory questions without *Chevron* is "no excuse for failing to confront the less difficult constitutional questions raised").

It is interesting that, until the penultimate day of the 2018 Term in *Kisor v. Wilkie*,[289] members of the Court, unlike academic commentators, seemed inclined to pay no real attention to the relevance of § 706 of the Administrative Procedure Act. That statute appeared to be no more than a remote background when it came to the scope of judicial review.

B. Administrative Deprivations of Liberty and Property

"[T]he whole point of the [traditional] 'public rights' analysis was that *no judicial involvement at all* was required," so wrote my colleague Peter Strauss.[290] Hart strongly resisted any such principle.[291] Hart first clarified his claim. This is the only point in which he gives a nod to the public rights doctrine, and even then, he only does so implicitly:

> It's perfectly obvious that final authority to determine even questions of law can be given to executive or administrative officials in many situations not having the direct impact on private persons of a governmentally created and judicially enforceable duty, or of an immediate deprivation of liberty or property by extra-judicial action.[292]

As I have said, in Hart's time, the idea of unreviewable administrative coercion of liberty or property rights was wholly anathema to legal traditions.[293] Writing within that tradition, Hart's focus was on the possibility of gaining *access* to an Article III court,

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289. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

290. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 632 (1984). Professor Fallon characterizes this statement as "misleading and pernicious," Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1129, but he acknowledges that this is the "[c]onventional wisdom." *Id.* at 1050. *See also* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373–74 (2018) (plurality opinion) (describing limitations to judicial interpretation of "public rights" analyses).

291. HART AND WECHSLER, *supra* note 2, at 354.

292. *The Dialogue*, *supra* note 4, at 1386. Hart continues:

> These cases, by and large, are those falling in the third of Justice Curtis' three classes in *Murray's Lessee*. Some such situations may rise to the dignity of a constitutional problem. But whatever the constitutional rights to judicial process of these plaintiffs may be, the power of Congress to impair them seems to involve no distinctive problems. The problems appear to be the same as those discussed in the next section.

Id. (footnote omitted). When Hart wrote, the "[c]onventional wisdom" was that "Article III and the Due Process Clause required no judicial review of government decisions involving 'public rights' or 'privileges' such as claims of entitlement to benefits or gratuities." Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1050; *see also* Monaghan, Marbury, *supra* note 5, at 16 (describing historical limitations to "judicial control of administrative law-interpretation").

293. *See* Monaghan, Marbury, *supra* note 5, at 1 & nn.5–6, 3 & n.17, 4 & n.27 (citing relevant sources).

despite congressional barriers. His premise here seems to have been that "the function of the courts is not one of review but essentially of control—the function of keeping [agencies] within their statutory authority."[294] One could certainly interpret Hart's words to require only *ultra vires* review.

Habeas jurisdiction was Hart's testing ground. When he wrote, habeas jurisdiction depended upon a statutory grant.[295] *The Dialogue* considered the possibility of excising any unconstitutional limitations on the then-existing statutorily authorized jurisdiction. This is where Hart enlarged upon his severability analysis. Having enacted habeas legislation, all future congressional limitations on the writ could be examined for their validity.[296] *Boumediene* seems to reflect that approach.[297]

Much of Hart's focus centered on detention in connection with administrative proceedings to exclude or deport (now remove) immigrants.[298] He recoiled from the Court's then-recent decisions that apparently rested on the premise that any process specified by Congress constituted due process.[299] Whether Hart got the content of existing immigration-law doctrine, apart from its "reasoning," correct is unnecessary to explore here.[300] Moreover, the specific case law discussed in *The Dialogue* has been overtaken by more recent developments in the field, and extended treatment of these

294. *Id.* at 27 (quoting Crowell v. Benson, 285 U.S. 22, 89 (1932) (Brandeis, J., dissenting) (alteration in original)).

295. *See The Dialogue*, *supra* note 4, at 1397 (quoting *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807)).

296. It is not clear whether this was because of Article III, the Suspension Clause, or due process.

297. *See* Boumediene v. Bush, 553 U.S. 723, 792 (2008) (holding that a statutory restriction upon an existing habeas jurisdictional grant was invalid).

298. *The Dialogue*, *supra* note 4, at 1387–1402.

299. *See* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

300. There is a substantial basis to doubt that Hart accurately described the substantive content of the then-existing immigration law, as opposed to some of the Court's then-recent rhetorical flourishes. *See, e.g.*, Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 83, 87 (2017); Polly J. Price, *A "Chinese Wall" at the Nation's Borders: Justice Stephen Field and* The Chinese Exclusion Case, 43 J. SUP. CT. HIST. 7, 13 (2018); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1248–50 (2018) (Thomas, J., dissenting) (discussing separation of powers and nondelegation).

developments is beyond the scope of this essay.[301] Thus, I will only outline his discussion on this topic in broad generalities.

For Hart, the cases he examined were about potential violations of the rule of law: arbitrary and judicially uncontrolled administrative detention with respect to "liberty" in the immigration–deportation context. Whatever the nineteenth-century view of such detention, Hart believed that liberty in its most basic sense was implicated and that the judicial function was to ensure that the government acted in a non-arbitrary manner. This was part of his emphasis on limited government, which in his (and our) era involved control of the administrative bureaucracy. And there is no suggestion—none at all—that the public-versus-private right distinction should have any controlling significance in this context.[302]

When Hart wrote, habeas corpus was the mode of review in immigration cases.[303] Hart did not examine the *scope* of the court's obligations in that context.[304] His focus was simply to insist on the need

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301. The changes continue to be significant in perhaps rejecting or limiting the core assumptions of the plenary power doctrine. Kristin A. Collins, *Equality, Sovereignty, and the Family in* Morales-Santana, 131 HARV. L. REV. 170, 197 n.159 (2017) (collecting sources).

302. For a survey of the current developments in this area, see Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1120–22. The 2017 Term's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), is a graphic recent example that a narrow majority of the Court is quite unsympathetic to procedural unfairness claims in this context, even though they make no reference to the public rights doctrine. A sharply divided Court denied that federal statutory law permitted bail hearings for immigration detainees but remanded for a determination whether the Constitution itself might require such relief. *Id.* at 851. The remand accords, in principle, with Hart's belief that due process requires access to some court in these circumstances. *Jennings* would, however, provide little real comfort to Hart. Whether a majority of the Court will find a due process violation seems problematic to me.

303. *See Developments in the Law: Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 921–22 (1957) (observing that, since Gegiow v. Uhl, 239 U.S. 3 (1915), "[h]abeas corpus has . . . served as the main road to review of actions of the immigration service").

304. Was habeas simply a vehicle for the vindication of any substantive and procedural Due Process Clause claims, or was it content independently drawn from the nature of habeas corpus itself, which could import a standard of review greater than that required by due process? *See* Boumediene v. Bush, 553 U.S. 723, 746 (2008) (stating that at an "absolute minimum," the content of habeas review is no less than it was as of 1789 (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001))). Chief Justice Roberts, joined by Justice Scalia, believed that habeas corpus was simply the vehicle for vindication of due process claims and not itself an independent source of standards of review. *Id.* at 804–05. (Roberts, C.J., dissenting). Or did the content of habeas inhere in Article III itself, even though the habeas court is not in the position of an enforcement court? Hart says: "That principle forbids a constitutional court with jurisdiction in habeas corpus from ever accepting as an adequate return to the writ the mere statement that what has been done is authorized by act of Congress." *The Dialogue*, *supra* note 4, at 1394. This reference to habeas corpus, of course, is a clear recognition that these are "external" limitations on the power of Congress to limit the subject-matter jurisdiction of Article III courts. Fallon, *Jurisdiction-Stripping Reconsidered*, *supra*

for judicial review of the administrative interference with liberty. At various points, Hart suggests that this review be robust;[305] at others, he asserts that the scope of judicial review depends on the context.[306]

The habeas cases were a microcosm of a larger problem addressed in this part of *The Dialogue*, which was concerned with securing access to an Article III court. It was decidedly less concerned with what happened once access was obtained.[307] The scope of judicial review of the challenged administrative conduct might turn upon the precise nature of the challenged administrative conduct and upon the nature of the administrative process involved.[308] The issues raised are complex, and they seem context specific. But a right of judicial access draws on traditions more pervasive than just *Boumediene*, and here, the fact that the state courts are open may matter.

The substantive legal principles that Hart seems to have believed are implicated in Article III courts' control over administrative coercion are also unclear. Most of the relevant discussion from *The Dialogue* centers on arbitrary administrative deprivations of liberty and property, but nowhere does Hart identify the substantive sources of those limits on such government conduct. Why can't Congress arbitrarily expel a class of aliens?[309] Hart doesn't say. His focus was quite clearly on the administrative bureaucracy and the need to control it judicially. Hart could be understood to say that, whatever the power

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note 28, at 1067. Does it matter whether the executive detention is alleged to have violated a statute or the Constitution itself?

305. Hart wrote:

> The great and generating principle of this whole body of law—that the Constitution always applies when a court is sitting with jurisdiction in habeas corpus. For then the court has always to inquire, not only whether the statutes have been observed, but whether the petitioner before it has been 'deprived of life, liberty, or property, without due process of law,' or injured in any other way in violation of the fundamental law.

The Dialogue, *supra* note 4, at 1393.

306. *See id.* at 1393 n.93 (illustrating how context matters); *see also Boumediene*, 553 U.S. at 779–80 (same).

307. That review was often restricted, of course, but "[r]estricted review implicates not the right to judicial review, but its scope." Monaghan, Marbury, *supra* note 5, at 23.

308. Richard Fallon's remarks are yet again instructive:

> [I]ssues involving congressional preclusion of judicial jurisdiction are often bound up with issues involving the permissible use of non-Article III federal tribunals such as legislative courts and administrative agencies. . . . Even when initial adjudication by a non-Article III tribunal is permissible, the Constitution may mandate the availability of either appellate review or some other mode of access to an Article III court.

Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1135.

309. For a bold effort to cabin the reach of the "plenary power" doctrine, see Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1418–33 (2019).

of Congress to act arbitrarily, such authority cannot be vested in the bureaucracy![310] But why not?

C. Remedies

Hart's fear of manipulation extended to concern about congressional control over judicial remedies.[311] To be sure, *The Dialogue* radiates a premise that constitutionally adequate remedies should—indeed, they must—be available when there has been a governmental deprivation of traditional conceptions of liberty or property. But that idea was left largely undeveloped. Hart started from the proposition that Congress had wide latitude over Article III court remedies and their timing.[312] But habeas aside, *The Dialogue* had very little to say on this general topic. Hart believed that injunctions—as opposed to tort actions—were an exceptional remedy.[313] Hart's world is long gone.[314] Indeed, since Hart wrote, the Court seems to be moving

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310. Hart stated:

> Before long, however, [the Court] began to see . . . that a power to lay down general rules, even if it were plenary, did not necessarily include a power to be arbitrary or to authorize administrative officials to be arbitrary. It saw that, on the contrary, the very existence of a jurisdiction in habeas corpus, coupled with the constitutional guarantee of due process, implied a regime of law. It saw that in such a regime the courts had a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used in exercising the authority, and—seemingly also—that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion.

The Dialogue, *supra* note 4, at 1390.

311. *Id.* at 1366–70.

312. *Id.* at 1366.

313. *Id.* at 1369.

314. That view had plausible support. *See generally* James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737 (discussing common-law and statutory remedies to military encroachments on private rights). As Professor Fallon observes, however, it does not now. *See* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1112 (providing examples of recent scholarship that altered traditional presumptions). I would add that, when Hart wrote, some case law did exist that held that an injunction could be a constitutionally necessary remedy, most saliently where the plaintiff had made out a prima facie case that legislatively or administratively prescribed rates were confiscatory. (The theory, of course, was that the expropriated rates could never be effectively recovered.) *Ex parte Young*, 209 U.S. 123 (1908), also seems to be premised on that basis. The Court granted a preliminary injunction against a threatened criminal prosecution because the legislative penalty scheme was clearly designed to deter anyone from challenging the allegedly confiscatory rates. *Id.* at 145–46. In the First Amendment area, I have argued that a preliminary injunction against a threatened criminal prosecution was also mandatory to prevent abridgement of First-Amendment rights. *See generally* Monaghan, *First Amendment "Due Process," supra* note 223. Subsequent case law is unilluminating on these issues, largely because the courts—contrary to Hart—are now quite comfortable with issuing declaratory and injunctive relief. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731,

toward a general conception that, prospective relief aside, judicial sanctions (e.g., damages or suppression of evidence) cannot be awarded absent a judicial conclusion of inexcusable "fault" by the relevant government official. This is surely the thrust of the Court's recent official immunity cases and of its Fourth Amendment exclusionary rule decisions, which increasingly hold that evidence need not be excluded unless the officer was at fault in ignoring Fourth Amendment limitations.[315]

That said, however, in cases involving challenges to significant deprivations of liberty or property, the Court has been on the whole very receptive to ensure adequate judicial access for prospective relief.[316] In any event, Hart believed (although he did not develop the point) that the state courts provided the ultimate safeguard for the protection of due process rights.[317]

CONCLUDING REFLECTIONS

The Dialogue, a mere casebook fragment, still remains the mesmerizing starting point for anyone interested in congressional

1804–06 (1991) (describing judicial recognition of new rights but not individual damage remediation); *see also* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1108–17.

315. *See, e.g.*, HART AND WECHSLER, *supra* note 2, at 1078–79; Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1546–56 (2018). The authors describe a similar pattern in the substantive federal criminal law. *Id.* at 1556–64. They ascribe both developments to intellectual and cultural emphasis on individual responsibility in recent decades. *Id.* at 1584–97. Further, on remedial restrictiveness with a focus on the immigration or citizenship context, see Collins, *supra* note 301, at 214–17, and of course, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). On "necessary" remedies, see generally *Fourteenth Amendment – Due Process Clause – Criminal Procedure* – Nelson v. Colorado, 131 HARV. L. REV. 283 (2017).

316. *See, e.g.*, Bond v. United States, 564 U.S. 211, 222–23 (2011); Boumediene v. Bush, 553 U.S. 723, 792 (2008); *see also* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1116–17 n.341. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* (*Patchak I*), 567 U.S. 209, 212 (2012), provides an excellent example, as well. The Court's recent decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370–71 (2018), is a more recent reminder of this fact. *See also* Nielsen v. Preap, 139 S. Ct. 954, 978 (2019) (discussing the importance of evaluating government statutory readings to preserve access to judicial remedies); *cf.* Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) (illustrating that the fact that Congress authorizes private parties to sue for a violation of the Stored Communications Act may not be enough to establish Article III standing for damages).

317. *The Dialogue*, *supra* note 4, at 1363–64. Hart made no effort to address the implications of cases like *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871), which, after all, was—and is—a principal case in the casebook. HART AND WECHSLER, *supra* note 2, at 427. But it is fair to believe that he thought, as I do, that it was not based on the Constitution itself. *See* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1061 n.78, 1085 (providing support from prior case law and discussing *Tarble's Case* explicitly).

control of the Article III courts. That essay left us with lots of issues. Sixty-six years later, they are still with us:

- With respect to the Supreme Court, it seems pretty clear that the Court will strenuously and successfully avoid reading any statute as barring constitutional review.[318] Indeed, counsel will be reluctant to advance any such argument. Moreover, with great deference to the Hatter and others, if faced with such a jurisdiction-stripping statute, I believe that a majority of the Court would invalidate a limitation on the Court's subject-matter jurisdiction where a substantial purpose of such legislation is to foreclose its consideration of a properly presented constitutional question. That result may be less probable with respect to limitations on the lower federal courts, particularly if the state courts remain open.

- Jurisdiction stripping in the statutory context presents different issues. Perhaps, as the *Patchak II* plurality states, such legislation should be upheld when Congress could have retroactively changed the applicable substantive law.[319] Ultimately, such a conclusion would be grounded in *McCulloch v. Maryland*, which recognized that Congress is invested with considerable flexibility in choosing among means to permissible ends.[320]

- Hart's sharp distinction between enforcement and non-enforcement courts has had little traction. But it captures, in part, important intuitions. At least with respect to administrative invasion of common-law rights (i.e., extra-judicial coercion), the Court is moving strongly along Hart's path regarding law declaration.[321] But I doubt that it will overthrow *Crowell*'s

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318. *Abbott v. Perez*, 138 S. Ct. 2305 (2018), is only a recent example. For another example, see *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2141 (2016) (reserving the question of whether a statute banning judicial review of certain administrative decisions applies to constitutional questions).

319. Consider the portal-to-portal cases, for example. Suppose that Congress had simply stripped the courts of subject-matter jurisdiction rather than coupling such a provision with a substantive overruling of the Court's holding. Arguably, the question which the Court should set for itself is whether a substantive change in the applicable substantive law would have been permissible, and if so, whether the jurisdiction stripping should be viewed as essentially accomplishing that.

320. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819); *cf.* Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1103 (noting that *Battaglia* upheld jurisdiction stripping after its merits determination that no constitutionally protected rights had been invaded). For more on this point, see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239–40 (1995), and HART AND WECHSLER, *supra* note 2, at 92.

321. This would be in part a return to earlier understandings. "In the domain of agency adjudication of private parties' legally enforceable duties to one another under federal law, it

holding with respect to "ordinary" facts.[322] To prevent regulatory agencies from creating and evaluating their own record would effectively destroy the modern administrative state.[323] The Court is unlikely to impose more control mechanisms than those imposed by *Crowell*. Indeed, on several occasions it has endorsed *Crowell*'s fanciful "adjuncts" explanation.[324] Whether as a matter of general judicial reasoning or because of § 706 of the APA, one can expect more stringent judicial supervision of administrative decision-making. *Weyerhaeuser Co. vs. U.S. Fish & Wildlife Service*,[325] decided at the beginning of the 2018 Term, is illustrative. A unanimous Court made clear that, unless a statute clearly precluded judicial review, a strong presumption existed that administrative conduct was reviewable.[326] The Court went on to say that the APA's exclusion of review for matters "committed to agency discretion" barred review only when no meaningful legal standard existed that could be applied.[327]

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is . . . hard to deny that current practice and modern doctrine have wandered far from the original constitutional understanding." Fallon, *Jurisdiction-Stripping Reconsidered*, *supra* note 28, at 1123.

322. *See* Crowell v. Benson, 285 U.S. 22, 56 (1932).

323. What I find puzzling is the significance of common-law rights in the modern regulatory context. The common law was and is a wholly inadequate mechanism for dealing with the complex regulatory problems of modern society. How to regulate air or water pollution is well beyond any judicially fashioned conception of the law of nuisance. Yet, without discussing it, the Court seems to treat this kind of litigation as falling within the common-law liberty and property paradigm. That creates problems.

324. *See, e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 n.7 (1977) (stating that, in cases which only involve private rights, the "Court has accepted factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master"); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 78 (1982) (plurality opinion) ("[T]his Court has sustained the use of adjunct factfinders even in the adjudication of constitutional rights . . . .").

325. *See* Weyerhaeuser Co. vs. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018). Justice Kavanaugh did not participate in this decision. *Weyerhaeuser* was reaffirmed in *Department of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019).

326. *Weyerhaeuser*, 139 S. Ct. at 370.

327. *Id.* (citing 5 U.S.C. § 701(a)(2) (2018)). Until recently, post-Hart administrative-law scholars downplayed the importance of the courts in controlling the administrative state. *See, e.g.*, Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. (forthcoming 2019) (manuscript at 55) (on file with the *Duke Law Journal*). For example, in a forthcoming book, FORTRESS OF LIBERTY: THE RISE AND FALL OF THE DRAFT AND THE REMAKING OF AMERICAN LAW, to be published by Harvard University Press, my colleague, Jeremy Kessler, emphasizes that there was an important strain of progressive legal thought emphasizing the importance of the strong administrative state (and not the courts) in protecting civil liberties. That strain, however, did not diminish the strong belief of the courts and of the bar regarding the importance of the judicial role in that regard. *The Dialogue* and Professor Jaffe's work attest to this point. *See, e.g.*, JAFFE, *supra* note 27, at 379–80.

- *Chevron* has generally been treated as a case of (supposed) legislative delegation with respect to statutory—not constitutional—meaning.[328] I do not doubt Congress's power to issue such instructions that courts must respect, subject to some conception of *ultra vires* limits. But that aside, the courts must yield something to administrative determinations with respect to such matters as the precise regulation of ambient air quality. And if they do, that has to fit within the APA formula. Perhaps, even under the major questions doctrine, the Court should employ *Chevron* when the challenged legal proposition is tightly interlocked with an agency's technical expertise.[329] Or as then-Judge Kavanaugh reformulated it: courts would supply the "best reading" of the statute, deferring to administrative construction only when the statute contains broad language that is suggestive of legislative delegation.[330] After all, the end result of such an allocation makes sense.

- On December 10, 2018, the Court granted review in *Kisor v. Wilkie*.[331] The grant seemed designed to overturn so called *Auer* deference—judicial deference to an agency's interpretation of its own ambiguous regulation.[332] "The only question presented here is whether we should overrule . . . . *Auer* deference," said Justice Kagan in her opinion.[333]

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328. Smith v. Berryhill, 139 S. Ct. 1765, 1778 (2019); *see* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2473 n.47 (2017) (referring to Monaghan, Marbury, *supra* note 5, and stating, "Monaghan's formalist, delegation-based rationale for reconciling the rule of (judicially declared) law with the administrative state was eventually elevated into the official justification for *Chevron* deference" (citing United States v. Mead Corp., 533 U.S. 218, 227–29 (2001))). Any such relationship is, needless to say, temporal, not causal.

329. *See* Sharkey, *supra* note 278, at 2438. Professor Sharkey's approach is entirely functional. Justice Breyer expressed similar views a long time ago: "Would one not expect courts to conduct a stricter review of matters of law, where courts are more expert, but more lenient review of matters of policy, where agencies are more expert?" Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN L. REV. 363, 397 (1986).

330. *See* Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1912–13 (2017); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153–54 (2016) (book review) (describing this attempt at clarification). To the extent that *Chevron* rests upon a theory of delegated authority, there seems little room for argument based on waiver or estoppel, even if the agency does not raise the claim. *See* Note, *Waiving* Chevron *Deference*, 132 HARV. L. REV. 1520, 1528–29 (2019) (describing the shortcomings of waiver when permitting the government's position to shift with administrative changes).

331. Kisor v. Wilkie, 139 S. Ct. 657 (2018) (granting certiorari).

332. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (establishing *Auer* deference).

333. Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

> In an elaborate concurring opinion by Justice Gorsuch, four Justices would have said yes.[334] To the surprise of many, however, the Court said no. Justice Kagan's plurality opinion advanced a vigorous defense of *Auer* on both legal and policy grounds, including *stare decisis*.[335] A brief concurrence by Chief Justice Roberts emphasized the latter grounds.[336] What is most striking is the decision's import for *Chevron*. Much of Justice Gorsuch's reasoning is fully applicable to *Chevron* deference. But Justice Kavanaugh, joined by Justice Alito, explicitly disclaimed any such implication, as did the Chief Justice.[337] Moreover, the plurality opinion's reasoning seems readily applicable to *Chevron*, which the plurality frequently cited.
>
> And so, it seems safe to say that *Chevron* deference—whatever its ultimate form—seems quite safe for now. Article III does not require that the court independently determine all statutory meaning. But the "whatever" is important. The plurality sharply criticized cabined *Auer* deference in much the same way that *Chevron* has been confined. Indeed, in *Kisor*, the Chief Justice wondered whether, at the end of the day, there was much difference on the ground between the plurality and the dissent.[338]

All in all, lots of difficult problems still to wrestle with—just what *The Dialogue* taught us would be the case.

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334. *See id.* at 2425 (Gorsuch, J., concurring) ("It should have been easy for the Court to say goodbye to *Auer v. Robbins*.").

335. Justice Kagan insisted that there was a "presumption" that Congress intended that the agency resolve any ambiguities. *Id.* at 2412 (plurality opinion). She brushed aside APA § 706(1) with the observation that, while it required the court to decide legal issues, it did not detail *how* to decide them. *See id.* at 2419 ("[E]ven when a court defers to a regulatory reading, it acts consistently with Section 706. That provision does not specify the standard of review a court should use in 'determin[ing] the meaning' of an ambiguous rule." (quoting 5 U.S.C. § 706) (alteration in original)). Justice Gorsuch thought that was an "anemic" reading of the statute. *Id.* at 2432 (Gorsuch, J., concurring).

336. *Id.* at 2424–25 (Roberts, C.J., concurring).

337. Justice Kavanaugh's articles, *supra* note 330, are inconsistent with such a view.

338. *Kisor*, 139 S. Ct. at 2424.