

ARTICLE I, ARTICLE III, AND THE LIMITS OF ENUMERATION

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Article I, Section 8 and Article III, Section 2 of the U.S. Constitution deploy parallel strategies for constraining the power of the federal government. They enumerate powers that the national legislature and judiciary, respectively, are permitted to exercise and thereby implicitly prohibit these two branches of government from exercising powers not enumerated. According to conventional thinking, this strategy has failed in connection with Article I and succeeded in connection with Article III. That is, it is widely acknowledged that Congress routinely exercises powers that are difficult to square with the Article I enumeration; but it is commonly thought that the subject matter jurisdiction of the federal courts is, in fact, limited to the nine categories of cases specified in Article III, Section 2.

If one examines the crucial cases governing the constitutional limits on federal court jurisdiction, however, it becomes apparent that the enumeration in Article III, Section 2, like its cousin in Article I, does little work when it comes to reining in federal power. This is reflected most dramatically in the fact that the Supreme Court has never struck down a federal statute on the ground that it confers jurisdiction on the federal courts in cases lying outside the enumeration in Article III. Instead, over the years, Congress has enacted numerous jurisdictional statutes that push hard on the limits specified in Article III, Section 2, and the Justices have consistently found ways—through a series of highly tendentious interpretive moves—to avoid deeming these provisions unconstitutional.

This Article explores the similarity of our practice under Articles I and III. It seeks to demonstrate, in particular, that despite the strict enumeration rhetoric that pervades the case law and scholarly

* Assistant Professor of Law, University of Michigan Law School. Special thanks to Scott Hershovitz and Richard Primus, who not only read and commented on earlier drafts but indulged me in more conversations about this project than one could reasonably expect of even the most dedicated colleagues. Thanks also to Evan Caminker, Dick Fallon, Don Herzog, Doug Laycock, Jessica Litman, Leah Litman, Jim Pfander, and Chris Whitman for reading and commenting on drafts, and to Eve Brensike Primus, Debra Chopp, Andy Coan, Ed Cooper, Rich Friedman, Monica Hakimi, Daniel Halberstam, Nina Mendelson, John Pottow, Mathias Reimann, Cristina Rodriguez, David Shapiro, and the participants in the Conference of Junior Federal Courts Faculty at Michigan State University Law School for helpful conversations about the subjects addressed here. Thanks, finally, to the Article Editors at the *Michigan Law Review* for their extremely thoughtful comments and suggestions. Mary Hanna-Weir provided outstanding research assistance.

commentary relating to federal court jurisdiction, the Supreme Court has shown little interest in keeping the federal courts within the subject matter limits of Article III, Section 2.

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INTRODUCTION

This Article is about two stories we tell ourselves relating to the Constitution’s allocation of power between the federal government and the states. In particular, these stories are about the enumerations of powers in Articles I and III of the Constitution and the extent to which they have given rise to

meaningful, judicially enforceable limits on federal authority. One story is true; the other is not.

The first story, about Article I, depicts the enumeration of federal legislative powers as a failure. The framers of the Constitution, the story goes, wished to constrain the powers of the federal government, and so, rather than confer upon it a general police power, they supplied (primarily through Article I, Section 8¹) a list of powers that the newly constituted Congress was authorized to exercise and thereby prohibited that body from exercising powers not on the list. According to the standard story, this enumeration of powers has proved to be little more than a parchment barrier;² Congress has long exercised powers that are difficult to locate within the Article I enumeration, and the principle of limited federal government has largely fallen by the wayside.

The second story is about Article III, and it depicts the enumeration of federal judicial powers as a success. According to this story, Article III, Section 2, which contains a list of nine categories of cases to which “the judicial Power [of the United States] shall extend,”³ remains inviolate. This account insists that Congress is prohibited from channeling into the federal courts cases that fall outside the list supplied in Article III, Section 2, and it suggests that, were Congress to do so, the relevant jurisdictional enactment would be invalidated by the courts.⁴

While the first story paints an accurate picture of our experience with Article I, the second story—the account of the constitutional limits on the judicial power of the United States—is seriously flawed. For the reality is that the Supreme Court has shown no more enthusiasm for enforcing the enumeration of judicial powers in Article III, Section 2 than it has for policing the enumeration of legislative powers in Article I. In fact, the Supreme Court has *never* invalidated a federal statute on the ground that it goes beyond the limits implicit in Article III’s enumeration of powers.⁵ And this is

1. Most of the powers explicitly conferred on Congress in the text of the Constitution are specified in Article I, Section 8. Congressional powers are enumerated elsewhere in the document as well. For ease of exposition, when referring to Congress’s enumerated powers, I will often refer to Congress’s “Article I powers,” or to the “Article I enumeration.”

2. See *infra* notes 18–19, 53.

3. U.S. CONST. art. III, § 2.

4. Although Article III defines the scope and nature of federal *judicial* power, it bears emphasis that *Congress* is the direct object of the enumeration-based limits in Article III, Section 2. This is so because the power conferred through that section is not self-executing, see, e.g., 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3601 (3d ed. 2009), and so, when the Constitution says that “[t]he judicial Power shall extend” to the specified set of cases, what it means is “Congress may, if it sees fit, extend the judicial power of the United States to the enumerated cases.” *But see* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (arguing that the Constitution requires the establishment of federal jurisdiction, either original or appellate, in federal question, admiralty, and ambassador cases).

5. The decisions in *Mesa v. California*, 489 U.S. 121 (1989), and *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch.) 303 (1809), come closest to supplying examples of judicial enforcement of the Article III enumeration. In both cases, the Court embraced narrowing constructions of jurisdictional

so despite the fact that Congress has enacted numerous statutes that unmistakably push hard on the limits specified in Article III, Section 2. Our longstanding jurisdictional practice thereby signals that Congress has extremely wide latitude to channel cases into the federal courts so long as it reasonably believes the establishment of federal jurisdiction to be in the national interest.

Over the course of our history, this account of the constitutional limits on federal court jurisdiction has been embraced explicitly in only one opinion from the Supreme Court. Specifically, in his opinion for a plurality of three Justices in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,⁶ Justice Jackson took the position that Congress is permitted to channel cases into the federal courts in order to advance Article I interests, and that it may do so without regard to the enumeration of powers in Article III.⁷ But Jackson's argument sparked vigorous dissent from six of his colleagues, in three separate opinions,⁸ and his conception of federal judicial power has been consigned ever since to the dustbin of federal courts theory.⁹

This Article attempts to revive Justice Jackson's much-maligned theory of the constitutional limits on federal court jurisdiction. It argues not only that Jackson's account best captures the reality of our jurisdictional practice, but that it rests on a normatively attractive conception of the role of the federal courts in our system of government. This conception, under which Congress is afforded considerable discretion to deploy the federal courts as

statutes in order to avoid potential Article III difficulties. I discuss these cases in detail in Parts II and III. *See infra* nn. 89, 201.

The Court has, of course, quite famously deemed a statute unconstitutional on the ground that it runs afoul of Article III, Section 2, Clause 2, which specifies the scope of the Supreme Court's original jurisdiction. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). But *Marbury* does not represent an example of judicial enforcement of the enumeration in the first clause of Article III, Section 2. The Court has also, more recently, enforced the "case or controversy" requirement of Article III, Section 2 with vigor, *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 571–78 (1992), but of course, this too is distinct from striking down a congressional enactment on the ground that it extends the subject matter jurisdiction of the federal courts to cases falling outside the nine categories enumerated in Article III, Section 2. The asymmetry in the Court's treatment of the "case or controversy" requirement of Article III and the enumeration-based limits implicit in Article III, Section 2 raises the obvious question whether there is reason that one limit should be enforced but not the other. I address this question in detail in Part III. From time to time in this Article, I will refer to "Article III limits" on federal judicial power or "the limits contained in Article III, Section 2." When I do, I mean only those limits implicit in the enumeration of these nine categories of cases; I do not mean to include the Article III questions raised by *Marbury* or the case or controversy requirement.

6. 337 U.S. 582 (1949) (plurality opinion).

7. *Id.* at 600 ("[W]here Congress in the exercise of its powers under Art. I finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concept of the justiciable, it may open the regular federal courts to them regardless of lack of diversity of citizenship.").

8. *Id.* at 604 (Rutledge, J., concurring); *id.* at 626 (Vinson, C.J., dissenting); *id.* at 646 (Frankfurter, J., dissenting).

9. Academic commentators have developed jurisdictional theories (generally traveling under the heading "protective jurisdiction") that are cousins of the Jackson model. But these theorists all disclaim Justice Jackson's approach, and their conceptions of federal judicial power have likewise failed to uproot the conventional wisdom relating to the enumeration in Article III. I discuss protective jurisdiction in detail in Part IV.

a tool for advancing legitimate federal interests, is of a piece with the vision of federal power underlying the vast expansion in the scope of federal legislative authority under Article I and the concomitant collapse of the enumeration strategy employed there.

I proceed in four parts. In Part I, I examine the fate of the enumeration of powers in Article I. Specifically, I explore the textual roots and scope of Congress's power across a variety of doctrinal areas in an effort to demonstrate the flimsiness of the constraints implicit in the Article I enumeration. In Part II, I show that our experience with the Article III enumeration is much the same. I provide a detailed account of Supreme Court decisions upholding a diverse array of jurisdictional statutes, each of which poses significant difficulties from an Article III perspective. In each instance, we will see, the Court finds a way to reconcile the relevant enactments with Article III, Section 2. But the reasoning in these cases is transparently tortured, and in the aggregate the cases suggest that the Justices feel a powerful compulsion to vindicate congressional judgments relating to the proper scope of federal court jurisdiction, and to do so regardless of the enumeration-based constraints contained in Article III.

Parts III and IV shift from the descriptive to the normative. In Part III, I develop and defend the vision of federal judicial power that silently drives the case law relating to the constitutional limits on federal court jurisdiction. In Part IV, I examine competing theories of federal jurisdiction that have been developed in the academic literature. Parts III and IV also draw attention to similarities in the structure and content of the debates relating to the enumerations of powers in Articles I and III. It is, of course, not necessary that we treat these two fragments of the Constitution the same. And it is not my claim that arguments that have carried the day in connection with Article I must do the same with respect to Article III. But the similarity in our practice and the scholarly discourse across these two contexts raises an important question about the stories we tell ourselves in connection with the Constitution's enumerations of powers: why has the erosion of the Article I enumeration been integrated into the conventional understanding of our federal system (even if unhappily by some), while the Court's failure to police the boundaries of Article III has gone largely unnoticed?¹⁰ I conclude with some tentative thoughts about this question.¹¹

10. The link between Articles I and III has received almost no attention in the academic literature. The point is flagged, but not explored, in Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 21 (1957).

11. My analysis here is restricted to an account of the enumerations in Articles I and III. Of course, Article II, Section 2 of the Constitution enumerates the powers of the federal executive. The constitutionally permissible scope of federal executive power has long been the subject of heated debate, and the debate has run particularly hot in recent years. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Symposium, *The Role of the President in the Twenty-First Century*, 88 B.U. L. REV. 321 (2008). Some of this debate focuses on the question whether the full sweep of executive powers, however defined, can be fit within the enumeration in Article II, Section 2. I leave the Article II enumeration

I. ENUMERATION AND ARTICLE I

The classic view of enumerated powers doctrine has two key features. The first is a commitment to locating all exercises of federal authority in the list of powers specified in the text of the Constitution. The framers' decision to enumerate Congress's powers, the argument goes, implicitly prohibits that body from exercising powers not enumerated. Second, the enumeration is thought to signal the framers' commitment to a national government of limited and defined powers.¹² For if federal power was to extend to any and all categories of human activity, it would be difficult to make sense of the enumeration—why provide a particularized list when an unbounded grant is intended? From the perspective of enumerated powers doctrine, moreover, this commitment to limited federal government should discipline the interpretation of those powers that *are* enumerated for, as one prominent commentator has explained, “[t]his textual strategy would have been pointless if one of the enumerated powers . . . was read so expansively as to embrace the whole.”¹³

These defining features of the enumerated powers doctrine—the requirement that individual exercises of federal authority be tethered to particular textual grants, and fealty to the principle of limited federal government—find expression in some of the most well-known and foundational decisions rendered by the Supreme Court. In *McCulloch v. Maryland*, for example, Chief Justice Marshall explained that the federal government, as a government of enumerated powers, “can exercise only the powers granted to it.”¹⁴ And in *Gibbons v. Ogden* the Court insisted that “[t]he enumeration [of powers] presupposes something not enumerated.”¹⁵ These passages echo the rhetoric employed by the Federalists during the ratification debates in response to Antifederalist concern that the proposed Constitution posed a grave threat to state autonomy.¹⁶ As James Madison wrote in Federalist No.

to one side in the interest of brevity and because, in at least one important way, Article I, Section 8 and Article III, Section 2 are particularly appropriate for comparative analysis. Specifically, both enumerate *congressional* powers. See *supra* note 4; *infra* text accompanying notes 196–197.

12. See, e.g., John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2063 (2009) (explaining that “the idea . . . that the Constitution adopts a system of limited and enumerated powers” is “apparent from the text of Article I, Section 8”).

13. BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 103 (1991).

14. 17 U.S. (4 Wheat.) 316, 405 (1819).

15. 22 U.S. (9 Wheat.) 1, 195 (1824). It bears mention that even as the Court offered up these now-canonical pronouncements relating to the constitutional limitations on federal authority, it took the important (and controversial) steps of affirming Congress's power to establish a national bank, *McCulloch*, 17 U.S. (4 Wheat.) at 424, and relying on its authority to regulate interstate commerce to reach those intrastate activities that “affect the states generally,” *Gibbons*, 22 U.S. (9 Wheat.) at 195.

16. See, e.g., *Essays of Brutus No. 1*, N.Y.J., Oct. 18, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 363, 367 (Herbert J. Storing with Murray Dry eds., 1981).

45, “The powers delegated by the proposed Constitution to the federal government are few and defined.”¹⁷

History has not been kind to this conception of federal power. Indeed, few commentators would today characterize the powers of the federal government under existing legal doctrine as either few or defined.¹⁸ Instead, the pendulum has swung far in the opposite direction, to the point that it has become fashionable in modern times to question whether there is any category of human activity that the federal government cannot reach.¹⁹

This Part documents the status of the enumeration strategy deployed by the framers in Article I of the Constitution. More specifically, it demonstrates that, over the course of our history, the core commitments of enumerated powers doctrine have gone unfulfilled. Congress has long exercised powers that are not easily located within the list supplied in Article I, and the principle of limited national government has come under enormous strain. To be sure, many of the Supreme Court decisions affirming broad congressional powers take pains to situate federal authority within the categories enumerated in Article I. And scholars, likewise, sometimes proffer Article I-based explanations for bodies of case law that, on their face, eschew any clause-bound justification for the particular exercises of federal power at issue. And, of course, one might (and some do) insist that the relevant cases are wrongly decided precisely because they sanction the exercise of congressional power outside the limits of Article I or are inconsistent with the vision of limited federal government implicit in the enumeration framework. On the whole, however, when one surveys the relevant bodies of case law in the aggregate, it becomes apparent that the cracks in the armor of enumeration are so many, so diverse, and so far-reaching that it is exceedingly difficult—unless one is willing to indulge in the most transparent kind of special pleading—to maintain the position that the enumeration of powers in Article I operates as a significant constraint on congressional authority.²⁰

17. THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

18. This is not to say that one would have difficulty finding commentators who think that federal regulatory powers *ought to be* few and defined. That, in fact, is rather easy. *See, e.g.*, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995). My point is simply that, given the state of the applicable legal rules, most would agree that Congress’s powers are sweeping and not accurately described as “few” or “defined.” *See infra* notes 19, 53.

19. *See, e.g.*, Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 130 (“Congress has the power to reach . . . practically every activity of social life.”); *see also infra* note 53.

20. This is not to say that judicially enforceable, federalism-based constraints on the exercise of congressional power do not exist. Indeed, the Supreme Court has animated a variety of constraints of this sort in the relatively recent past. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). The limits enunciated in these cases, however, are not rooted in the enumeration strategy. As I discuss in Part I.B.1, the Rehnquist Court appeared to reinvigorate enumeration-based constraints on the scope of the federal commerce power, *see United States v. Morrison*, 529 U.S. 598

None of this is news. Indeed, it is important to my argument that the understanding of the Article I enumeration that I describe here is conventional. This is important because, as I describe in Part II, the conventional understanding of the enumeration of powers contained in Article III, Section 2 of the Constitution is markedly different. That enumeration of powers is thought to be a functioning bulwark against the extension of federal power beyond the limits codified in the text. And this asymmetry—the asserted divergence in the success of these enumeration strategies—merits further examination.

A. Congressional Power Outside the Enumeration

The erosion of Article I's enumeration-based limits on federal authority has come about as a result of two distinct interpretive maneuvers on the Court's part. In some circumstances, the Court openly acknowledges the existence of federal regulatory authority drawn from sources outside the Constitution's enumerated powers. In other cases, the Court construes a particular enumerated power so broadly as to raise the possibility that Congress might rely on that power to regulate virtually any category of human activity. These interpretive strategies put pressure on enumerated powers doctrine in distinct ways. The former creates tension with the principle that requires exercises of congressional power to be drawn from the list codified in Article I; the latter undermines the framers' apparent commitment to limited federal government. In this Section, I address two prominent examples of the former interpretive approach; I examine instances of the latter in the Section that follows.

1. Immigration

Nobody knows where the federal government's power to regulate immigration comes from. I don't mean to suggest by this that there is serious doubt as to whether Congress is constitutionally authorized to regulate immigration. I mean only to point out that there is nothing approaching consensus as to the constitutional source of that authority. Potential sources include the Foreign Commerce Clause,²¹ the Naturalization Clause,²² the war power,²³ and the Migration or Importation Clause.²⁴ But approaches to the immigration power that seek to locate federal authority in these provisions have failed to secure widespread support among courts or scholars.²⁵ There

(2000); *United States v. Lopez*, 514 U.S. 549 (1995), but this effort appears to have foundered, *see Gonzales v. Raich*, 545 U.S. 1 (2005), and it remains common, even after these cases, for scholars to pronounce the Article I enumeration strategy a failure, *see infra* notes 62, 66 and accompanying text.

21. U.S. CONST. art. I, § 8, cl. 3.

22. *Id.* cl. 4.

23. *Id.* cl. 11.

24. *Id.* § 9, cl. 1.

25. *See infra* notes 32–33.

is, moreover, a longstanding tradition—one that is central to the case law and scholarly discourse in this area—that characterizes the immigration power as one inherent in the sovereign character of the national government; which is to say, there is an important tradition that conceives of federal authority in the immigration context as independent of any power explicitly delegated to Congress in the text of the Constitution.

The seminal case is *Chae Chan Ping v. United States*,²⁶ in which the Court affirmed congressional power to enact laws excluding aliens from the United States.²⁷ Rather than attempt to ground Congress's authority anywhere in the list of powers enumerated in Article I, *Chae* advances the notion that such authority is inherent in the national government's sovereign status.²⁸ As one prominent commentator has written, "We are not told where in the Constitution the Court found this grant of power, [nor] how it is to be justified in the face of the provision . . . that the powers not delegated to the [federal government] are reserved to the States."²⁹

The Court would sound this inherent powers theme repeatedly in immigration cases following *Chae*. Thus, in *Nishimura Ekiu v. United States*, the Court insisted that "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."³⁰ And, in *Fong Yue Ting v. United States*, the Court explained that "[t]he right to exclude or to expel all aliens, or any class of aliens . . . [is] an inherent and inalienable right of every sovereign and independent nation."³¹

More than a century after these decisions, the constitutional basis for Congress's authority to regulate immigration remains opaque. Each of the textually grounded theories of the federal immigration power has significant limitations,³² and none has strong roots in the foundational cases in this

26. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889).

27. Whether the government's refusal to allow *Chae* to return to the United States is best characterized as an act of exclusion or expulsion is the subject of debate. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 132 (2002).

28. See *Chae*, 130 U.S. at 603 ("Jurisdiction over its own territory to that extent [(i.e. to the extent of being permitted to exclude aliens)] is an incident of every independent nation."); *id.* at 609 ("The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States[] as a part of those sovereign powers delegated by the Constitution . . ."). The Court's reference to "powers delegated by the Constitution" would be more encouraging to an enumerated powers purist if the Court had bothered to identify any passage in the Constitution that might be taken to embody that delegation.

29. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 16 (2d ed. 1996).

30. 142 U.S. 651, 659 (1892).

31. 149 U.S. 698, 711 (1893).

32. On the limits of the Naturalization Clause argument, see *The Passenger Cases*, 48 U.S. (7 How.) 283, 483 (1849) (Taney, C.J., dissenting), and Cleveland, *supra* note 27, at 81. On the limits of the Migration or Importation Clause approach, see *The Passenger Cases*, 48 U.S. (7 How.) at

domain. Leading casebooks in the field dedicate entire sections to the question of where the constitutional roots of the immigration power lie, and these casebooks treat the inherent powers model as (at the very least) an important and viable alternative to approaches rooted in the text of Article I.³³

I do not mean to suggest that the inherent powers conception of federal authority over immigration is uncontroversial. The tension between this model and classic enumerated powers doctrine has been widely commented on by immigration law scholars.³⁴ Indeed, one commentator recently insisted that, even now, 120 years since the Supreme Court first confronted these questions directly, “the power over exclusion and deportation is far from normalized.”³⁵ But it seems more accurate to say, instead, that the existence and general scope of federal power in this domain are very much normalized insofar as (a) courts are exceedingly unlikely to introduce significant constraints on Congress’s authority,³⁶ and (b) it would be extremely destabilizing if they did. Moreover, few (if any) participants in the contemporary scholarly discourse relating to this issue think the tension between the inherent authority model and the enumerated powers doctrine casts serious doubt on the legitimacy of Congress’s general exercise of power in the area of immigration. Hence, the fact that judges and scholars have failed to converge on a plausible theory grounding the immigration power in the text of Article I does not mean that the power is not yet “normalized.” What it means, rather, is that (in this context at least) the exercise of congressional power outside of Article I has itself become normalized.

2. Foreign Affairs

The leading case relating to the nature of the federal government’s power in connection with foreign affairs, *United States v. Curtiss-Wright Export Corp.*,³⁷ unabashedly locates federal authority in this domain outside

474–78 (Taney, C.J., dissenting), *id.* at 511–14 (Daniel, J., dissenting), and *id.* at 540–41 (Woodbury, J., dissenting). At least one authority views the Foreign Commerce Clause approach as promising, *see* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 136 (1996), and another leans significantly toward this view but appears to stop short of fully endorsing it, *see* Cleveland, *supra* note 27, at 99–150, 158–63, 278–79. Other leading commentators in the field have expressed doubt about the merits of the Foreign Commerce Clause approach. *See, e.g.*, Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567, 1594–95 (1997).

33. *E.g.*, THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 192–237 (6th ed. 2008); STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 113–249 (5th ed. 2009).

34. *See, e.g.*, ALEINIKOFF ET AL., *supra* note 33, at 206; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 274.

35. Cleveland, *supra* note 27, at 162.

36. By this I mean only that the courts are unlikely to push back on the notion that Congress is, generally speaking, authorized to enact laws governing the exclusion and deportation of aliens. Constraints rooted in concern for the protection of individual rights and routed through the Due Process or Equal Protection Clauses, for example, are another matter.

37. 299 U.S. 304 (1936).

of the Constitution's enumerated powers framework.³⁸ Justice Sutherland's opinion for the Court explains:

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs

. . . .

. . . [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.³⁹

As I discuss immediately below, *Curtiss-Wright* has been the target of sustained and wide-ranging scholarly criticism, much of it focused on the analysis in the above-quoted passage. Nevertheless, the federal courts continue to cite this discussion with approval,⁴⁰ and *Curtiss-Wright's* atextual conception of the foreign affairs power remains, in the words of the leading treatise in the field, "authoritative doctrine."⁴¹

Curtiss-Wright has become something of a punching bag for legal academics. Thus, Justice Sutherland's historical analysis has been vigorously criticized as inconsistent with the relevant evidence.⁴² And, the Court's readiness to ground federal power over foreign relations in sources outside of the Constitution has been attacked as a betrayal of the enumerated powers principle.⁴³ Moreover, *Curtiss-Wright* has been criticized for making a hash

38. *Curtiss-Wright* focuses a great deal of attention on the powers of the federal executive, see *Curtis-Wright*, 299 U.S. at 319–22; but it also speaks, in more general terms, to the scope of federal authority as a whole in connection with foreign affairs, see *id.* at 315–18. As Professor Henkin has explained, see HENKIN, *supra* note 29, at 70, the case is sometimes relied on to support the notion that Congress enjoys some legislative authority that is "inherent" in the sovereign character of the United States.

39. *Curtiss-Wright*, 299 U.S. at 315–16, 318.

40. See, e.g., *Perpich v. Dep't of Def.*, 496 U.S. 334, 354 n.28 (1990); *Atamirzayeva v. United States*, 524 F.3d 1320, 1322–23 (Fed. Cir. 2008); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 50 (1st Cir. 1999); *United States v. Oriakhi*, 57 F.3d 1290, 1296 (4th Cir. 1995); *Zweibon v. Mitchell*, 516 F.2d 594, 621 (D.C. Cir. 1975); *United States v. White*, 51 F. Supp. 2d 1008, 1011 (E.D. Cal. 1997).

41. HENKIN, *supra* note 29, at 20.

42. See, e.g., Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26–33 (1972); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 478–90 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 32 (1973).

43. See, e.g., HENKIN, *supra* note 29, at 19–20; Levitan, *supra* note 42, at 497; Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000).

of the Constitution's separation of powers⁴⁴ by concentrating authority in the executive branch,⁴⁵ and, relatedly, for treating the federal government's conduct of foreign relations as largely unconstrained by constitutional limits and subject to only the most deferential species of judicial review.⁴⁶

Notwithstanding the many serious questions raised by Justice Sutherland's analysis (on which I take no position here), *Curtiss-Wright* illustrates a crucial truth about the federal government's foreign affairs power: it is, in important respects, extremely difficult to locate in the Constitution's text. Even commentators who take issue with much of the *Curtiss-Wright* framework acknowledge as much. Professor Henkin, for example, has explained as follows:

The Constitution does not delegate a 'power to conduct foreign relations' to the United States or to the federal government, or confer it upon any of its branches. . . .

. . . .

Attempts to build all the foreign affairs powers of the federal government with the few bricks provided by the Constitution have not been widely accepted. Such constitutional 'interpretation' requires considerable stretching of language, much reading between lines, and bold extrapolation from 'the Constitution as a whole'; in the end, it still does not plausibly account for all the foreign affairs power that the federal government claims and that it exercises in fact.⁴⁷

This view of the uneasy relationship between the foreign affairs power and the text of the Constitution is widely held.⁴⁸ And while some have made efforts to construct a textually grounded account of federal authority in this

44. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION*, 94–95 (1990); Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 *YALE J. INT'L L.* 5, 12–13 (1988).

45. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936) (“[W]e are here dealing . . . with . . . the very delicate, *plenary and exclusive* power of the President as the sole organ of the federal government in the field of international relations . . .”) (emphasis added); see also *id.* at 319–22 (making the case for a preeminent role for the president in the conduct of foreign affairs).

46. See, e.g., KOH, *supra* note 44, at 134–49; Cleveland, *supra* note 27, at 5–6; Levitan, *supra* note 42, at 497.

47. HENKIN, *supra* note 29, at 14–15 (footnote omitted). The scholarly discourse relating to the foreign affairs power includes significant discussion of both the Necessary and Proper Clause and the “Vesting” Clause of Article II as potential textual sources for the broad sweep of the federal government's power to regulate foreign affairs. See, e.g., *id.* at 73–74; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 252–53 (2001). But neither of these accounts (nor the two operating in tandem) is widely thought to “solve” the textual difficulties that attach to the foreign affairs power, and the conventional view remains that the federal government retains significant unenumerated power in the area of foreign affairs.

48. See Prakash & Ramsey, *supra* note 47, at 233 (“Many eminent scholars and judges have labored to make sense of the Constitution's allocation of foreign affairs powers. Although these attempts often have little in common, they share one trait: They have given up on the Constitution. The received wisdom would have us believe that the foreign affairs Constitution contains enormous gaps that must be filled by reference to extratextual sources . . .”).

area, these commentators acknowledge that they swim against a powerful tide.⁴⁹ As is true with respect to immigration, then, theories of the foreign affairs power that operate outside the enumerated powers scheme are decidedly mainstream.⁵⁰

B. *Enumerated Power, Unlimited Power*

In addition to the doctrinal areas in which the Court has simply jettisoned the enumeration framework, there are a variety of areas in connection with which the prevailing interpretation of a particular Article I power creates serious tension with the enumerated powers doctrine. Specifically, the Court has construed certain grants of power in Article I so expansively as to raise the possibility that they might serve as a source of plenary federal regulatory authority. In these contexts, the difficulty from the perspective of the enumerated powers doctrine is not that the relevant congressional powers cannot be located in the text of the Article I enumeration; they can.⁵¹ It is, rather, that the prevailing conception of these particular powers is difficult to reconcile with the framers' commitment (embodied in the enumeration strategy) to limited federal government.⁵² This Section considers two examples of such broad construction of specific enumerated powers.

1. *Interstate Commerce*

Perhaps the fiercest and most well-known battles over Article I and the enumerated powers doctrine have been fought in connection with the Supreme Court's Commerce Clause jurisprudence. While the judicial and scholarly debate in this area is longstanding and frequently heated, the point

49. *See id.*

50. Immigration and foreign affairs are not the only areas in connection with which the Supreme Court has acknowledged the existence of "inherent" federal regulatory authority, i.e., federal power drawn from sources outside the text of the Constitution. Thus, federal authority over Indian affairs and federal authority in connection with U.S. territories are both justified by reference to "inherent power" theories. *See, e.g.,* Cleveland, *supra* note 27, at 25–81 (reviewing cases establishing and expounding on an "inherent power" theory of federal authority over Indian tribes); *id.* at 200–50 (exploring the development of an "inherent power" theory of federal authority over territories); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 212–26 (1984) (noting the development of the inherent power conception of federal authority over Indian tribes). Dean Caminker has also identified an array of federal powers (including the power to safeguard presidential elections, to enact a maritime code, and to preserve and protect the American flag as a national symbol) that appear to be implied in the structure of the Constitution, rather than enumerated in its text. Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1135 & n.35 (2001).

51. At least this is arguably the case. As we will see, some who acknowledge the legitimacy of the vast expansion of federal power during and after the New Deal era reject the notion that the powers ratified by the Court can properly be understood as exercises of the commerce power. *See infra* note 67 and accompanying text.

52. *See* ACKERMAN, *supra* note 13, at 103 ("[T]he original Constitution did not grant plenary lawmaking authority to the national government, but doled out power in a series of enumerated grants. This textual strategy would have been pointless if one of the enumerated powers . . . was read so expansively as to embrace the whole.").

I wish to make here is largely uncontroversial: Since at least the late 1930s, the Court's Commerce Clause jurisprudence has placed significant strain on the classic conception of enumerated powers. Indeed, the observation that, under existing law, Congress may rely on the commerce power to do more or less whatever it likes—a state of affairs that would seem impossible to reconcile with the enumerated powers doctrine—has become something of a cliché.⁵³

A detailed account of the case law in this area is not necessary here, so I paint with exceedingly broad strokes. During the late 19th and early 20th centuries, the Supreme Court deployed the enumerated powers doctrine to cabin the expansion of federal power under the Commerce Clause. Specifically, the Justices struck down numerous pieces of federal legislation on the ground that they reached activities not falling within the list supplied in Article I, Section 8 (in particular, the regulated activities were deemed not to constitute interstate commerce).⁵⁴ In reaching these conclusions, the Court repeatedly emphasized that a reading of the Commerce Clause that fails to constrain the reach of federal power cannot be reconciled with the Constitution's commitment to a national government with limited and defined authority and is therefore unsustainable.⁵⁵

This approach toward policing Congress's exercise of the commerce power collapsed during the New Deal era beneath pressure on the Court to ratify the federal government's authority to supervise the national economy.⁵⁶ Through a series of decisions rendered in the late 1930s and early 1940s, the Justices embraced a far more permissive approach toward the federal commerce power.⁵⁷ And in subsequent years, federal power expanded radically as Congress enacted measures ranging from criminal statutes to civil rights protections to laws governing the sale of food and drugs, many of which would have been constitutionally unthinkable a gen-

53. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 816 (3d ed. 2000); Lessig, *supra* note 19, at 130. Numerous commentators have characterized the enumerated powers strategy as a "failure," e.g., Steven D. Smith, *The Writing of the Constitution and the Writing on the Wall*, 19 HARV. J.L. & PUB. POL'Y 391, 396 (1996); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1764, 1766, 1802 (2005), while others have described federal authority under Article I as virtually unlimited, e.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 338 (1997); Ilya Somin, *A False Dawn for Federalism: Clear Statement Rules after Gonzales v. Raich*, 2005-2006 CATO SUP. CT. REV. 113, 115.

54. E.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

55. E.g., *Carter Coal*, 298 U.S. at 294; *Schechter Poultry*, 295 U.S. at 548.

56. That, at least, is the conventional view. It is reflected in the work of many scholars. See Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 202 n.1 (1994) (listing sources). A number of commentators have criticized this view as oversimplified and/or insufficiently supported by the relevant historical evidence. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994).

57. See *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942); *United States v. Darby*, 312 U.S. 100, 122-23 (1941); *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 7 (1937).

eration earlier, and all of which the Court deemed to be legitimate exercises of the commerce power.⁵⁸ Indeed, it was in reaction to these developments, in particular that it became commonplace for scholars to claim that no activity was beyond Congress's reach and, as a corollary, that the enumerated-powers doctrine was effectively dead.⁵⁹

The doctrine did make a dramatic return from the ashes through the Court's controversial decisions in *United States v. Lopez*⁶⁰ and *United States v. Morrison*,⁶¹ each of which struck down a federal statute on the ground that it exceeded the scope of Congress's power under the Commerce Clause (something the Court had not done in nearly sixty years despite numerous congressional provocations). But commentators tend to view these decisions as nibbling at the margins of a power that remains breathtakingly expansive and is still so broad as to defy any effort to bring it in line with the notion of limited federal government.⁶² In other words, for all the emphatic enumerated powers rhetoric contained in the *Lopez* and *Morrison* opinions,⁶³ the prevailing view is that those cases do little to scale back the ultimate scope of the commerce power.⁶⁴ Indeed, the Court's most recent significant case involving the limits of national power under the Commerce Clause, *Gonzales v. Raich*,⁶⁵ suggests that the enumerated powers doctrine has returned to sleep mode.⁶⁶

Academic commentators tend to fall into two camps when it comes to understanding the revolution in the commerce power marked by the New Deal cases and those that followed. Crucially, for my purposes, neither is able fully to dissolve the tension between Commerce Clause jurisprudence and the enumerated powers framework. Some (most prominently, Professor Ackerman) regard the changes wrought by the New Deal as a full-blown

58. See *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); see also *TRIBE*, *supra* note 53, at 815.

59. See *supra* note 53.

60. 514 U.S. 549 (1995).

61. 529 U.S. 598 (2000).

62. See, e.g., Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 806 (2006); Young, *supra* note 53, at 1808 & n.300.

63. E.g., *Morrison*, 529 U.S. at 607 ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."); *Lopez*, 514 U.S. at 567 (insisting that upholding the statute under review "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated").

64. See *supra* note 62; *infra* note 66.

65. 545 U.S. 1 (2005) (upholding application of the Controlled Substances Act to individuals who grew small amounts of marijuana for medicinal use).

66. See, e.g., Lino A. Graglia, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31 *HARV. J.L. & PUB. POL'Y* 761, 785 (2008) ("*Raich* indicates a return to the Court's practice since 1937 of reviewing purported exercises of the commerce power in name only, which makes judicial review a means of validation rather than a limitation."); Randy E. Barnett, *Three Federalisms*, 39 *LOY. U. CHI. L.J.* 285, 293 (2008) (similar).

amendment to our constitutional order.⁶⁷ These commentators reject the notion that the full sweep of federal power recognized during the New Deal era can straightforwardly be filed under the heading “Commerce . . . among the several states” and thereby located within the text of Article I. On this view, the Commerce Clause serves as a fig leaf to cover change of constitutional dimension, which has taken place outside the strictures of Article V. It is the key player in the story that proponents of expanded national power tell themselves in an effort to maintain an illusion of textual regularity and historical continuity in connection with the conception of federalism that emerges from the case law. From the perspective of the enumerated powers doctrine, of course, this account is seriously problematic. For the “constitutional amendment” approach not only confounds the principle of limited federal government (by endorsing a commerce power of virtually unlimited scope), it does so with only the most tenuous connection to the list of powers contained in Article I.

An alternative view understands the exercises of federal power authorized during the relevant period as fitting within the text of Article I. This argument rests primarily on the notion that fundamental changes in the realities of American commercial life (brought about by dramatic changes in communication and transportation technology) triggered a massive expansion in the class of activities that constitute “Commerce . . . between the several states” or, at the very least, “substantially affect interstate commerce.”⁶⁸ As Professor Laycock has urged, this view also draws support from the series of constitutional amendments (the Reconstruction and Sixteenth Amendments in particular) that significantly expanded the reach of national power after the Civil War and into the twentieth century.⁶⁹ These developments, Laycock argues, sent a clear signal of the people’s embrace

67. See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 259–61 (1998) (arguing that the New Deal entailed “a sweeping redefinition of the aims and methods of American government” and that this redefinition constitutes change of constitutional dimension); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1470 (2001) (noting that while the “expansion of Congress’s power came about principally through judicial interpretation, especially of the Commerce Clause . . . [t]his change in the scope of federal power has to be regarded as a constitutional change”). Neither Professor Strauss nor Professor Ackerman means to intimate, through these passages, that the relevant cases were, as Strauss puts it, “usurpative or otherwise inappropriate.” *Id.* Nevertheless, their approaches treat the New Deal revolution as something more than a matter of our collectively coming to grips with the fact that, as a result of changed circumstances, extant doctrinal categories and fragments of constitutional text had come to be more capacious than they once were.

68. See Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L. J. 1711, 1735 (1990) (discussing “the transportation and communication revolutions that forever changed the nature of interstate commerce” and arguing that “[t]he change was sudden and dramatic,” that “it required no legal fiction to see the effects,” of this change, and that as a result of this change, “[n]o state or locality could manage its own economy and no commerce was beyond the reach of the commerce clause”); Lessig, *supra* note 19, at 137–44 (discussing the increased integration of the U.S. economy over time and the concomitant expansion of the constitutional category “Commerce . . . among the several states”); see also Laycock, *supra*, at 1736 (“The concept of intrastate commerce became obsolete, not because of judicial interpretation, but because of technological change.”).

69. Laycock, *supra* note 68, at 1736–38.

of bigger, activist federal government and laid the groundwork for a fundamental reorientation of the Court's approach to the power clauses of the Constitution.⁷⁰ From this perspective, the transformation marked by the New Deal cases need not be understood as an abandonment of the foundational notion that exercises of congressional authority must ultimately be traceable to the list of powers enumerated in Article I. Rather, under this view, the Commerce Clause (or, perhaps, the Commerce Clause together with the Necessary and Proper Clause),⁷¹ newly conceived in light of technological and constitutional change, can carry the full weight of the expanded federal power recognized in the key cases.

Still, this alternative approach solves only part of the problem from the perspective of the enumerated powers doctrine. For even if one finds it satisfying as a textual matter to cram the vast universe of modern federal power into some combination of the Commerce and Necessary and Proper Clauses, and even if one regards the constitutional amendments of the era as marking a dramatic transformation in the allocation of power between the federal government and the states (and how could one not?), there is no escaping the conclusion that the framers' commitment to a federal structure in which the national government enjoys powers that are limited, few, and defined is a casualty of this story.

I do not mean to suggest by this that the expansion of federal power over the course of the twentieth century is illegitimate as a matter of constitutional text or structure. It is perfectly sensible to understand the Constitution's enumeration of federal legislative powers as an effort to list those government activities that would best be undertaken at the federal level⁷² and to endorse a purposive reading of these enumerated powers that keeps this enabling spirit in focus. But this is fully consistent with also finding a commitment to state autonomy and the principle of limited federal government embedded in the Article I enumeration.⁷³ Under modern conditions, we cannot have both. That is, it has become necessary to choose which of these implied constitutional commitments—to empowering the federal government to tackle those problems that are best addressed at the federal level, and to limited federal government—is to be honored, and which is to be sacrificed. The commerce cases mark a clear choice to subordinate the interest in state autonomy to the interest in effective central

70. *Id.*

71. Many of the crucial cases expounding on the scope of the commerce power have flagged the Necessary and Proper Clause as a relevant source of federal authority. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 35 (2005) (Scalia, J., concurring); *Wickard v. Filburn*, 317 U.S. 111, 121 (1942); *United States v. Darby*, 312 U.S. 100, 118 (1941); *see also, e.g.*, Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *TEX. L. REV.* 795, 807–11 (1996) (discussing the role of the Necessary and Proper Clause in underwriting the expansion of the federal power over the course of the 20th century).

72. *See, e.g.*, Donald H. Regan, *How To Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 *MICH. L. REV.* 554, 555–57 (1995).

73. *Id.* at 556 (“The mere fact of an enumeration of powers makes it clear that the federal government's powers are meant to be limited.”).

government. And my point, for present purposes, is that even if one believes that (a) this is the correct choice, and (b) the text of the Constitution (the Commerce Clause in particular) is up to the task of housing the powers recognized during the New Deal era, there is no denying the fact that this choice does violence to the principle of limited federal government and, as a corollary, to Article I's enumeration of powers.

2. *The Spending Power*

Like the federal government's authority under the Commerce Clause, the spending power has been construed so broadly as to create serious tension with the principle of limited federal government.⁷⁴ The crucial precedents here are *United States v. Butler*⁷⁵ and *South Dakota v. Dole*.⁷⁶ The former involved a challenge to provisions of the Agricultural Adjustment Act of 1933, which, among other things, authorized the secretary of agriculture to pay out subsidies to farmers in exchange for their agreement to reduce production of certain commodities.⁷⁷ In the course of assessing the constitutionality of this regulatory scheme, the Court explained that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."⁷⁸ In other words, according to *Butler*, Congress may wield its authority under the Spending Clause to induce states to undertake action that Congress could not directly command of them under the heads of power enumerated in Article I.⁷⁹

This sentiment was echoed half a century later in *Dole*. In that case, the Court upheld a federal statute that promised to withhold 5 percent of federal highway funds from any state that did not prohibit "the purchase or public possession . . . of any alcoholic beverage" by persons under the age of twenty-one.⁸⁰ The Court explained that Congress is authorized to "act[] indi-

74. The spending power is drawn from Article I, Section 8, Clause 1, which provides, "The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

75. 297 U.S. 1 (1936).

76. 483 U.S. 203 (1987).

77. *Butler*, 297 U.S. at 54–55.

78. *Id.* at 66. The Court ultimately invalidated the regulatory scheme on the ground that, by regulating agricultural production (even if only indirectly through a conditional grant of federal funds), it invaded a sphere of state autonomy that is off limits to the federal government under the Tenth Amendment. *Id.* at 68.

79. The *Butler* Court traced this understanding of the spending power to the founding generation, and to Alexander Hamilton in particular. *Id.* at 65–66 ("Hamilton . . . maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States."). See generally ALEXANDER HAMILTON, Alexander Hamilton's Final Version of the Report on the Subject of Manufactures (Dec. 5, 1791), in 10 THE PAPERS OF ALEXANDER HAMILTON 230 (Harold C. Syrett et al. eds., 1966).

80. *Dole*, 483 U.S. at 205 (omission in original) (quoting 23 U.S.C. § 158 (1982 & Supp. III)) (internal quotation marks omitted).

rectly under its spending power to encourage uniformity in the States' drinking ages . . . even if [it] may not regulate drinking ages directly."⁸¹ "[O]bjectives not thought to be within Article I's enumerated legislative fields," the Court determined, "may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."⁸²

Numerous commentators have argued that this state of affairs is impossible to reconcile with the Constitution's commitment to limited federal government. Thus, one leading commentator has argued that "[w]ith *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states,"⁸³ since Congress may achieve through a conditional grant of federal funds that which it may not achieve through direct regulation. "[*Dole*] cannot be the end of the matter," another commentator insisted; "[o]therwise, ours would not be . . . a government of limited powers, but a government that is in effect empowered to pursue almost any objective by almost any means."⁸⁴

It is not necessary for my purposes to join issue on the question whether greater limits on Congress's power under the Spending Clause are in order.⁸⁵ It suffices simply to point out that Congress may rely on the spending power to circumvent limits on the reach of its authority under Article I, and that the prevailing understanding of that power is difficult to square with the principle of limited federal government. As Justice O'Connor explained in her dissenting opinion in *Dole*, "the Spending Clause gives power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."⁸⁶

81. *Id.* at 206. The State had insisted that the federal government is prohibited under the Twenty-First Amendment from directly establishing a minimum drinking age and that it could not use the spending power to accomplish indirectly that which the Twenty-First Amendment prohibited it from accomplishing directly. *Id.* at 205.

82. *Id.* at 207 (internal quotation marks omitted).

83. Lynn A. Baker, *Conditional Spending After Lopez*, 95 COLUM. L. REV. 1911, 1914 (1995) [hereinafter Baker, *Conditional Spending*]. Professor Baker has repeatedly criticized the Court's Spending Clause decisions and is an ardent proponent of limiting Congress's authority in this area. See Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495 (2009); Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001).

84. Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 25 (2003); see also Baker, *Conditional Spending*, *supra* note 83, at 1920 (arguing that under the prevailing conception of the spending power, "the notion of 'a federal government of enumerated powers' [has] no meaning"); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 85 (contending that Spending Clause doctrine "challenge[s]" the notion "that the national government is one of delegated powers").

85. For a thoughtful discussion of the future of Spending Clause litigation, see Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345 (2008).

86. See *Dole*, 483 U.S. at 217 (O'Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)) (internal quotation marks omitted).

II. ENUMERATION AND ARTICLE III

In this Part, I turn my attention to Article III of the U.S. Constitution. Like Article I, it contains an enumeration of powers. Specifically, Article III, Section 2 enumerates nine categories of cases to which “the judicial Power of the United States” extends.⁸⁷ But the conventional wisdom relating to the enumeration of powers in the judiciary Article differs markedly from the standard account of the enumeration in Article I. For while it is widely acknowledged that across a variety of contexts we do little more than pay lip service to the Article I enumeration, the dominant view of Article III, Section 2—reflected in both the case law and the relevant scholarly commentary⁸⁸—is that it represents a bona fide limit on congressional authority to confer jurisdiction on the federal courts.

The standard picture, however, does a poor job of capturing the reality of our jurisdictional practice, for there is little evidence that the Article III enumeration constrains Congress any more than its Article I counterpart. This is reflected most dramatically in the fact that the Supreme Court has *never* invalidated a federal statute on the ground that it channels into the federal courts cases that fall outside the list supplied in Article III, Section 2.⁸⁹ This has not been for lack of opportunity. Over the course of U.S. history, Congress has enacted numerous jurisdictional statutes that unquestionably push the limits of what is permitted under Article III, Section 2, and these statutes have been the subject of constitutional challenges in the federal courts. Yet the Justices have always resolved these challenges in favor of the constitutionality of the jurisdictional enactments. If the Article III enumeration has significant bite, then, it is not reflected in the case law.

87. That Section reads:

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

U.S. CONST. art. III, § 2.

88. See *infra* Section II.A.

89. The Court has, on more than one occasion, adopted narrowing constructions of jurisdictional statutes in order to avoid potential Article III difficulties. See, e.g., *Mesa v. California*, 489 U.S. 121 (1989) (refusing to construe the federal officer removal statute, 28 U.S.C. § 1442(a)(1), to reach cases in which the defendant federal official presents state-law defenses to a state-law claim); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (declining to construe section 11 of the Judiciary Act of 1789 to establish federal court jurisdiction in every suit to which an alien is a party); *Montalet v. Murray*, 8 U.S. (4 Cranch) 46 (1807) (same); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800) (same). These decisions suggest that the Court is willing to give at least some bite to the Article III enumeration, even if it has never gone so far as to invalidate a jurisdictional statute on this basis. Still, these cases do not undermine the core claims I develop here, namely that (1) the Article III enumeration imposes only weak constraints on Congress’s jurisdiction-conferring authority, and (2) the Court has repeatedly taken great pains to avoid enforcing any such constraints. As I explain in Part III, moreover, it is possible to read these cases as supportive of the “congressional power” model of federal court jurisdiction that I develop in this Article. See *infra* n.201.

To be sure, one cannot automatically infer from the Justices' failure in these cases to strike down the relevant jurisdictional enactments that the Article III enumeration imposes no limits on congressional power. For it is possible that Congress has never actually transgressed the limits of Article III, Section 2, even if it has repeatedly come close to the line. And if it so happens that Congress has never enacted a statute that is constitutionally infirm in just this way, then the relevant case law provides no reason to doubt that under appropriate circumstances—which is to say, in a case involving a statute that goes *over* the constitutional line—the Justices would enforce the enumeration of powers and strike down the offending law.

Of course, this is precisely the sense one gets from reading the cases relating to the limits of Article III, Section 2. They indicate—indeed, collectively, they *hold*—that Congress has always stayed within the limits of the Article III enumeration. But there is reason to treat this body of case law with suspicion. For, as I demonstrate in this Part, the Justices have taken significant interpretive liberties in their efforts to fit the jurisdictional enactments at issue within the limits of Article III, Section 2. They have stretched the language of the Constitution, mangled statutory text, and advanced highly tendentious accounts of legislative history. Considered in isolation from one another, the interpretive moves in each of these cases might only raise an eyebrow. But when we consider them in the aggregate, a pattern emerges that reveals something fundamental about our jurisdictional system: the enumeration of powers in Article III, Section 2, like its cousin in Article I, does little to constrain the exercise of congressional power.

In Part II.A, I briefly demonstrate the deep entrenchment of the strict enumeration view—the view that Congress cannot confer jurisdiction on the federal courts in cases falling outside the list in Article III, Section 2—in the federal courts orthodoxy. In Part II.B, I show that this deeply entrenched view does not describe the reality of our practice. For while the Supreme Court has long talked the talk of strict enumeration, it has taken great pains to avoid ever having to walk the walk.

A. Article III, Section 2: In Theory

According to the conventional wisdom, it is among the most fundamental principles of federal jurisdiction that Congress may not channel into the federal courts cases that fall outside the nine categories enumerated in Article III, Section 2. This proposition finds support in many opinions of the Supreme Court. Thus, in *Verlinden B.V. v. Central Bank of Nigeria*, a case I will discuss at length in Part II.B, the Court explained that “Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution.”⁹⁰ And, in *Ankenbrandt v. Richards*, the Court insisted that Article III, Section 2 “delineates the absolute limits on the federal courts’ jurisdiction.”⁹¹ Similarly, in *Finley v. United States* Justice

90. 461 U.S. 480, 491 (1983).

91. 504 U.S. 689, 695 (1992).

Stevens explained that “Article III of the Constitution identifies the categories of ‘Cases’ and ‘Controversies’ that federal courts may have jurisdiction to decide. If a case is not within one of the specified categories, neither Congress nor the parties may authorize a federal court to decide it.”⁹²

Unsurprisingly, given the direct and forceful quality of these pronouncements from the Supreme Court, the strict enumeration theory of federal court jurisdiction is today vigorously defended at all levels of the federal judiciary,⁹³ and it is treated as black-letter law by scholarly commentators.⁹⁴ Indeed, the rhetoric deployed in some of the academic literature on the subject suggests a degree of reverence for the strict enumeration view that we typically associate with religious devotion. Thus, Dean Sager has described Article III of the Constitution as “the text to which all priests of federal jurisdiction must ultimately repair.”⁹⁵ And Professor Pfander characterized a jurisdictional theory that does not locate the limits of federal judicial power in Article III as “com[ing] close to outright jurisdictional apostasy.”⁹⁶

Of course, such instances of apostasy *do* exist, and I do not mean to suggest that the entire corpus of relevant judicial and scholarly commentary offers but a single perspective on the constitutional limits of federal subject matter jurisdiction. In particular, there is a sizeable body of scholarly literature propounding theories of “protective jurisdiction”—so named because these theories posit that Congress may channel cases into the federal courts in order to protect important federal interests—and to varying degrees, these theories draw on Article I as a source of congressional power to channel cases into the federal courts.⁹⁷

92. 490 U.S. 545, 558–59 (1989) (Stevens, J., dissenting) (footnote omitted).

93. See, e.g., *Mizuna, Ltd. v. Crossland Fed. Sav. Bank*, 90 F.3d 650, 655 (2d Cir. 1996); *In re Meyerland Co.*, 960 F.2d 512, 517 (5th Cir. 1992); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 849 (3d Cir. 1991); *Balt. Gas and Elec. Co. v. United States*, 133 F. Supp. 2d 721, 725 (D. Md. 2001).

94. See, e.g., ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 266 (5th ed. 2007); 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3521 (3d ed. 2008); Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CAL. L. REV. 699, 724 (2008); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1622 (2008).

95. Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22 (1981).

96. James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1926 (2004).

97. The essential reading on the subject of protective jurisdiction includes Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216 (1948); Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157 (1953); Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542 (1983); Scott A. Rosenberg, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933 (1982); Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361 (2002); Pfander, *supra* note 96; Carlos M. Vazquez, *The Federal “Claim” in the District Courts: Osborn, Verlinden, and Protective Jurisdiction*, 95 CAL. L. REV. 1731 (2007); and Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CAL. L. REV. 1775 (2007). I will explore different theories of protective jurisdiction in Part IV.

For present purposes, however, I wish only to note that the protective jurisdiction theory (in all of its variations) is, at bottom, a renegade account of federal judicial power. It has been “neither . . . embraced by the Supreme Court nor . . . fully accepted by the academic community.”⁹⁸ Indeed, when Justice Jackson advanced a version of the protective jurisdiction thesis in his opinion in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, it was forcefully denounced by six of his colleagues, in three separate opinions;⁹⁹ and it has not been defended in a Supreme Court opinion ever since.¹⁰⁰ Hence, the protective jurisdiction theory notwithstanding, there is no mistaking the fact that the strict enumeration view represents the dominant account of the constitutional limits on federal court jurisdiction.

B. Article III, Section 2: In Practice

While the decisions of the Supreme Court and the lower federal courts are littered with statements to the effect that Congress’s power to confer jurisdiction on the federal courts is constrained by the enumeration in Article III, Section 2, the thrust of the case law—tellingly manifested in the outcomes of these cases—suggests otherwise. For despite Congress having enacted numerous statutes that unquestionably press hard on the limits contained in Article III, Section 2, and despite the fact that the constitutionality of these provisions has been tested in court, the Supreme Court has *never* declared a federal statute unconstitutional on the ground that it channels into the federal courts cases that fall outside the enumerated categories.

For the most part, as we will see, the Court’s preferred means of securing the constitutionality of the jurisdictional enactments at issue in these cases has been to stretch the enumerated powers specified in Article III in a manner vaguely reminiscent of the stretching of Article I powers described in Part I.B. The unapologetic embrace of congressional authority outside of the enumerated powers framework—which characterizes the cases explored in Part I.A—is largely foreign to the Article III case law. There is, we will see, but a single example in this context (and this from a plurality opinion) of an outside-the-enumeration approach to federal court jurisdiction. The steadfast eschewal of this approach reflects (and contributes to) the stranglehold of the strict enumeration view on our collective consciousness of the nature of federal judicial power.

98. Goldberg-Ambrose, *supra* note 97, at 545 (footnote omitted).

99. 337 U.S. 582, 604, 626 (1949) (Rutledge, J., concurring); *National Mutual Insurance Co.*, 337 U.S. at 645 (Vinson, C.J., dissenting); *id.* at 652 (Frankfurter, J., dissenting); *see also* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting) (insisting that the theory of protective jurisdiction “cannot be justified under any view of the allowable scope to be given to Article III”).

100. Indeed, only one other opinion from the entire history of the Supreme Court expresses even a modicum of support for this understanding of the constitutional limits of federal jurisdiction, but that (two paragraph) opinion does not bother to explain or defend the view. *See Lincoln Mills*, 353 U.S. at 460 (Burton, J., concurring).

My goal in this Section is not to prove that each (or, indeed, any) of the cases I explore here is wrongly decided. It is, rather, to demonstrate that the Court's reasoning in these cases has produced doctrinal and conceptual difficulties that are widely recognized as deeply vexing. And so, while the case law appears to support the notion that Congress's power to confer jurisdiction on the federal courts is limited by the enumeration in Article III, Section 2, it does so only by engaging in a series of significant interpretive contortions. My discussion here will pave the way for the claim I advance in Part III, namely that there is a far simpler way to understand the case law in this area: the enumeration of powers in Article III, Section 2, like its counterpart in Article I, Section 8, imposes exceedingly weak constraints on the exercise of congressional power.¹⁰¹

1. *Osborn v. Bank of the United States*

*Osborn v. Bank of the United States*¹⁰² involved the constitutionality of a federal statute that authorized the U.S. circuit courts to exercise original jurisdiction in any case to which the U.S. Bank is a party.¹⁰³ The constitutional difficulty lay in the fact that none of the party-based heads of jurisdiction in Article III, Section 2 covers such cases (since the Court had previously determined that the Bank did not qualify for federal jurisdiction under the "U.S. as a party" head of judicial power¹⁰⁴), and it is far from obvious that *every* case to which the Bank is a party—consider, for example, garden-variety contract litigation in which state common law supplies the governing rule—can be said to "arise under" federal law for constitutional purposes.¹⁰⁵ Without a foothold in Article III, Section 2, it was argued, federal jurisdiction could not lie.¹⁰⁶

The Court managed to avoid striking down the jurisdictional statute by holding that federal law "forms an original ingredient in every cause" to which the U.S. Bank is a party, and, hence, all such cases "arise under" federal law for purposes of Article III.¹⁰⁷ Justice Marshall explained, by way of example, that in every contract case involving the Bank, the questions

101. As I discuss in Part III, this is not to say that the Article III enumeration does nothing to constrain Congress in its conferral of jurisdiction on the federal courts. But these enumeration-based constraints are, for the most part, self-imposed. See *infra* text accompanying notes 242–245.

102. 22 U.S. (9 Wheat.) 738 (1824).

103. Act of Apr. 10, 1816, ch. 44, 3 Stat. 266, 269.

104. See *Bank of the U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907–08 (1824) (explaining that "when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen" and that "[a]s a member of a corporation, a government never exercises its sovereignty").

105. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority . . .").

106. See *Osborn*, 22 U.S. (9 Wheat.) at 811–16 (argument of Harper, Brown, and Wright).

107. *Id.* at 824, 827.

whether the Bank has a right to sue, to sue in federal court, and to enter into contracts are present.¹⁰⁸ These questions, he insisted, “exist in every case,” whether or not they are actually raised or disputed by the parties,¹⁰⁹ and their presence in these cases (such as it is) suffices to underwrite federal “arising under” jurisdiction.

Judges and scholars have offered at least two accounts of *Osborn*’s “original ingredient” formulation. Some (including Justice Johnson, who dissented in *Osborn*) understand Justice Marshall to have held that a suit arises under federal law for constitutional purposes so long as it is *possible* that a question of federal law will be raised in the course of the litigation.¹¹⁰ Others see in the majority opinion a more technical conception of what it means for federal law to “form[] an original ingredient” of a cause of action.¹¹¹ Whichever reading is correct, there is a significant mismatch between the jurisdictional rule crafted by the *Osborn* Court and the purpose that rule is supposedly designed to serve. The decision appears to be premised on the notion that (should Congress deem it appropriate) the federal courts ought to be available to adjudicate cases calling for the interpretation or application of federal law. But because jurisdiction under the *Osborn* standard turns on the “presence” in a suit of federal questions that might not actually be pressed or disputed by the parties, the decision ultimately allows for the possibility of “arising under” jurisdiction in suits in which no federal issue is even raised, much less decided, by the court.

108. *Id.* at 823–24. On the facts of *Osborn* itself, it was plain that questions of federal law were a part of the litigation. (The Bank challenged the constitutionality of Ohio’s efforts to levy a tax on it.) Marshall, however, chose to tackle the broader question—squarely raised by the companion case of *Bank of the U.S. v. Planters’ Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824)—whether federal jurisdiction would lie over any breach of contract suit involving the bank.

109. *Osborn*, 22 U.S. (9 Wheat.) at 824.

110. *See, e.g., id.* at 874–76, 886–87, 889 (Johnson, J., dissenting); *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 492 (1983); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 482 (1957) (Frankfurter, J., dissenting); MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 86 (2d ed. 1990); James H. Chadbourne & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 662 (1942). Some find this exceedingly broad reading of *Osborn* constitutionally untenable. *See, e.g., Osborn*, 22 U.S. (9 Wheat.) at 874 (Johnson, J., dissenting); *Lincoln Mills*, 353 U.S. at 481–82 (Frankfurter, J., dissenting). The principal concern that has been raised in connection with this reading of the Arising Under Clause is that it cannot be reconciled with the structural side of the strict enumeration view (since it authorizes federal jurisdiction of virtually unlimited scope). As will become clear in Part III, I do not think it disqualifying for a theory of federal jurisdiction to contemplate only the thinnest of Article III-based limits on the exercise of federal judicial power. Accordingly, my critique of the *Osborn* rule does not focus—as others do—on its breadth. I focus, instead, on the disconnect between the content of the *Osborn* rule and the purpose it is supposedly designed to serve.

111. *See, e.g.,* Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 332–40 (2007) [hereinafter Bellia, *Origins*]; Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 800–12 (2004) [hereinafter Bellia, *Article III*]. In Bellia’s view, the “original ingredient” test carries a technical meaning rooted in pleading conventions drawn from longstanding practice at English common law that does not extend to every suit in which a question of federal law might possibly arise. *See* Bellia, *Article III, supra*, at 808; Bellia, *Origins, supra*, at 334–35; *see also* Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731, 782 (noting that one might read *Osborn* for the (relatively narrow) proposition that “all suits involving federal instrumentalities ‘arise under’ [federal law]”).

Osborn thus establishes an extremely broad prophylactic rule. It is a very good tool if one's goal is to confer sweeping discretion on Congress when it comes to determining the scope of federal jurisdiction;¹¹² but if one's goal is to ensure that cases that actually entail the interpretation or application of federal law can be heard in federal court, it is a rather blunt instrument. *That* aim, it would seem, could be served through a far narrower conception of constitutional arising under jurisdiction—one that focuses on questions that are actually litigated in a given case, rather than those that might be.¹¹³

At the time *Osborn* was decided, there was, of course, an obvious and powerful reason to allow for the exercise of federal jurisdiction in any case to which the U.S. Bank was a party. Important national interests might have been undermined by adjudication of such cases before state courts that were virulently hostile to the Bank.¹¹⁴ And this was true, moreover, without regard to whether any particular case involved a question of federal law; for a state court might do violence to important national interests by unfairly adjudicating state-law claims brought by or against the Bank just as easily as it could do so through tendentious construction or application of a federal statute in a suit to which the Bank was a party.¹¹⁵ But rather than hold straightforwardly that the national interest in federal court adjudication of cases involving the Bank sufficed, on its own, to support federal jurisdiction, Chief Justice Marshall crammed the entire universe of cases to which the

112. There is good reason to think that this was an important unspoken goal of Marshall's decision. It certainly would be consistent with the jurisprudence of the Marshall Court more generally. *See, e.g.,* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (holding that Congress has broad discretion under the Necessary and Proper Clause to select the legislative means it thinks most efficacious for advancing the legitimate ends of the federal government).

113. To be sure, it is not always possible, at the outset of a case, to determine what role federal law will play (if any) as the suit unfolds. And a construction of the Arising Under Clause that allows for federal jurisdiction only in cases in which questions of federal law are actually at issue would prevent the exercise of original jurisdiction by the federal courts in many cases in which federal law turns out to play a prominent role. It could be argued, accordingly, that Chief Justice Marshall's expansive conception of the Arising Under Clause is necessary to safeguard the interest in federal court adjudication of federal questions. But this argument hangs together only if one dismisses the possibility that some combination of removal jurisdiction and review of state court judgments by the U.S. Supreme Court (or, less conventionally, the U.S. courts of appeals) will ensure adequate federal court intervention in suits that require interpretation of federal law but fall outside the federal courts' original jurisdiction. *See Lincoln Mills*, 353 U.S. at 481–82 (1957) (Frankfurter, J., dissenting) (“We . . . have become familiar with removal procedures that could be adapted to alleviate any remaining fears by providing for removal to a federal court whenever a federal question was raised.”); Mishkin, *supra* note 97, at 187 (noting that state court errors in the construction and application of federal law might have been remedied “by Supreme Court reversal of any negation of . . . [federal] power by the state courts”). The *Osborn* Court had nothing to say about this set of issues. It simply touched on the interest in federal court adjudication of questions of federal law and endorsed the awkward and over-inclusive construction under which suits might “arise under” questions of federal law that turn out to play no role in the litigation. *Osborn*, 22 U.S. (9 Wheat.) at 826.

114. Harry Shulman & Edward C. Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 405 (1936) (“[T]he Bank was the object of great popular hatred and of measures of reprisal by many state legislatures. It was sadly in need of a federal haven for its litigation.”).

115. *See* Goldberg-Ambrose, *supra* note 97, at 549; Mishkin, *supra* note 97, at 195.

Bank is a party—even those in which the parties press no federal claims—into the Arising Under Clause of Article III.

For the time being, I do not wish to engage the question whether, all things considered, it was appropriate for the Court to stretch the Arising Under Clause so that it might accommodate the statute under review in *Osborn*.¹¹⁶ It suffices, for my purposes, simply to point out that it required considerable stretching to do so. *Osborn* embraces a nonobvious (and certainly not necessary) construction of Article III, Section 2’s Arising Under Clause. It crafts a rule that is over-inclusive when measured against the federal interest highlighted by the Court—securing federal court review of questions of federal law—and under-inclusive when measured against the apparent purpose underlying the jurisdictional statute under review—protecting important federal interests that might be threatened by state court litigation of state or federal questions.

2. “Related to” Jurisdiction in Bankruptcy

28 U.S.C. § 1334(b) provides that the U.S. district courts “shall have original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Code].”¹¹⁷ It is the latter half of this jurisdictional statute—the “related to” language in particular—that gives rise to serious constitutional difficulty. It does so because the category of proceedings that “relate to” cases under the Bankruptcy Code has been construed broadly¹¹⁸ and it encompasses proceedings between non-diverse parties that are governed by state law.¹¹⁹ The constitutional basis for federal court jurisdiction over such proceedings is uncertain.

The Supreme Court case law touching on the constitutionality of the federal courts’ jurisdiction in bankruptcy proceedings is itself rather murky.¹²⁰ There is language in cases such as *Lathrop v. Drake*,¹²¹ *Schumacher v. Beeler*,¹²² and *Williams v. Austrian*,¹²³ suggesting the existence of

116. I address this issue in Part III.

117. 28 U.S.C. § 1334(b) (2006).

118. See *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (“[T]he test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.*”); see also John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 Nw. U. L. REV. 1188, 1194 (1993) (“In general, a proceeding is related to a bankruptcy case if resolution of that proceeding could *in any way* affect the liquidation or reorganization of the debtor’s estate.” (emphasis added)).

119. See Cross, *supra* note 118, at 1190 (“[F]ederal courts in bankruptcy may exercise jurisdiction over . . . state-law claims without reference to the citizenship of the parties . . .”).

120. The cases I explore here all predate the modern incarnation of the statute, which was enacted in 1978 and which contains the broad “related to” language quoted above. Nevertheless, these cases are germane because they speak (obliquely, as we will see) to the legitimacy of federal bankruptcy jurisdiction in suits between non-diverse parties that are to be governed by state law.

121. 91 U.S. 516 (1875).

122. 293 U.S. 367 (1934).

123. 331 U.S. 642 (1947).

congressional power to channel bankruptcy-related state-law litigation between non-diverse parties into federal courts.¹²⁴ But, as numerous scholars have noted, these cases appear to answer questions of statutory, rather than constitutional, interpretation;¹²⁵ and much of the language in these cases that at least arguably speaks to the constitutional limits on bankruptcy jurisdiction appears to be dicta.¹²⁶ Hence, while scholars tend to agree that the Supreme Court has at least tacitly affirmed the constitutionality of “related to” jurisdiction in bankruptcy,¹²⁷ the relevant precedents fail to supply a firm theoretical foundation for this jurisdiction, and they do nothing to advance the cause of locating these controversial exercises of federal judicial power within the Article III enumeration.

This is not to say that there have been no sustained efforts to find constitutional authority for the breadth of the federal courts’ jurisdiction in bankruptcy proceedings. Justice Frankfurter’s dissenting opinion in *Textile Workers Union v. Lincoln Mills* (a case I explore in detail later on in this Section), briefly mentions two possible justifications for the extension of federal bankruptcy jurisdiction to state-law claims between non-diverse parties, and each of these justifications has been explored in depth by academic commentators in the decades since. One of these theories relies on notions of supplemental jurisdiction to do the necessary work.¹²⁸ Where there is sufficient connection between a state-law claim and the administration of a bankrupt estate, the argument goes, the state-law claim can ride into federal court on the coattails of federal questions that necessarily arise in connection with the bankruptcy.¹²⁹ A second account attempts to justify the scope of

124. See *Austrian*, 331 U.S. at 664 (Frankfurter, J., dissenting) (discussing federal court litigation of state-law causes of action between non-diverse parties and asserting that “[n]o doubt Congress could authorize such a suit”); *Schumacher*, 293 U.S. at 374 (“The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction.”); *Lathrop*, 91 U.S. at 518 (“[A] uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise.”).

125. See Cross, *supra* note 118, at 1204, 1207 n.72; Thomas Galligan, Jr., *Article III and the “Related to” Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1, 21 (1987); Radha A. Pathak, *Breaking the “Unbreakable Rule”: Federal Courts, Article I, and the Problem of “Related To” Bankruptcy Jurisdiction*, 85 OR. L. REV. 59, 79, 81 (2006). But see Cross, *supra* note 118, at 1206 (“[T]he Court in *Schumacher* was forced to consider the constitutional question.”).

126. Cross, *supra* note 118, at 1204 n.60, 1207; Pathak, *supra* note 125, at 77.

127. See Cross, *supra* note 118, at 1204; Galligan, *supra* note 125, at 20; Pathak, *supra* note 125, at 75.

128. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (Frankfurter, J., dissenting).

129. Versions of this argument are explored in Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 831–52 (2000), and Cross, *supra* note 118, at 1237–50. Commentators link this theory of supplemental jurisdiction to the familiar species that was explicitly authorized by the Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Under *Gibbs*, what is required in order to usher state-law claims between non-diverse parties into the federal courts is that the claims arise out of “a

federal jurisdiction in bankruptcy by reference to the “original ingredient” theory developed by the Supreme Court in *Osborn*.¹³⁰ A bankruptcy trustee is “a creation of federal law with strictly defined powers and responsibilities,”¹³¹ and it is always possible that a court will be called upon to determine whether the trustee is acting within the legitimate scope of her authority.¹³² Since that question must be answered by reference to federal law, it could be argued that federal law forms an original ingredient of all claims arising in bankruptcy and, hence, that all such claims qualify for federal question jurisdiction.

As numerous commentators have acknowledged, however, these two theories are fraught with difficulty. The former simply does not fit established notions of supplemental jurisdiction.¹³³ The seminal case expounding on the subject of supplemental jurisdiction provides that it will take hold only when federal and nonfederal claims arise out of “a common nucleus of operative fact.”¹³⁴ Yet “[a] bankruptcy court often adjudicates claims that occurred months, or even years, apart,” and “[t]he underlying events giving rise to these claims may be totally unrelated.”¹³⁵ Even scholars who are attracted to this account of bankruptcy jurisdiction concede that it “stretches notions of pendent and ancillary jurisdiction to the breaking point.”¹³⁶

The “original federal ingredient” theory fares no better. The litany of federal questions that is supposedly implicit in, and forms an original ingredient of, every bankruptcy case tends to focus on the capacity of the trustee to act in one way or another.¹³⁷ But the trustee is not a party to important species of bankruptcy litigation, including “debtor in possession” suits under Chapter 11¹³⁸ and suits between third parties that “relate to” cases arising directly under the Bankruptcy Code.¹³⁹ The “original ingredient” theory cannot straightforwardly explain the extension of federal court jurisdiction to

common nucleus of operative fact.” *Id.* at 725. In the bankruptcy context, what is required is some nexus between the state-law claim and the administration of a bankrupt estate.

130. See *Lincoln Mills*, 353 U.S. at 472 (Frankfurter, J., dissenting).

131. Cross, *supra* note 118, at 1232.

132. See, e.g., *Lincoln Mills*, 353 U.S. at 472 (Frankfurter, J., dissenting) (“[T]he trustee’s right to sue might be challenged on obviously federal grounds—absence of bankruptcy or irregularity of the trustee’s appointment or of the bankruptcy proceedings. So viewed, this type of litigation implicates a potential federal question.” (citation omitted)).

133. See, e.g., Cross, *supra* note 118, at 1237 (“[T]he bankruptcy jurisdiction statutes . . . do not fit neatly within current theories of ancillary jurisdiction.”); *id.* at 1240 (“Bankruptcy jurisdiction fails the *Gibbs* . . . test.”); Galligan, *supra* note 125, at 36–41 (detailing myriad difficulties with the ancillary jurisdiction account of “related to” bankruptcy jurisdiction).

134. *Gibbs*, 383 U.S. at 725.

135. Cross, *supra* note 118, at 1240.

136. Young, *supra* note 97, at 1783–84.

137. See *supra* text accompanying notes 131–132.

138. See Galligan, *supra* note 125, at 34.

139. Young, *supra* note 97, at 1783; see also Cross, *supra* note 118, at 1232 (“The trustee is not a party to a significant number of the proceedings that arise in bankruptcy.”).

either of these categories of claims, since the battery of questions relating to the legitimacy or capacity of the bankruptcy trustee would not be present.¹⁴⁰

My point, of course, is not that our established practice in connection with bankruptcy jurisdiction is constitutionally infirm. Nor is it that the theories alluded to by Justice Frankfurter and subsequently elaborated upon by scholars are necessarily unsound. The point, rather, is that it takes considerable effort to fit “related to” bankruptcy jurisdiction into the enumeration of powers in Article III. It can be done, but only through construction of an entirely new account of supplemental jurisdiction or transformation of the original ingredient theory of arising under jurisdiction (which is itself less than satisfying¹⁴¹) into something unrecognizable.

3. Tidewater

In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,¹⁴² the Supreme Court considered the constitutionality of a 1940 amendment to the federal diversity statute. The amendment extended federal diversity jurisdiction to suits “between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory.”¹⁴³ The plaintiff in the *Tidewater* litigation, a D.C. corporation, relied on this provision as the predicate for subject matter jurisdiction when it sued the National Mutual Insurance Company, a Virginia corporation, in federal court. The Fourth Circuit determined that Article III, Section 2’s Diversity Clause does not authorize the exercise of federal jurisdiction in suits pitting a citizen of a state against a citizen of the District of Columbia.¹⁴⁴ The difficulty lay in the fact that the Diversity Clause authorizes Congress to confer jurisdiction on the federal courts in “Controversies . . . between Citizens of different States,”¹⁴⁵ and the District of Columbia is not a state.¹⁴⁶ Accordingly, the court of appeals deemed the amendment unconstitutional.¹⁴⁷

The Supreme Court reversed under a rather bizarre set of circumstances. Five Justices voted to uphold the statute. But, as I explain in detail immedi-

140. Brubaker, *supra* note 129, at 830 (“*Osborn*’s original federal ingredient theory simply cannot be stretched to reach . . . third-party claims . . .”).

141. *See supra* text accompanying notes 111–115.

142. 337 U.S. 582 (1949).

143. Act of April 20, 1940, ch. 117, 54 Stat. 143. Diversity jurisdiction was established by statute through the Judiciary Act of 1789. That statute authorized the federal courts to hear suits “between a citizen of the State where the suit is brought, and a citizen of another State.” Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The 1940 amendment is now codified at 28 U.S.C. § 1332(e), which provides that “[t]he word ‘States’, as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.” 28 U.S.C. § 1332(e) (2006).

144. *See Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 165 F.2d 531, 536 (4th Cir. 1948).

145. U.S. CONST. art. III, § 2.

146. *But see infra* notes 152, 156–157 and accompanying text (discussing Justice Rutledge’s opinion, which concludes that District of Columbia citizens qualify as citizens of a “state” for purposes of the Constitution’s Diversity Clause).

147. *Tidewater*, 165 F.2d at 536.

ately below, three (Jackson, Burton, and Black) endorsed a theory that was explicitly disclaimed by the other six Justices,¹⁴⁸ while two (Rutledge and Murphy) advanced an alternative theory that was explicitly rejected by the other seven.¹⁴⁹ Hence, the constitutionality of the 1940 amendment to the diversity statute stands on the shoulders of two jurisdictional theories that were expressly repudiated by substantial majorities of the Justices.

Justice Jackson's plurality opinion takes the position that Congress may confer jurisdiction on the federal courts in suits involving subject matter or parties that fall within Congress's Article I powers, regardless of whether such cases can be located within the list of cases enumerated in Article III.¹⁵⁰ (In this respect, the Jackson theory is reminiscent of the "outside-the-enumeration" areas of Article I power explored in Part I.A.) Because Congress is empowered under Article I to enact legislation concerning the District of Columbia,¹⁵¹ it could, in Justice Jackson's view, confer jurisdiction on the federal courts in cases in which a citizen of the District is a party, without regard to whether such suits satisfy the requirements of Article III's Diversity Clause. Justice Rutledge's concurring opinion, meanwhile, takes the position that considerations of fairness require the courts to construe the term "state," as it is deployed in the Diversity Clause, to include the District of Columbia.¹⁵²

I believe Justice Jackson's theory of federal jurisdiction is sound. But my defense of the Jackson view can wait until Part III. For present purposes, I wish to focus on two aspects of the *Tidewater* decision. First, while it is remarkable that three members of the Court took the position that federal court jurisdiction outside of Article III is constitutionally permitted, the case is typically cited for the illegitimacy of that proposition and the soundness of the strict enumeration theory.¹⁵³ Given the tally of votes, this is entirely appropriate. Despite Justice Jackson's "apostasy"¹⁵⁴—or, more precisely, because of the manner in which a majority of the Justices reacted to it—*Tidewater* ultimately reflects an orthodox view of the Article III enumeration.

Second, in keeping with my broader effort in this section to demonstrate the lengths to which the Court has been willing to go to avoid enforcing the enumeration of powers in Article III, Section 2, it is worth pausing for a moment over Justice Rutledge's opinion. That opinion manages simultaneously to profess adherence to the strict enumeration view of

148. *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 606–17 (1949) (Rutledge, J., concurring); *id.* at 626–45 (Vinson, C.J., dissenting); *id.* at 646–52 (Frankfurter, J., dissenting).

149. *Id.* at 584–88 (plurality opinion); *id.* at 645–46 (Vinson, C.J., dissenting); *id.* at 652–55 (Frankfurter, J., dissenting).

150. *Id.* at 600 (plurality opinion) (“[W]here Congress in the exercise of its powers under Art. I finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concept of the justiciable, it may open the regular federal courts to them regardless of lack of diversity of citizenship.”).

151. U.S. CONST. art. I, § 8, cls. 17–18.

152. *Tidewater*, 337 U.S. at 625–26 (Rutledge, J., concurring).

153. See, e.g., Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 244 n.116 (1990); Rosenberg, *supra* note 97, at 981.

154. See *supra* note 96 and accompanying text.

Article III¹⁵⁵ and to argue in favor of upholding the statute under review. But it does so only by reaching the genuinely staggering conclusion that, for purposes of Article III, Section 2, the District of Columbia is a “State.”¹⁵⁶ To be sure, there is great force to Justice Rutledge’s claim that denying District citizens access to federal court on the same terms as all other U.S. citizens is an act of “purposeless and indefensible . . . discrimination.”¹⁵⁷ And the Court has made interpretive moves no less jarring than Rutledge’s in other circumstances where it was necessary to prevent discrimination, including in *Bolling v. Sharpe*—a case that also raised the question whether the District ought to be treated the same as the states for constitutional purposes, and that is nothing short of a sacred cow in our constitutional culture.¹⁵⁸ Nevertheless, this does nothing to diminish the audacity of Rutledge’s interpretive move. His opinion preserves the integrity of the Article III enumeration, but only through an exercise in blatant textual alchemy.¹⁵⁹

4. LMRA § 301 and the Lincoln Mills Case

In *Textile Workers Union v. Lincoln Mills*,¹⁶⁰ the Supreme Court considered the constitutionality of § 301(a) of the Labor Management Relations Act.¹⁶¹ That statute provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting [interstate] commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.¹⁶²

This statute is constitutionally suspect because it provides no obvious basis for federal arising under jurisdiction in the covered cases—neither the LMRA nor any other federal statute supplies a body of contract law to gov-

155. *Tidewater*, 337 U.S. at 607 (Rutledge, J., concurring).

156. *Id.* at 605 (“[T]here is no real escape from deciding what the word ‘State’ as used in Article III, § 2 of the Constitution means.”).

157. *Id.* at 625.

158. See *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (deeming the segregation of schools by race in the District of Columbia to be violative of what we now commonly characterize as the “equal protection component” of the Fifth Amendment’s Due Process Clause). For a provocative discussion of the relationship between *Bolling*, *Tidewater*, and a contemporary debate relating to the status of District citizens, see Richard Primus, *Constitutional Expectations* (FORTHCOMING MICH. L. REV. 2010).

159. To be clear, Justice Rutledge did not suggest that the District be treated as a “State” for all purposes. He was not suggesting, for example, that the District is entitled to representation in the Senate. Still, even confined to Article III’s deployment of the term “State,” Rutledge’s reading is plenty striking. At the very least, it requires that the foundational term “State” be understood in different ways in different sections of the Constitution.

160. 353 U.S. 448 (1957).

161. Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (2006).

162. *Id.*

ern the relevant disputes—and, it expressly extends the reach of federal court jurisdiction to cases in which diversity will not lie. Hence, the statute appears to authorize the exercise of federal jurisdiction in suits between non-diverse parties that are to be governed by state law, and it is of course difficult to see how such suits can be channeled into the federal courts without running afoul of Article III, Section 2.

The majority in *Lincoln Mills* evaded the constitutional difficulty by construing § 301(a) as implicit authorization for the federal courts to craft a body of common law to govern the enforcement of collective bargaining agreements.¹⁶³ Because the covered suits were to be governed by federal law, they fell uncontroversially within the federal courts' arising under jurisdiction, and the constitutional problem evaporated.¹⁶⁴ Two concurring Justices, meanwhile (Burton and Harlan), determined that "the constitutionality of § 301 can be upheld as a congressional grant to Federal District Courts of what has been called 'protective jurisdiction.'" ¹⁶⁵ There is little to say about this concurring opinion since it does not bother to explain what the theory of protective jurisdiction is, much less explore the constitutional difficulties it raises.¹⁶⁶ For present purposes, I wish to focus on the analysis in the majority opinion, which relies on a dubious construction of § 301.

To begin with, LMRA § 301 says nothing at all about federal law governing the relevant suits,¹⁶⁷ nor does it explicitly authorize the federal courts to fashion such law on their own. Moreover, as Justice Frankfurter took pains to point out in his dissenting opinion in *Lincoln Mills*, the legislative history of the LMRA (and of its predecessor, the Case Bill) provides scant support for the majority's reading of the statute.¹⁶⁸ The leading scholarly commentary on the *Lincoln Mills* case (and on § 301 generally) reaches the same conclusion,¹⁶⁹ and, indeed, the

163. *Lincoln Mills*, 353 U.S. at 450–51, 456–57.

164. See Bickel & Wellington, *supra* note 10, at 7 ("If there is a federal law of labor contracts, there is a law for arising under.")

165. *Lincoln Mills*, 353 U.S. at 460 (Burton, J., concurring).

166. I will examine protective jurisdiction theories in detail in Part IV.

167. See Edward B. Miller & Willis S. Ryzar, *Suits By and Against Labor Organizations Under the National Labor Relations Act*, 1955 U. ILL. L.F. 101, 103–07 (assessing the constitutionality of § 301(a) and noting that "Congress creates no substantive rights" through the statute); Donald H. Wollett & Harry H. Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445, 473 (1955) ("[T]he language of Section 301(a) merely provides that suit may be brought in a federal district court. It makes no reference to federal substantive law.")

168. 353 U.S. at 462 (Frankfurter, J., dissenting).

169. See Bickel & Wellington, *supra* note 10, at 19; Wollett & Wellington, *supra* note 167, at 472. I don't mean to suggest that there is *no* support for the majority's view in the legislative history of the LMRA. There is. In particular, there is some evidence that Senator Taft believed that cases arising under § 301 would be governed by federal law. See *Labor Relations Program: Hearings on S. 55 and S.J. Res. 22 Before the Comm. on Labor and Pub. Welfare*, 80th Cong. 57 (1947). But these bits of evidence have failed to persuade most observers that the *Lincoln Mills* majority has the better of the argument on this score. But see James E. Pfander, *Judicial Purpose and the Scholarly Process: The Lincoln Mills Case*, 69 WASH. U. L.Q. 243, 287–309 (1991) (mining the legislative history of the Taft-Hartley Act in an effort to resuscitate the reading of § 301 advanced by the *Lincoln Mills* majority).

Lincoln Mills majority acknowledged that the relevant legislative history is “cloudy and confusing.”¹⁷⁰

Notably, the Court’s reading of § 301 entails a significant transfer of authority from the states to the federal government, and it invites the federal courts, with limited statutory guidance, to create a body of common law to govern the relevant litigation. The notion that Congress intended so sweeping an alteration in the established balance of power between the federal government and the states and to delegate extraordinary lawmaking authority to the courts, and that it did these things without saying so explicitly and without leaving behind a clearer legislative record, is exceedingly difficult to swallow.¹⁷¹

For these reasons and others, the *Lincoln Mills* decision has been a target of sharp scholarly criticism.¹⁷² Professor Pfander summed up the state of play as follows:

Doubts raised by [Justice] Douglas’s discursive opinion and Frankfurter’s pointed attack continue to inform the attitudes of legal scholars toward the legitimacy of the Court’s formulation of federal common law under section 301. Those who commented upon *Lincoln Mills* at the time it came down generally agreed with Frankfurter that the 80th Congress had failed to specify that it meant the federal courts to apply federal law to the collective labor agreement. . . . In recent years, leading texts and law review articles have continued to treat the judicial role under section 301 as one that Douglas conferred upon the Court by fiat rather than one he discovered in the statute.¹⁷³

It is not necessary to my argument to demonstrate the correctness of what Pfander here describes as the dominant scholarly perspective on *Lincoln Mills*. It suffices for me simply to point out that this *is* the dominant view,¹⁷⁴ and to emphasize that the *Lincoln Mills* Court managed to dodge the constitutional question seemingly posed by § 301(a) of the LMRA only by reading that provision to do something that it unmistakably does not say—something that unquestionably constitutes an important shift in the allocation of lawmaking authority between the federal government and the states

170. *Lincoln Mills*, 353 U.S. at 452.

171. See Bickel & Wellington, *supra* note 10, at 8 (taking note of “the modern American doctrine which refuses to impute to Congress the casual intention to make vast and far-reaching changes in existing statutory or common law, especially if the effect is an important alteration in the federal balance,” and explaining that “[s]uch is most certainly the effect of section 301 if it is read to create a body of substantive federal law”).

172. See *id.* at 6 (“The disposition [in *Lincoln Mills*] was virtually without ‘opinion,’ if by opinion we mean rationally articulated grounds of decision.”); Charles O. Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 641 (1959) (“Justice Douglas did not offer much explanatory legal theory. He saw where he wanted to go and knew he would get there if he could get the votes of four of his colleagues . . .”).

173. Pfander, *supra* note 169, at 245–46 (footnotes omitted).

174. The notable dissenting voices are those of Professors Pfander and Shapiro. See *id.*; see also David L. Shapiro, *The Story of Lincoln Mills: Jurisdiction and the Source of Law*, in *Federal Courts Stories* 389, 401–04 (2010); David L. Shapiro, *Of Institutions and Decisions*, 22 STAN. L. REV. 657, 664 (1970).

and that invites the federal courts to embark on a far-reaching project of common law-making with scant congressional guidance. Here too, then, the enumeration of powers in Article III, Section 2 appears to have survived intact, but only by way of a rather dramatic interpretive gesture on the part of the Court.

5. *The FSIA and the Verlinden Case*

*Verlinden, B.V. v. Central Bank of Nigeria*¹⁷⁵ involved the constitutionality of the jurisdictional provisions of the Foreign Sovereign Immunities Act. That statute, 28 U.S.C. § 1330(a), provides for federal court jurisdiction “of any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity”¹⁷⁶ Where the plaintiff in such a suit is a citizen of a U.S. state, the exercise of federal court jurisdiction is constitutionally uncontroversial; Article III, Section 2 explicitly allows for federal jurisdiction in cases pitting a state citizen against a foreign state.¹⁷⁷ Where, however, the plaintiff in a suit against a foreign sovereign is a foreign citizen (as was the case in *Verlinden*), and the suit is to be governed by state or international law, it is considerably more difficult to identify a textual foundation for the exercise of federal judicial power.

The *Verlinden* Court nonetheless upheld the application of § 1330 to cases involving foreign plaintiffs. It determined that all suits filed against foreign sovereigns under this provision are cases “arising under” federal law within the meaning of Article III, Section 2. “[A] suit against a foreign state under [the FSIA],” the Court held, “necessarily raises questions of substantive federal law at the very outset.”¹⁷⁸ The Court explained:

The [FSIA] must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a). At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act.¹⁷⁹

Having determined that a question of federal law is unavoidably tucked into every case in which a plaintiff invokes § 1330, the Court had little difficulty concluding that such suits “‘arise[] under’ federal law, as that term is used in Art. III.”¹⁸⁰

175. 461 U.S. 480 (1983).

176. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330(a) (2006).

177. U.S. CONST. art. III, § 2 (extending the judicial power of the United States to “Controversies between . . . a State, or the Citizens thereof, and foreign States”).

178. *Verlinden*, 461 U.S. at 493.

179. *Id.* at 493–94 (footnote omitted).

180. *Id.* at 493.

Here I wish to be more pointed in characterizing the limitations of the Court's reasoning. The problem with the Justices' determination that the FSIA "must be applied by the district courts in *every* action against a foreign sovereign"¹⁸¹ is that it isn't true. As one commentator has explained, "In any given case it may be so clear that a foreign state is not entitled to immunity under the FSIA's immunity provisions that a foreign state would be highly unlikely to raise a claim of immunity. . . . If so, then the existence of an immunity issue in any given case would be a possibility, not a certainty."¹⁸² It is no answer to suggest, as the *Verlinden* Court did,¹⁸³ that the immunity question is part of every case under § 1330 because the issue is one of federal subject matter jurisdiction, and such questions must be raised *sua sponte* by the federal courts. For while it is true that objections to the exercise of federal subject matter jurisdiction are generally nonwaivable, the FSIA makes clear by its express terms that this is not so of foreign sovereign immunity, which is amenable to both explicit and implied waiver.¹⁸⁴ To take the facts of *Verlinden* itself as an example, if the Nigerian defendant had explicitly waived its immunity from suit in its contract with the plaintiff, then it would be far from certain—indeed, it seems unlikely—that the immunity issue would be raised and decided by the Court.¹⁸⁵ Numerous cases from the lower federal courts confirm that the immunity of a foreign sovereign may be waived through *ex ante* contract,¹⁸⁶ or through simple failure to raise the claim in a responsive pleading.¹⁸⁷ Where this occurs, the suit would not "necessarily raise[]" questions of federal law, and the asserted predicate for federal arising under jurisdiction would collapse.

To be sure, when a foreign sovereign has not waived its immunity through contract, one cannot know, prior to litigation, whether the question of immunity will be raised. It is thus possible that in any such case, the court will be called upon to address a question of federal law. But *Verlinden* explicitly disclaims reliance on the language from *Osborn* suggesting that federal question jurisdiction will lie "over any case or controversy that *might*

181. *Id.* (emphasis added).

182. Vazquez, *supra* note 97, at 1740.

183. *Verlinden*, 461 U.S. at 493 n.20.

184. 28 U.S.C.S § 1605(a) (LexisNexus 2003 & Supp. 2009); *see also* Vazquez, *supra* note 97, at 1741 (emphasizing the waivability of claims of immunity by foreign sovereigns and rejecting the *Verlinden* Court's contention that the issue of immunity is present in every suit against a foreign sovereign).

185. *See* Segall, *supra* note 97, at 381; Vazquez, *supra* note 97, at 1740.

186. *See, e.g.,* Gulf Resources Am., Inc. v. Congo, 370 F.3d 65, 72–74 (D.C. Cir. 2004) (enforcing contractual clause waiving immunity of a foreign sovereign); *Proyecfin de Venez., S.A. v. Banco Indus. de Venez., S.A.*, 760 F.2d 390, 393–94 (2d Cir. 1985) (similar).

187. *See, e.g.,* Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 243 (2d Cir. 1996) (noting that a foreign sovereign may impliedly waive its immunity from suit by "filing a responsive pleading without asserting an immunity defense"); *MCI Telecomms. Corp. v. Alhadhood*, 82 F.3d 658 (5th Cir. 1996) (similar).

call for the application of federal law.”¹⁸⁸ *Verlinden* rests, instead, on the notion that a question of federal law *necessarily* arises in every case falling within § 1330(a) and that such cases “do[] not involve a mere speculative possibility that a federal question may arise at some point in the proceeding.”¹⁸⁹ Again, because of the possibilities of explicit waiver through contract and implied waiver over the course of litigation, this claim simply isn’t true.

Verlinden thus fits snugly into the pattern developed by the Court over its long history dealing with statutes that push the limits of Article III. The Court insists that the enumeration of powers in Article III, Section 2 constitutes a robust and enforceable limit on congressional authority,¹⁹⁰ but it takes pains to avoid having to enforce that limit.

III. FEDERAL COURT JURISDICTION OUTSIDE THE ENUMERATION

Having surveyed the key precedents relating to the constitutional limits on Congress’s authority to channel cases into the federal courts, we are now better positioned to assess the standard account of how these limits operate. As noted in Part II.A, the standard account holds that Article III, Section 2 supplies an exhaustive list of the cases over which the federal courts may permissibly exercise jurisdiction. And it suggests that were Congress to enact a statute establishing federal court jurisdiction over cases falling outside the list enumerated in that Section, the courts would deem the statute unconstitutional and strike it down.¹⁹¹ The cases examined in Part II.B, meanwhile, are typically treated as crucial data points supporting the standard view. Though none actually invalidates a jurisdictional enactment on Article III grounds, the cases provide some of the most widely cited expressions of the strict enumeration theory, and all take as a premise the inviolability of Article III, Section 2.

But if one considers this body of case law in the aggregate, a very different picture of Article III emerges. For what is most striking about these cases is just how much *work* it takes to fit the relevant congressional enactments

188. *Verlinden*, 461 U.S. at 492 (emphasis added); see also *supra* note 110 and accompanying text.

189. *Verlinden*, 461 U.S. at 493.

190. *Id.* at 491.

191. I do not wish to overstate the point. As noted earlier, read for all it is worth, the *Osborn* decision arguably renders Congress’s authority to channel cases into the federal courts virtually unlimited, and this is structurally incompatible with the enumeration of powers in Article III, Section 2. See *supra* note 110. To the extent this is true, and to the extent *Osborn* nonetheless remains one of the pillars of conventional thinking about the constitutional limits on federal subject matter jurisdiction, it is appropriate to say that the standard account of the law in this area has, in a way, assimilated the erosion of the Article III enumeration. Still, the evidence on the whole overwhelmingly suggests our legal culture’s continued commitment to the strict enumeration view of Article III. See *supra* Part II.A. *Osborn*’s failure to dislodge this view may be attributable to the fact that an alternative, narrower account of the *Osborn* decision is available. See *supra* note 111 (discussing Professor Bellia’s understanding of the *Osborn* decision). Or perhaps it is because the Supreme Court itself has raised doubts as to the soundness of the broad reading of *Osborn*. *Verlinden*, 461 U.S. at 492 (noting that the breadth of the *Osborn* rule “has been questioned”).

within the enumeration in Article III.¹⁹² As we have seen, the cases are witness to (among other interpretive gymnastics) the stretching of constitutional and statutory text, highly selective attention to legislative history, and the reshaping or even abandonment of long-established doctrine.¹⁹³ There is always, it would seem, another epicycle at the ready.

But just beneath the surface of the Court's labored conception of Article III lies a far simpler account of the constitutional limits on federal subject matter jurisdiction: The enumeration-based constraints on Congress's power to channel cases into the federal courts are exceedingly weak. Congress has broad discretion to channel cases into the federal courts when it believes it would be in the national interest to do so, and the Justices can generally be relied upon to find a way, however contrived, to fit jurisdictional enactments within the bounds of Article III, Section 2.

This is not to say that the enumeration of powers in Article III does *nothing* to rein in congressional excess when it comes to the establishment of federal court jurisdiction. For despite the permissive approach reflected in the case law, it seems likely that a truly radical departure from established jurisdictional tradition—imagine a statute conferring jurisdiction on the federal courts in “all cases affecting interstate commerce”—would be struck down by the Court and that the Court would point to, among other things, the Article III enumeration, and the federalism-based presuppositions underlying it, as justification for doing so.

Still, for two reasons, I think it makes sense to regard congressional authority to set the subject matter jurisdiction of the federal courts as near plenary. First, the possibility of Congress actually enacting a tradition-shattering measure of this sort seems genuinely fanciful.¹⁹⁴ Even if it is possible to dream up hypothetical jurisdictional enactments that we think

192. Jurisdictional enactments other than those addressed in these cases pose difficult questions from the perspective of the Article III enumeration. Specifically, jurisdictional components of the Clean Air Act, the Air Transportation Safety and System Stabilization Act, the Diplomatic Relations Act, and the Alien Tort Statute have all been identified by commentators as something of a tight fit for purposes of Article III. *See, e.g.*, RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 772–73 (6th ed. 2009). If these are to be brought within the limits of Article III, Section 2, still more interpretive stretching is required. *See* Young, *supra* note 97, at 1787–93 (attempting to defend the constitutionality of these jurisdictional enactments under Article III).

193. The Court's willingness to overlook (or, really, overturn) established precedent in order to accommodate jurisdictional enactments designed to advance important federal regulatory interests was also on display in connection with the issue of corporate citizenship. Thus, the Court held, in *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), that corporations did not count as state “citizens” for purposes of the Diversity Clause of the Constitution. As a leading treatise explains, however, “[t]he increased use of the corporate form as a means of doing business, the appearance of entities engaged in interstate activities, and the desire of corporations to resort to the federal courts proved inexorable.” WRIGHT ET AL., *supra* note 4, § 3623 (3d ed. 2009), and in 1844 the Court relented and overturned *Deveaux*, *see* *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844).

194. Of course, the extreme improbability of Congress enacting a jurisdictional provision of this sort is almost certainly a function of, among other things, federal legislators' sense of obligation to work within the text of Article III. In this way, the Constitution's enumeration of powers disciplines Congress's behavior with respect to the establishment of federal jurisdiction even without the specter of searching judicial review hovering over legislators' heads.

the Court simply would not tolerate, the sheer improbability of this coming to pass leaves intact my contention that enumeration-based constraints are virtually nonexistent in this context. Second, even the supposition that the Court would invalidate a jurisdictional statute that swept into federal court “all cases affecting interstate commerce” cannot be advanced with certainty. It is difficult to imagine what would have to come to pass for Congress even to consider enacting a statute of this sort (something quite serious, I would think). A world in which such a statute is even possible would be one full of new problems and possibilities (constitutional and otherwise). And this makes it difficult to speak with any measure of confidence about what the Court would do if called upon to exercise judicial review in such circumstances.

This means that our experiences in connection with the enumerations in Articles I and III of the Constitution are far more similar than a comparison of the conventional wisdom in these two contexts would suggest. This is reflected not only in the doctrinal bottom lines (*i.e.*, neither enumeration has much bite); it is also evident from the fact that the interpretive strategies deployed by the Court in these two bodies of case law run along parallel tracks. *Raich* and *Osborn*, for example, signal the Justices’ willingness to stretch and bend particular enumerated powers (the Commerce and Arising Under Clauses, respectively) so that the appearance of fidelity to constitutional text can be maintained even as controversial exercises of federal power are upheld. *Curtiss-Wright* and *Tidewater*, meanwhile, signal the Justices’ willingness, under certain conditions, to abandon the enumeration framework altogether.¹⁹⁵

At some level, the symmetry in the case law makes good sense. For Article III, Section 2, as noted earlier,¹⁹⁶ is properly understood as conferring a species of *legislative* power, even though it (along with the rest of that Article) is generally addressed to the structure and powers of the federal courts. This is so because the judicial power established by Article III is not self-executing.¹⁹⁷ That is, it falls to *Congress* to breathe life into the jurisdictional grants contained in Article III, Section 2 by enacting statutes that actually channel cases into the federal courts. If the Supreme Court were to rigorously enforce the enumeration of powers in Article III, then, it would open up a rift in its treatment of congressional powers conferred by Article I and those conferred by Article III.

To be sure, it does not follow from the fact that the Court has declined to police the Article I enumeration that it must do the same with respect to Article III. There might be reasons to limit Congress’s power to deploy the

195. As the discussion in Part II makes clear, in the Article III context, the stretching of individual enumerated powers is the more prevalent means of justifying Congress’s more controversial jurisdictional enactments. Only *Tidewater* suggests the permissibility of grounding federal court jurisdiction in constitutional provisions outside the Article III enumeration. I will discuss this fact, and its ramifications for the jurisdictional theory I develop here, in Parts III and IV.

196. See *supra* note 4.

197. See, *e.g.*, WRIGHT ET AL., *supra* note 4, § 3601.

federal courts that do not apply when Congress uses other means of achieving its regulatory goals. I will consider this issue in Part III, immediately below. For the time being, however, I wish only to note that the Court's orientation toward congressional power is consistent across these contexts. The Court is no more eager to constrain Congress's power under Article III than it is to keep Congress within the limits of Article I.

In this Part, I defend the jurisdictional vision that silently drives the case law relating to the constitutional limits on federal subject matter jurisdiction. In Part III.A, I describe the textual and structural mechanics of this expansive view of federal jurisdiction and the conception of federalism upon which it rests. I will call this view the "congressional power model," since it posits that the scope of federal authority to channel cases into federal court is coextensive with the scope of Congress's power generally. In Part III.B, I anticipate and respond to potential challenges to this way of thinking about the constitutional limits on federal court jurisdiction.

In addition to supplying a defense of the congressional power model of federal jurisdiction, I will use this section to further explore the parallels between the enumerations in Articles I and III. As we will see, many of the arguments for and against the expansive conception of federal court jurisdiction that I develop here mirror the arguments one finds in the case law and scholarly commentary relating to the enumeration-based limits on federal power under Article I. And this, in turn, makes the divergence in the conventional wisdom relating to the two enumerations all the more puzzling.

A. *The Congressional Power Model of Federal Court Jurisdiction*

1. *The Congressional Power Model: Text and Structure*

The case law examined in Part II.B rests on a congressional power theory of federal jurisdiction.¹⁹⁸ At the core of the theory lies the notion that "[a] grant of jurisdiction is . . . one mode by which the Congress may assert its regulatory powers;"¹⁹⁹ it is "simply one tool at Congress' disposal in effectuating article I interests."²⁰⁰ From this perspective, the legitimacy of a

198. As Part II makes clear, the cases do this without saying so. Justice Jackson's opinion in *Tidewater* is the only one in this line of cases openly to acknowledge that it relies on such a theory; the others typically disclaim this approach, and do so with vigor. As the discussion in Part III indicates, however, the congressional power account better accords with the arc of the case law in this area as a whole.

199. Wechsler, *supra* note 97, at 225.

200. See Rosenberg, *supra* note 97, at 948. One commentator summarized the array of national interests that might be served by the establishment of federal court jurisdiction in state-law cases as follows:

First, Congress may want to protect federal instrumentalities from state court hostility. Second, Congress may want a certain set of obligations to be litigated in a more uniform setting than the fifty state court systems. Third, Congress may believe that certain federal procedures . . . may further national interests even though the law to be applied in such cases is state law.

Segall, *supra* note 97, at 367 (footnotes omitted); see also Rosenberg, *supra* note 97, at 949–50 (similar).

jurisdictional enactment turns on whether the parties or transactions it regulates are proper subjects of Congress's attention. And this, of course, is determined by reference to the full sweep of congressional power, not the categories delineated in Article III.²⁰¹

From a textual perspective, jurisdictional statutes may thus be characterized as straightforward exercises of particular congressional powers. The conferral of jurisdiction on the federal courts in suits against foreign sovereigns, for example, might be justified by reference to Article I, Section 8, Clause 3, which authorizes Congress to regulate commerce with foreign nations; or, in some circumstances, it might be understood as an exercise of Congress's power, granted by Article I, Section 8, Clause 10, to define offenses against the law of nations.²⁰² The establishment of federal court jurisdiction in suits to which a citizen of the District of Columbia is a party might be rooted in Congress's power "[t]o exercise exclusive Legislation in all Cases" concerning the District.²⁰³ And the conferral of jurisdiction on the federal courts in cases to which the U.S. Bank is a party might be classified as an exercise of Congress's power to regulate interstate and foreign commerce.²⁰⁴ In each of these cases, moreover, the Necessary and Proper Clause supplies additional textual support for Congress's jurisdiction-conferring authority (that is, Congress might deem the establishment of federal court

201. I suggested earlier, see *supra* n.89, that the Supreme Court's decisions in *Mesa v. California* and *Hodgson v. Bowerbank*, both of which advanced narrowing constructions of federal jurisdictional statutes in an apparent effort to avoid running afoul of the Article III enumeration, can be understood in terms consistent with the congressional power model. This is because it is at least arguable that the jurisdictional statutes at issue in those cases did not serve any legitimate federal interest. In other words, the cases might be better understood in Article I terms, rather than Article III terms. *Mesa* readily lends itself to such a reading. In that case, the Court rejected the government's reading of the federal officer removal statute, 28 U.S.C. § 1442, which would have allowed for removal to federal court in any suit against a federal officer for actions taken in the course and scope of that officer's employment (without regard to whether the defendant raised a defense sounding in federal law). In so doing, the Court stated, "[W]e do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged." *Mesa v. California*, 489 U.S. 121, 137 (1989). From the perspective of the congressional power model, the Court's reference to the absence of "any federal interest" in the relevant cases is particularly provocative. Without a federal interest at stake, there is no foundation under Article I for federal action. In *Hodgson*, meanwhile, the Court declined to read Section 11 of the Judiciary Act of 1789 as extending federal court jurisdiction to every suit to which an alien is a party. *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809); see also *Montalet v. Murray*, 8 U.S. (4 Cranch) 46 (1807) (same); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800) (same). The Court intimated, rather, that for alienage jurisdiction to lie, an alien and a U.S. citizen must be pitted against one another. In contrast to *Mesa*, nothing on the face of the *Hodgson* opinion lends support to the congressional power model of federal jurisdiction. The Court's cryptic four-sentence opinion speaks of avoiding an Article III difficulty, not of any problem with congressional power under Article I. Still, it is far from obvious that there is a federal interest in play when one alien sues another in a domestic court. And the holding of *Hodgson*, if not the rhetoric, can be read as reinforcing the notion that the touchstone of federal judicial power in the presence of some legitimate federal interest.

202. See *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 493 n.19 (1983).

203. U.S. CONST. art. I, § 8, cl. 17. This argument, as noted earlier, was pressed by Justice Jackson in *Tidewater*. See *supra* text accompanying notes 150–151.

204. U.S. CONST. art. I, § 8, cl. 3.

jurisdiction necessary and proper to the accomplishment of legitimate federal objectives).²⁰⁵

Of course this account of federal judicial power and constitutional text runs headlong into the doctrine of enumerated powers. As noted in connection with Article I, the classic conception of the enumerated powers doctrine has two key components. First, it requires that exercises of federal authority be traceable to the list of powers supplied in the text of the Constitution. Second, it demands that Congress's power along the relevant dimension be subject to limits.²⁰⁶ Each of these directives has application to Article III, Section 2. Thus, under the strict enumeration view, Article III, Section 2 is to be construed as an exhaustive list of the set of circumstances in which Congress may channel cases into the federal courts; exercises of federal court jurisdiction that cannot be grounded in that section are necessarily invalid. In addition, the strict enumeration view dictates that the framers' decision to specify particular categories of cases to which the judicial power of the United States extends signals that there must be some limit to the reach of federal court jurisdiction.²⁰⁷ Here too, why would one provide a detailed list when an unbounded grant is intended?

It should immediately be evident that each strand of the enumerated powers doctrine poses difficulties for the congressional power model. By premising federal jurisdiction on some combination of particular Article I powers and the Necessary and Proper Clause, the congressional power model sanctions an end-run around the requirement that exercises of federal jurisdiction be grounded in the text.²⁰⁸ And, by linking the scope of

205. *Id.* cl. 18. Justice Jackson's opinion in *Tidewater* relies explicitly on the Necessary and Proper Clause as a source of congressional authority to establish federal court jurisdiction in the cases at issue. See *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 589, 603 (1949) (plurality opinion).

206. See *supra* text accompanying notes 14–17.

207. Numerous participants in the public debates over the ratification of the Constitution expressed concern that federal court jurisdiction would ultimately prove limitless and/or would ultimately render the state courts unnecessary. *E.g.*, Letter from the *Federal Farmer No. 18* (Jan. 25, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 346–47 (Herbert J. Storing with Murray Dry eds., 1981); Essays of *Brutus No. 12*, N.Y.J., Feb. 7, 1788, reprinted in THE COMPLETE ANTI-FEDERALIST, *supra*, at 427; 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonthan Elliot ed., 2d ed. 1836) 521, 523 [hereinafter ELLIOT'S DEBATES] (Mason); 4 *id.* at 137, 164 (Spencer). The nationalist camp, as one would expect, pointed to the enumeration as evidence that such power would be limited. See THE FEDERALIST No. 83, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“In like manner the judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.”); see also 3 ELLIOT'S DEBATES, *supra*, at 553 (Marshall) (explaining that the heads of jurisdiction specified in Article III do not extend so far as to displace the state courts).

208. Justice Rutledge expressed the point colorfully in his concurring opinion in *Tidewater*: “If [Article III is] correctly read . . . as preventing Congress from unlocking the courthouse door to citizens of the District, it seems past belief that Article I was designed to enable Congress to pick the lock.” *Tidewater*, 337 U.S. at 607–08 (Rutledge, J., concurring). Of course, the Article I powers (necessary and proper included) are enumerated in the text of the Constitution. But the question, for purposes of enumerated powers doctrine, is whether congressional authority is drawn from the text

Congress's jurisdiction-conferring authority to the full measure of its constitutional powers (which, we have noted, are breathtakingly expansive²⁰⁹), the congressional power model appears to transgress the requirement that federal court jurisdiction ultimately be subject to limitation.

But these difficulties are not conclusive of the legitimacy of the congressional power model. For, as the discussion in Part I makes clear, this approach toward constitutional text and structure is hardly foreign to our established practice. The immigration and foreign affairs cases demonstrate the Court's willingness to sanction the exercise of congressional power outside of Article I's enumeration framework;²¹⁰ and the Commerce and Spending Clause cases evince the Court's willingness effectively to abandon the notion that enumerated power means limited power.²¹¹ To be sure, it does not follow from the fact that the Court has permitted Congress effectively to steamroll the Article I enumeration that the Article III enumeration must likewise be enfeebled. But our Article I practice does suggest that the strict enumeration view does not supply a knock-down argument. Where there are sufficiently good reasons for doing so, our practice tells us, significant departures from the enumerated powers framework are permitted.²¹²

2. *Why Abandon Article III?*

While there are important analogs in our practice to the textual and structural mechanics of the congressional power model, the obvious tension between this model and the enumerated powers scheme suffices to raise the question whether it qualifies as an improvement over the interpretive approach manifest in the cases examined in Part II.B. The question is especially pointed in light of my earlier emphasis on the interpretive stretching that characterizes those cases. Given that the congressional power model is conceptually vexed in its own way, it is sensible to wonder whether it offers real benefits over the approach we see in the case law.

Moreover, most of the cases considered in Part II.B are conceptually analogous to the Commerce and Spending Clause cases considered in Part

of the *relevant* enumeration. And when it comes to federal court jurisdiction, the relevant enumeration is located in Article III, Section 2.

209. See *supra* Part I.

210. See *supra* Section I.A.

211. See *supra* Section I.B.

212. By relying on the Article I story to demonstrate that the textual and structural features of the congressional power model of federal jurisdiction are not foreign to our established practice, I invite the criticism that I must defend or justify our practice in connection with Article I before I can rely on it to do real work here. But the elements of our Article I practice on which I focus attention—the vast commerce and spending powers, federal authority to regulate immigration, and foreign affairs—are now deeply entrenched in our constitutional system. Along each of these dimensions, we are not going back. And this means that, to an extent, the key textual and structural moves that have been used by the courts to underwrite the significant expansion of federal authority have themselves achieved a measure of interpretive regularity. And this, in turn, means that one cannot dismiss the congressional power model of federal jurisdiction out of hand on the ground that it relies on some kind of interpretive impossibility. This is true regardless of whether one approves of what has become of Article I.

I—in those cases, we witness the Court stretching an enumerated power to accommodate congressional enactments that, at first (and perhaps second) glance, appear to fall outside the limits of the relevant clause. Thus, *Osborn*, the bankruptcy theories, and *Verlinden* all play with the Arising Under Clause in order to find textual support for the jurisdictional statutes at issue. Justice Rutledge's opinion in *Tidewater*, meanwhile, does the same with the Diversity Clause.²¹³ The jurisdictional model advanced here, however, suggests that Congress may work *outside* the enumerated powers scheme altogether. Only Justice Jackson's *Tidewater* opinion provides support for this approach in connection with Article III and, the immigration and foreign affairs cases notwithstanding, this would seem the more radical interpretive move. If it is possible, then, to stretch the powers enumerated in Article III, Section 2 to provide support for the diverse array of jurisdictional statutes reviewed in the applicable case law, why adopt a theory that deviates from deeply ingrained traditions of clause-bound justification for congressional action?

Let us note, first, the deep irony in the suggestion that we reject the congressional power model of federal jurisdiction because it rests on an awkward reading of Article III. The alternative is to swallow the endless chain of embarrassing claims marked by the case law examined in Part II.B. Hence, the choice between the methodology on display in these cases and the congressional power model is not one between ho-hum, vanilla constitutional interpretation on the one hand, and Katy-bar-the-door, anything-goes revisionism on the other. We're stuck with awkward interpretations. But we have a choice: we can buy them wholesale or retail. And wholesale, I think, comes cheaper. While the congressional power model supplies a single theory to account for the constitutionality of the statutes at issue, the cases indulge an ever-shifting array of interpretive contrivances. And who is to say what exercise in textual jujitsu will be demanded next?

Moreover, the congressional power model has the virtue of bringing the constitutional and political justifications for the relevant jurisdictional enactments into alignment. Under the congressional power model, federal jurisdiction may be established in cases to which the U.S. Bank is a party for the very reason federal jurisdiction *was* established in cases to which the Bank is a party: there is a federal interest in shielding the Bank from hostile state courts.²¹⁴ Similarly, the congressional power model posits that federal jurisdiction may be established in suits against foreign sovereigns for the very reasons federal jurisdiction *was* established in suits against foreign

213. The Court's about-face on the issue of corporate citizenship and diversity jurisdiction, *see supra* note 193, likewise evinces the Court's willingness to reshape the Diversity Clause to accommodate more expansive federal court jurisdiction. In that scenario, however, the constitutional text is more readily adapted to the relevant cause (understanding corporations to be "citizens" of a state) than is the case in connection with Justice Rutledge's interpretive move (understanding the term "State" to include the District of Columbia). Hence, the corporate citizenship issue is not so much a case of the Court stretching the Diversity Clause itself as it is stretching of the Court's own long established understanding of that Clause.

214. *See supra* note 114 and accompanying text.

sovereigns: there is a federal interest in supplying a relatively uniform body of law in such cases and in protecting foreign sovereigns from potentially hostile state court juries.²¹⁵

Under the Article III approach, in contrast, the relevant jurisdictional statutes are justified on grounds that have little to do with the concerns that impelled Congress to act in each case. Strictly speaking, there may be nothing wrong with this. There are other areas of law in which we eschew motive-based scrutiny of congressional enactments.²¹⁶ Nevertheless, there is something appealing about the fact that the congressional power model does not rely on pretext as the Article III model so often does.

This is not to suggest that lawyers ought to stand up in court and encourage judges to discard these pretexts and ignore Article III altogether when assessing the legitimacy of jurisdictional enactments. But it is one thing for lawyers and judges to call upon familiar tools in the course of their advocacy and opinion-writing (and the stretching of the Article III categories, though consistently awkward, is by now quite familiar), and it is another for students of the law to presume that these are the best tools at our disposal when it comes to making sense of legal doctrine. And as a student of the law, the Article III-based account of the constitutional limits on federal court jurisdiction leaves me cold. I am perfectly comfortable with the notion that we ought to engage in purposive reading of the enumerated heads of jurisdiction in order to advance the goal of empowering Congress to deploy the federal courts in service of the national interest. But we ought not to mistake this endeavor for an effort to identify a set of bona fide constitutional limitations against which we are open-mindedly testing the legitimacy of Congress's jurisdictional output.

Finally, it bears emphasis that the model of federal court jurisdiction developed here resonates with our experience in connection with the enumeration of powers in Article I, and in so doing, it lays the foundation for a consistent, holistic account of the allocation of power between the national government and the states in our federal system. At the core of this account is the notion, highlighted by Dean Kramer, that “[t]here are . . . and always have been, two sides to federalism: not just preserving state authority, but also enabling the federal government to act where national action is desirable.”²¹⁷ The case law relating to the enumeration of powers in Article

215. See H.R. Rep. No. 94-1487, at 32 (1976) (“In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts.”); Vazquez, *supra* note 97, at 1744–45.

216. A famous example—one that involves federal court jurisdiction—is supplied by *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868) (upholding a federal statute that withdrew the Supreme Court’s appellate jurisdiction in certain habeas cases and stating, “We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution . . .”). But see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008) (describing changes in the Supreme Court’s orientation toward purpose-based review of congressional action and emphasizing that such review has become commonplace in modern times).

217. Larry Kramer, *What’s a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the *New Deal*, 46 CASE W. RES. L. REV. 885, 920 (1996).

III, Section 2, no less than that relating to the enumeration in Article I, is driven by the impulse to “enabl[e] the federal government to act where national action is desirable.” The Supreme Court decisions relating to the constitutional limits on federal subject matter jurisdiction obscure this fact, and thereby impede understanding of our federal system.

B. Critiques of the Congressional Power Model

In addition to the formal concerns noted in the previous Section, the congressional power model of federal court jurisdiction might also be criticized in functional terms. Specifically, one might object to the jurisdictional theory developed here on the ground that it rests on an unattractive vision of how power ought to be allocated between state and federal courts. In this Section, I consider two objections of this sort as well as the question whether the congressional power model can be reconciled with the Supreme Court’s approach to limits on congressional power that are drawn from other fragments of Article III.

1. State Control Over State Law

One might take issue with the congressional power model on the ground that by vastly expanding the opportunities for federal court adjudication of state-law claims, it threatens to upset the traditional allocation of authority between federal and state courts.²¹⁸ Professor Young, for example, has criticized theories of protective jurisdiction (which, I have noted, are cousins of the congressional power approach²¹⁹) on the ground that they “threat[en] . . . the state courts’ supremacy as expositors of state law,”²²⁰ and “tend[] to divest the state courts of their authority over state law.”²²¹ This is problematic, he argues, not only because it is an affront to the dignity of the states,²²² but because it drives a wedge between the interpretation of state law and the processes of political control that traditionally attach to it. “It is only the state courts,” Young emphasizes, “that are politically responsible to the state electorate.”²²³

I do not think this concern significantly undermines the case for the congressional power model of federal jurisdiction. To begin with, the claim

218. See Rosenberg, *supra* note 97, at 955.

219. See *supra* note 9. I discuss protective jurisdiction in detail in Part IV.

220. Young, *supra* note 97, at 1800.

221. *Id.* at 1798.

222. *Id.* at 1799.

223. *Id.* at 1801; see also Goldberg-Ambrose, *supra* note 97, at 604 (similar). Of course, states are deprived of some measure of control over the interpretation of their own law through the exercise of federal diversity jurisdiction, supplemental jurisdiction, and the application of their law by sister states when choice of law principles require it. But, as Professors Goldberg and Young have emphasized, these devices do not operate in the same systematic fashion as a protective jurisdiction statute might. See *id.* at 608; Young, *supra* note 97, at 1801–02. And this argument applies with equal force to the congressional power model of jurisdiction I develop here.

that jurisdictional enactments of this sort “divest the state courts of their authority over state law”²²⁴ is significantly overstated. Federal courts are obligated to adhere to the decisions of the states’ highest courts with respect to questions of state law.²²⁵ Hence, when federal court jurisdiction over a set of state-law claims is concurrent with that of the state courts, the states retain control over the ultimate shape of state law through the binding precedent generated by their own high courts. Even when federal jurisdiction over state-law claims is rendered exclusive, the legislative process represents a crucial lever through which states may retain control over the content of their own law. States remain free to “correct” or otherwise respond to unsatisfying federal court decisions by amending state law or supplementing any applicable common law rules with statutory provisions.

Professor Young points out that when a federal court decides a question of state law, there is no opportunity for review of that decision in the state courts. And he notes that while federal judges are required to follow the decisions of a state’s highest court with respect to state-law matters, they are “free to disagree with or simply disregard the jurisprudence of state trial and intermediate appellate courts.”²²⁶ Furthermore, as Professor Goldberg notes, even after a state legislature amends state law in response to a wayward judicial decision, federal judges might construe the new legislation in a manner that runs counter to the legislators’ intention.²²⁷

However, to transform these observations, as Professors Young and Goldberg do, into the stuff of serious federalism-based concern requires one to adopt a cartoonishly sinister image of federal judges. So long as we reject the premise that federal judges are apt to willfully disregard the decisions of state courts and the messages sent through state legislative processes—and I think we should—it is difficult to see the establishment of federal jurisdiction over state-law claims as a serious threat to states’ ultimate control over the content of state law. In the ordinary course of things, we should expect federal judges to act with due regard for their responsibility to adhere to the relevant judgments of a state’s highest court and for the comparative expertise of even intermediate appellate and trial level state judges when it comes to matters of state law.²²⁸ And we should expect them to interpret any amendment to state law—especially one that is obviously triggered by a

224. Young, *supra* note 97, at 1798.

225. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

226. Young, *supra* note 97, at 1800–01.

227. Goldberg-Ambrose, *supra* note 97, at 604.

228. The Supreme Court has emphasized, in a different context, that state court jurisdiction over federal claims does not pose a serious threat to the uniformity of federal law, in part because federal courts would not be bound by state courts’ interpretation of that law and because state judges could be expected to look to federal court precedents for guidance. *See Tafflin v. Levitt*, 493 U.S. 455, 464–65 (1990). The argument I am developing here simply applies this point to federal court jurisdiction over state-law claims, rather than state-court jurisdiction over federal claims. Of course, where state court interpretation of federal law is at issue, the availability of Supreme Court review provides further protection against any state court interference with federal interests, and there is no analogous protection for state interests when federal courts adjudicate state law claims.

prior federal court judgment—in good faith. To be sure, because there is no direct appellate review by state courts over the decisions of federal courts, federal adjudication of state-law claims might render less efficient the process of shaping state law into precisely the form desired by state citizens. But the claim that federal adjudication under these conditions represents a fundamental incursion on state autonomy seems overwrought.

This is not to say that federal court adjudication of state-law claims will have no effect on the shape of state law. Indeed, the whole purpose of establishing federal court jurisdiction over state-law claims is to alter *something* about the way those claims are adjudicated. But it does not follow from this that the establishment of such jurisdiction threatens to divest states of control over their own law in a way that is problematic from a federalism perspective. This is due, in part, to the fact that any distinctively federal gloss on the construction of state law that emerges through federal court intervention is likely to overlap substantially with the national interest that motivates the establishment of federal court jurisdiction in the first place.

To take the statute at issue in *Osborn* as an example, there can be no mistaking that the establishment of federal court jurisdiction in all litigation to which the U.S. Bank is a party threatens to strip the states of some control over state law.²²⁹ But there is little reason to think that federal courts' interpretation of state law in such cases would be inflected with a federal sensibility that somehow undermines state interests except to the extent states might wish to manipulate their law so as to disadvantage the Bank. And, of course, if that is what lies behind the argument for state control over the content of state law, the argument is rather weak.

Moreover, even if there were some reason to worry about a more sweeping alteration in the construction of state law in these cases, it bears emphasis that the relevant jurisdictional provision strips states of control over state law *only in cases to which the Bank is a party*. States retain significant control over their common law of contract or tort (or whatever law might come up in suits against the Bank) through their jurisdiction over analogous claims in suits not involving the Bank. Hence, even allowing for the fact that the channeling of state-law claims into federal court might well be *designed* to modify the way in which state law is applied in the covered cases, it is far from clear that this poses a serious problem for purposes of state autonomy.

All of this assumes, of course, that federal judges will act in good faith when deploying the powers conferred upon them through a grant of jurisdiction over state-law claims. Of course this will not universally be the case. Just as there are circumstances in which Congress might reasonably be concerned that state court adjudication of state-law claims will undermine federal interests,²³⁰ there might also be scenarios in which there is cause to

229. At the time the relevant statute was enacted, the law applicable in such cases would have been characterized not as state law, but "general common law." See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 832 (1824).

230. See *supra* note 114 and accompanying text.

worry that federal judges will muck up state law (willfully or otherwise). But whatever the likelihood that federal judges will disregard statutory and judicial guidance from the states, acknowledging the possibility that this may occur signals only that it is not necessarily costless, from the perspective of state autonomy, to channel state-law claims into the federal courts. This tells us nothing about whether these costs are sufficiently high to outweigh the benefits (viewed from the perspective of national interest) of doing so, and it thereby tees up (but does not resolve) the question of who ought to decide how the jurisdictional balance should be struck.

The Constitution, we have noted, does not conclusively resolve this question directly,²³¹ and it is therefore appropriate to treat the matter as falling within Congress's discretion. It bears emphasis, in this respect, that the question whether state or federal judges are more apt to undermine important government interests through their adjudication of state-law claims is an empirical, politically contingent, and context-specific one that must be answered on the basis of incomplete information. Congress's case-by-case assessment of these matters is likely to supply better answers than we would get were we to treat the Article III enumeration as implicitly rendering conclusive judgment on the question in gross and for all time.

2. Lowering the Barriers to Federal Intrusion

A related, but distinct, objection to the congressional power model of federal court jurisdiction is that it makes it easier (indeed, *too* easy) for Congress to enact legislation that reduces the scope of state regulatory autonomy. Professor Young explains:

Statutory proposals must navigate a complicated legislative procedure with multiple veto-gates, and they must secure the acquiescence of a majority of legislators who may not only be cognizant of state governmental interests but also (or alternatively) hostile to the particular proposal on the merits. . . .

. . . [T]he ability to bracket the substantive issues and simply provide a federal forum may often lower the political and procedural hurdles that federal legislation must otherwise overcome.²³²

If Congress is prohibited from pursuing its ends through the establishment of federal court jurisdiction over state-law claims, the argument goes, it will be left in the all-or-nothing position of either enacting substantive federal law to govern the relevant activity or forgoing federal intervention altogether. And because of the challenges that often accompany the enactment of substantive law, Congress may choose the latter course, thereby leaving the states in full control of both the governing substantive law and

231. Neither Article III, nor any other part of the Constitution expressly forbids Congress from using federal court jurisdiction as a means of advancing its legitimate regulatory goals, and, as we have seen, *see supra* Part III.A.1, the argument for allowing Congress to do so relies on an approach to constitutional text and structure that is familiar from our practice under Article I.

232. Young, *supra* note 97, at 1796–97.

judicial enforcement.²³³ When we allow for federal court adjudication of state-law claims, then, the overall measure of federal invasion of state prerogatives is likely to increase. Or so it has been argued.

The difficulty with this line of reasoning is twofold. To begin with, like the argument about state control over the meaning of state law, this argument does nothing more than assert that state-autonomy costs inhere in a regime that is broadly permissive of federal court adjudication of state-law claims. It fails to demonstrate that these costs outweigh the benefits of such a regime. Second, the argument is highly speculative. In some instances, when faced with the all-or-nothing choice of enacting substantive legislation or declining to regulate, Congress will take the latter route. At other times, however, federal legislators may well just bite the bullet and enact substantive law. If we assume, as I think we should, that the threat posed to state autonomy by the enactment of substantive federal law (and the concomitant displacement of state law) is greater than that posed by the establishment of federal jurisdiction over state-law claims,²³⁴ then depriving the federal government of power to do the latter will, in some cases, yield the greater invasion of state autonomy.

My point is not that Congress's greater power to enact substantive law in a given area necessarily includes the lesser power to permit states to retain substantive lawmaking authority over that domain so long as federal courts are able to interpret and apply the relevant state law.²³⁵ It is, rather, that in order to make a sound judgment as to the overall effect on state autonomy of restraining Congress's authority to channel state-law cases into the federal courts, one needs to do more than gesture in the direction of the political and procedural hurdles to enacting substantive legislation. What is needed, in particular, is a thicker account of (1) the relative costs, from the perspective of state autonomy, of federal displacement of state substantive law and federal court adjudication of state-law claims,²³⁶ and (2) the likelihood that Congress, faced with the all-or-nothing choice, will go whole hog and enact substantive federal law. None of the critics of federal-power-based theories of federal court jurisdiction has provided such an account, and so the ultimate effect on state autonomy of constraining Congress's power to channel state-law claims into federal court remains uncertain.

233. See Goldberg-Ambrose, *supra* note 97, at 582.

234. See, e.g., Bickel & Wellington, *supra* note 10, at 19–20; Vazquez, *supra* note 97, at 1764.

235. Some commentators have pressed the greater-includes-the-lesser argument in this context. See, e.g., Bickel & Wellington, *supra* note 10, at 20–21; Wechsler, *supra* note 97, at 224–25. Others have rejected it. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting).

236. If the costs, from a state autonomy perspective, of federal displacement of state law are thought to be much greater than the costs of allowing for federal court jurisdiction over state-law claims, then Congress would need to exercise the displacement option relatively infrequently in order for the jurisdictional prohibition to be a net loss for state autonomy purposes.

3. *Other Constraints on Federal Judicial Power?*

a. *The Case or Controversy Requirement*

An additional challenge to the congressional power model of federal court jurisdiction relates to the “case or controversy” requirement of Article III: If Congress is permitted to execute an end-run around the enumeration of powers in Article III, Section 2 in order to advance national interests, the argument goes, is there any reason it cannot evade the justiciability requirements of Article III, Section 2 in the same way?²³⁷ May Congress, under the congressional power view, authorize the federal courts to hear claims pressed by litigants who do not meet the requirements for standing? To hear disputes that are unripe or moot? To issue advisory opinions?

A comprehensive treatment of the textual roots and constitutional status of the various doctrines of justiciability is beyond the scope of this Article. Still, it is tempting to argue that the answer to the package of questions raised above is a simple “yes.” Courts and commentators have long questioned whether and to what extent the requirements imposed by justiciability doctrine should be understood as constitutional in nature.²³⁸ And in connection with standing doctrine in particular (which the Court has stated “is perhaps the most important” of the justiciability rules²³⁹), prominent commentators have argued that Congress has near-plenary authority to satisfy the requirements of Article III simply by enacting a statute creating a cause of action.²⁴⁰ Hence, if the congressional power model of federal court jurisdiction suggests that Congress has sweeping discretion with respect to the

237. The concurring and dissenting opinions in *Tidewater* all press this objection. See Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 616 (Rutledge, J., concurring); *id.* at 628 (Vinson, C.J., dissenting); *id.* at 648 (Frankfurter, J., dissenting).

238. See, e.g., *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) (arguing that, despite contrary indications in the case law, the constraints of mootness doctrine are not “forced upon us by the case or controversy requirement of Article III”); 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.1 (3d ed. 2008) (similar); see also, e.g., FALLON ET AL., *supra* note 192, at 210–11 (examining ripeness doctrine and questioning whether “considerations of the adequacy of factual framing, fitness of issues for review, and hardship to parties [should] be elevated to constitutional stature”); *id.* at 52 (noting that “[t]he English judicial practice with which early Americans were familiar had long permitted the Crown to solicit advisory opinion from judges” and that “neither the constitutional text nor the discussions at the Constitutional Convention reflected any clear prohibition against advisory opinions”).

239. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

240. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 178 (1992) (“There is absolutely no affirmative evidence that Article III was intended to limit congressional power to create standing.”); see also *id.* at 177 (“[P]eople have standing if the law has granted them a right to bring suit.”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988) (arguing that “[i]f a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it”). The Supreme Court’s decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), which invalidated certain applications of the citizen suit provision of the Endangered Species Act, holds otherwise. The Court’s subsequent decisions in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998) and *Massachusetts v. EPA*, 549 U.S. 497 (2007), take a much more permissive approach toward the question of when Congress is authorized to create standing to sue.

jurisdictional limitations traditionally located in Article III, including the rules governing justiciability, it is not alone in so doing.²⁴¹

But it is not necessary to embrace this account of justiciability doctrine in order to answer the “case or controversy” challenge. For it does not follow from the fact that Congress may, under the congressional power model, work outside the Article III enumeration that it must also be permitted to escape the justiciability limits thought to be embedded in that Article. This is so because the former constraints sound primarily in federalism, while the latter are rooted principally in the separation of powers, and, as a result, the argument for recognizing congressional power to toggle off these constraints differs in the two contexts.

Many commentators have argued that the federal courts ought not to enforce federalism-based constraints on congressional power, since the interests of the states can be—and, as a matter of constitutional design, should be—protected through the national political process.²⁴² Proponents of this view tend to emphasize, in particular, that by directing the election of members of the House and Senate *from the states*, the Constitution assures that state interests will be accounted for in the ordinary course of federal lawmaking.²⁴³ Others have questioned the soundness of the “political safeguards of federalism” argument,²⁴⁴ and the Supreme Court—especially in recent years—has shown little hesitation when it comes to enforcing federalism-based constraints on the exercise of congressional power.²⁴⁵ But even skeptics of the political-safeguards argument as applied in connection with federalism would likely agree that such an argument is still harder to defend in connection with the separation of powers. That is, there is little reason to think that the interests of the coordinate branches of the federal government are protected through structural features of the political process, for neither the federal executive nor the federal judiciary has a natural voting constitu-

241. The analogy between the sort of congressional discretion contemplated under the scholarly accounts of standing doctrine mentioned above, *see supra* note 240 and accompanying text, and that authorized under the congressional power approach to the Article III enumeration is imperfect. Thus, Professor Sunstein and Judge Fletcher do not contend that Congress is free to *override* the Constitution’s standing requirements; they argue, rather, that Congress has considerable leeway to work *within* these requirements (since the establishment of a cause of action satisfies them). The congressional power model, in contrast, suggests that Congress may rely on the full sweep of its authority under the Constitution in order to *evade* the constraints implicit in the Article III enumeration. Thus, while both approaches recognize virtually unfettered congressional discretion along the relevant dimension, the conceptual infrastructure undergirding the two models differs.

242. *See, e.g.*, JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175–184 (1980); Herbert Wechsler, *Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543, 546–58, 560 (1954); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) (“State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”).

243. *See, e.g.*, Wechsler, *supra* note 242, at 546.

244. *See, e.g.*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 *S. CAL. L. REV.* 1311 (1997).

245. *See supra* note 20; *see also* United States v. Morrison, 529 U.S. 598, 616 (2000) (“Under our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace.”).

ency in Congress.²⁴⁶ Hence, one can imagine a regime under which Congress is, generally speaking, able to work outside the enumeration framework of Article III (a federalism-based limit), but constrained by some package of justiciability requirements (which are rooted in the separation of powers).

b. *Federal Court Jurisdiction and State Sovereign Immunity*

A final objection to the congressional power model of federal court jurisdiction is that it is out of step with the recent wave of Supreme Court decisions relating to state sovereign immunity—*Seminole Tribe v. Florida* in particular.²⁴⁷ In that case, the Supreme Court held that the Eleventh Amendment prohibits Congress from abrogating state sovereign immunity when legislating pursuant to its Article I powers.²⁴⁸ In reaching this conclusion, the Court insisted that “[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”²⁴⁹ To hold otherwise, the Court explained, would be to “contradict[] our unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal court jurisdiction.”²⁵⁰ In this way, *Seminole Tribe* appears to undermine the jurisdictional model developed here which, of course, rests on the notion that Congress *is* permitted to turn to Article I as a source of jurisdiction-conferring authority.

But the tension between the congressional power model and *Seminole Tribe* is not nearly as sharp as the above-quoted passages suggest. For despite the rhetoric in the majority opinion, the core question at issue in *Seminole Tribe* was not whether Congress may rely on its Article I powers to channel into the federal courts cases that fall outside the limits of Article III. Neither the plaintiffs nor the dissenting Justices took the position that the jurisdictional enactment at issue in *Seminole Tribe* attempted to channel into the federal courts cases falling outside the limits of Article III. They argued, instead, that a damages action against a state for a violation of federal law falls squarely within the limits of Article III, and that neither the Eleventh Amendment nor background principles of state sovereign immunity prevent Congress from authorizing private parties to bring such actions. Hence, the majority’s deployment of the strict enumeration theory in this context is something of a contrivance.

246. The interests of the executive and judicial branches might be protected, of course, through other structural features of our constitutional system such as judicial review.

247. 517 U.S. 44 (1996); *see also* Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743 (2002); Alden v. Maine, 527 U.S. 706 (1999). *But see* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) (holding that, through the plan of the Convention and the ratification of the Constitution’s Bankruptcy Clause in particular, the states surrendered their immunity from suits in bankruptcy to void preferential transfers).

248. *Seminole Tribe*, 517 U.S. at 72–73.

249. *Id.* (emphasis added).

250. *Id.* at 65 (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 39 (1989) (Scalia, J., dissenting)).

The Court's subsequent decision in *Alden v. Maine*²⁵¹ lends support to this way of conceptualizing the issues at stake in *Seminole Tribe*. In *Alden*, the Court held that Congress could not rely on its Article I powers to authorize state-court damages actions against unconsenting states.²⁵² The majority opinion in that case sounds many of the same themes that were developed in *Seminole Tribe*, but of course *Alden*—a case involving the scope of state-court jurisdiction—is not about the scope of federal judicial power under Article III. It presents instead as a case about the scope of congressional power under the Commerce Clause. And taken together, then, it makes sense to understand both *Seminole Tribe* and *Alden* as cases about the scope of Congress's powers under Article I, not about the limits embedded in Article III.

To be sure, by invalidating the jurisdictional statute at issue in *Seminole Tribe*, the majority necessarily held that Congress could not rely on its Article I powers to authorize the exercise of federal jurisdiction in the cases at issue. But the basis for this holding is the Court's specific conclusion that the Eleventh Amendment (or, at least, principles of state sovereign immunity reflected therein²⁵³) prohibits the exercise of such jurisdiction. The question whether Congress may look outside of Article III for jurisdiction-conferring authority when state sovereign immunity is not at issue was not before the Court, and it is not necessary, conceptually or functionally, that Congress be deprived of such power when state sovereign immunity is off the table simply because such power is lacking when sovereign immunity is in play.

Still, *Seminole Tribe* does indicate that congressional power to establish federal court jurisdiction does not always follow from its authority to enact substantive law in a given area. And at this, more general, level, the decision's tension with the congressional power model is not so easily dissolved, since the congressional power model advances the claim that federal regulatory power and authority to establish federal court jurisdiction ought to travel more closely together. But this aspect of *Seminole Tribe*—the wedge it drives between Congress's general legislative power and its jurisdiction-conferring authority—is among its most unsatisfying features (and there are many unsatisfying features to choose from). By curtailing Congress's authority to confer jurisdiction on the federal courts in damages actions against states for violations of federal law, *Seminole Tribe* advances the awkward notion that the scope of state sovereign immunity is ultimately broader than the scope of state sovereignty itself.²⁵⁴ Thus, Congress may,

251. 527 U.S. 706 (1999).

252. *Id.* at 753.

253. *See Seminole Tribe*, 517 U.S. at 54.

254. *See, e.g.*, Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 61–62 (noting that the message sent by *Seminole Tribe* “is a bit curious when viewed against a snapshot of today’s constitutional terrain” in which the Court “has (at least for the moment) abandoned the effort of *National League of Cities v. Usery* to limit substantive regulation of the states themselves”); *The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 200, 206–07 (1999) (discussing the Court’s decision in *Alden v. Maine*, which held that Congress may not rely on its Article I powers to abrogate states’ immunity from suit in state court and taking note

under *Garcia v. San Antonio Metropolitan Transit Authority*, rely on its Article I powers to regulate states directly,²⁵⁵ but it may not, under *Seminole Tribe*, rely on the federal courts to enforce obligations imposed on states through such Article I regulation (at least not through the device of a damages action). To the extent the congressional power model rests uncomfortably alongside this component of *Seminole Tribe*, I am inclined to consider it a virtue.²⁵⁶

IV. RIVAL THEORIES: PROTECTIVE JURISDICTION

As alluded to earlier, scholarly commentators have previously attempted to rethink the key Supreme Court cases relating to the constitutional limits on federal subject matter jurisdiction. In this Part, I briefly consider what are perhaps the two most prominent endeavors of this sort: the protective jurisdiction theories advanced by Professors Herbert Wechsler and Paul Mishkin.²⁵⁷ Theories of protective jurisdiction take as their premise that Congress may, under certain circumstances, channel state-law cases involving non-diverse parties into the federal courts in order to protect federal interests that might be implicated in the litigation. As we will see, in different ways and to different extents, both Wechsler and Mishkin turn to Article I as a source of congressional authority to confer jurisdiction on the federal courts. Like the congressional power model, then, these theories attempt to forge a closer link between the full scope of Congress's affirmative authority and its power to confer jurisdiction on the federal courts. However, even as Professors Wechsler and Mishkin look to Article I as a source of jurisdiction-conferring authority, they endeavor to harmonize their conceptions of federal judicial power with the strict enumeration view of Article III. That is, in sharp contrast to the congressional power model of federal jurisdiction, these theorists attempt to squeeze all of the cases they deem eligible for federal court jurisdiction into the list contained in Article III, Section 2.

My goal in this Part is twofold. First, I hope to bolster the case for the congressional power model of federal jurisdiction by demonstrating that while these commentators agree that Article I may serve as a wellspring of federal judicial power, the Article III hooks on which they hang their jurisdictional theories ultimately provide inadequate support. Second, I attempt

of the "theoretical inconsistency" of the Court's conclusion that "the Constitution [preserves] . . . a sphere of sovereign immunity broader than that of state sovereignty").

255. 469 U.S. 528, 552 (1985).

256. Like the cases relating to standing discussed immediately above, the sovereign immunity decisions raise the question why Congress enforces some limitations on the scope of federal court jurisdiction aggressively, while others—such as the enumeration-based limits of Article III, Section 2—are largely toothless. Of course, haphazardness in the rigor with which different fragments of the Constitution are enforced is not unique to the jurisdictional context. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 881 (1996) ("If we are cavalier with the text sometimes, why do we treat it somewhat seriously almost all the time, and extremely seriously sometimes?"). And I leave consideration of the Article III permutation of this question for another day.

257. See Mishkin, *supra* note 97; Wechsler, *supra* note 97.

to further enrich the analogy between the Article I and Article III enumerations by highlighting connections between, on the one hand, Professors Wechsler and Mishkin's efforts to bring expansive federal court jurisdiction within the ambit of Article III and, on the other hand, the Supreme Court's efforts to reconcile the expansion of the federal commerce power with the enumeration in Article I.

A. *The Wechsler Theory: "Arising Under" the Jurisdictional Statute*

Professor Herbert Wechsler's contribution to the academic debate relating to protective jurisdiction is exceedingly brief (it spans all of two paragraphs in a wide-ranging article assessing proposed revisions to the Judicial Code);²⁵⁸ but it is typically treated as the starting point for discussions of the subject. Wechsler argued as follows:

The power of the Congress to confer the federal judicial power must extend . . . to every case that might involve an issue under federal law. It should extend, I think, beyond this to all cases in which Congress has authority to make the rule to govern disposition of the controversy but is content instead to let the states provide the rule so long as jurisdiction to enforce it has been vested in a federal court.²⁵⁹

As this passage makes clear, Professor Wechsler believed that Congress ought to be allowed to establish federal court jurisdiction over suits between non-diverse parties that involve matters of state law only. He dealt with the obvious Article III difficulty this poses by insisting that such cases can be made to fit within the Arising Under Clause. "A case is one 'arising under' federal law," he explained, "whenever it is comprehended in a valid grant of jurisdiction."²⁶⁰ Though this passage is less than clear, it is widely understood to express the view that a jurisdictional statute may *itself* serve as the federal law under which a case arises for purposes of Article III.²⁶¹

Of course, this effectively renders any constraints on federal court jurisdiction that might flow from Article III a nullity. This is so because all that is required, under Wechsler's theory, for Congress to establish jurisdiction over a class of cases without running afoul of Article III is for it to enact a statute doing exactly that. And if the mere enactment of a jurisdictional statute suffices to satisfy Article III, then that Article does not serve as an independent constraint on congressional power (at least not one that is judicially enforceable), and the scope of federal subject matter jurisdiction is then ultimately a function of the general reach of Congress's authority.²⁶²

258. Wechsler, *supra* note 97, at 224–25.

259. *Id.* at 224.

260. *Id.* at 225.

261. *E.g.*, Goldberg-Ambrose, *supra* note 97, at 586.

262. In this way, Professor Wechsler's approach toward Article III, Section 2 dovetails with his approach toward judicial enforcement of federalism-based constraints on congressional authority generally. In his famous essay *The Political Safeguards of Federalism*, Wechsler detailed myriad ways in which states' interest in regulatory autonomy is protected through the political process,

Professor Wechsler's vision of federal court jurisdiction has been roundly criticized on a variety of different grounds. His contention that a jurisdictional statute can serve as the federal law under which a case "arises" for Article III purposes has been dismissed as circular or a form of bootstrapping.²⁶³ His theory has been challenged, more generally, on the ground that it renders the Article III limits on federal court jurisdiction toothless.²⁶⁴ I agree wholeheartedly with this last characterization of the Wechsler theory, but I am untroubled by it. As is clear from the discussion in Part II.B, the Article III enumeration has already been defanged by the applicable case law; and, as the discussion in Part III signals, I think this is a welcome state of affairs.

What is of interest to me about Professor Wechsler's approach lies not in the nature of the limits it imposes (or, really, fails to impose) on the scope of federal court jurisdiction, but in its stretching of the Arising Under Clause to accommodate any case Congress sees fit to channel into the federal courts. This stretching is reminiscent of the Commerce Clause-based account of the expansion of congressional power over the course of the twentieth century.²⁶⁵ Under Wechsler's theory, it is the Arising Under Clause that serves as a fig leaf to render deviation from the apparent structural logic of Article III textually regular, just as the Commerce Clause plays this role in connection with congressional power and the Article I enumeration.

On the one hand, Wechsler's account might be thought of as a creative means of reconciling a salutary feature of our jurisdictional practice (the enabling of Congress to deploy the federal courts in service of the national interest) with the relevant constitutional text. And we might deem this creativity a virtue because, while the limits on congressional power (under both Articles I and III) have proven supple, it is evident that our constitutional culture places a premium on maintaining at least the appearance of textual fidelity. On the other hand, Wechsler's "arising under" move seems disingenuous.²⁶⁶ It gestures in the direction of the strict enumeration approach even as it eviscerates the core protections that approach is designed to

Wechsler, *supra* note 242, at 546–58, and expressed the view that "it is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism," *id.* at 560. One can see a similar parallel in connection with Justice Jackson's writings about federal power generally and federal judicial power in particular. Thus, the broad conception of congressional power to channel cases into the federal courts that we see in Jackson's opinion in *Tidewater*, see *supra* text accompanying notes 150–151, is mirrored by his opinion for the Court in *Wickard v. Filburn*, 317 U.S. 111 (1942), which embraced an expansive conception of Congress's power under the Commerce Clause.

263. *E.g.*, Mishkin, *supra* note 97, at 190 & n.142; Note, *Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Action*, 69 MICH. L. REV. 710, 721 (1971). The Supreme Court, moreover, has squarely rejected the notion that a jurisdictional statute can itself provide the foundation for arising under jurisdiction. See *Mesa v. California*, 489 U.S. 121, 135–36 (1989); *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 496 (1983).

264. *E.g.*, Mishkin, *supra* note 97, at 190–92.

265. See *supra* text accompanying notes 68–71.

266. Professor Goldberg wondered whether Wechsler was simply "play[ing] a semantic trick." Goldberg-Ambrose, *supra* note 97, at 586.

secure. Of course, the disingenuousness of this interpretive move is substantially mitigated by its transparency. It is impossible to miss the fact that Professor Wechsler's theory does away with Article III-based limits on federal court jurisdiction, and his gesture in the direction of Article III seems almost tongue-in-cheek. But the almost brazen flimsiness of Wechsler's textual maneuver serves only to highlight the fact that it is ultimately beside the point. If one is seriously committed to the notion that the most attractive conception of our federal system is one under which Congress is broadly permitted to use federal court jurisdiction to advance federal interests, then it is hard to imagine also accepting the notion that the legitimacy of this conception, under our Constitution, turns on a textual argument as thin as the one on offer from Professor Wechsler.²⁶⁷

B. Professor Mishkin's "Federal Programs" Approach

Professor Paul Mishkin's contribution to the protective jurisdiction debate came in his celebrated article *The Federal "Question" in the District Courts*.²⁶⁸ Mishkin felt that the jurisdictional theories espoused by Justice Jackson in *Tidewater* and Professor Wechsler were constitutionally defective because they made nonsense of the enumeration of powers in Article III.²⁶⁹

267. Professor Carlos Vazquez developed a related theory of protective jurisdiction in a 2007 article published as part of a symposium celebrating Paul Mishkin's work. See Vazquez, *supra* note 97. Like Professor Wechsler, Vazquez would recognize virtually unfettered congressional discretion to channel cases into the federal courts in order to advance federal interests. See *id.* at 1733 ("I conclude that federal claim analysis supports a congressional grant of jurisdiction over any class of cases over which Congress has legislative power."). And like Professor Wechsler, he argues that such broad federal jurisdiction can be situated within the enumerated powers framework of Article III. Vazquez reasons as follows:

[I]f Congress has legislative power under Article I, it should be able to "create" federal claims by throwing a federal cloak around an already existing category of claims, declaring them to be federal while specifying that the governing law will remain as before. In other words, Congress should be able to confer jurisdiction by declaring a category of existing claims to be federal claims governed by incorporated state or foreign law.

Id. at 1749. It should be clear from the discussion in Part III that I wholeheartedly agree with Vazquez that the scope of Congress's power to create federal jurisdiction ought to be a function of the full sweep of its legislative authority. But it should be equally clear that I see no need for the "incorporation" move. Like Professor Wechsler's claim that a jurisdictional statute may serve as the federal law under which a suit "arises" for purposes of Article III, the incorporation move is a functionally empty mechanism—functionally empty because the governing law changes not at all, it is simply relabeled "federal"—for cramming the relevant cases into Article III's Arising Under Clause. And as is true of the Wechsler theory, then, the thinness of the Article III veneer makes one wonder about the utility and necessity of the interpretive endeavor. Cf. *Class Action and Other Consumer Protection Procedures: Hearings on H.R. 14931, H.R. 14585, H.R. 14627, H.R. 14832, H.R. 15066, H.R. 15655, and H.R. 15656 Before the Subcomm. on Commerce and Finance of the H. Comm. On Interstate and Foreign Commerce*, 91st Cong. 23 (1970) (Letter from Charles L. Black, Jr., Luce Professor of Jurisprudence, Yale Law School, to Rep. Bob Eckhardt, Member of the House of Representatives (May 27, 1969)) (discussing a suggested amendment to the Class Action Jurisdiction Act which would adopt state law as federal law and remarking, "I firmly adhere to my view . . . that the simple grant of judicial jurisdiction [to federal courts over state-law claims] . . . is, without more, constitutional").

268. Mishkin, *supra* note 97.

269. See *id.* at 190.

Still, Mishkin read the Supreme Court's decision in *Osborn* to support the proposition that, in order to protect federal interests, federal courts might sometimes exercise jurisdiction over suits between non-diverse citizens involving state-law claims only.²⁷⁰ The challenge, from his perspective, lay in identifying those interests that are constitutionally fit for such protection. He resolved the matter as follows: "[W]here there is an articulated and active federal policy regulating a field, the 'arising under' clause of Article III apparently permits the conferring of jurisdiction on the national courts of all cases in the area—including those substantively governed by state law."²⁷¹ Because the conferral of jurisdiction on the federal courts in such cases is designed as "a shield for federal legislation," he argued, "[i]n a very real sense do all such cases 'arise *under*' the laws establishing the congressional plan."²⁷²

Professor Mishkin's approach relies on Article I as a source of federal judicial power over state-law claims. The requirement that there be an "articulated and active federal policy" in the relevant area assures that there are identifiable Article I interests and policy goals in play before the jurisdictional maneuver can be executed. Meanwhile, by confining protective jurisdiction to a relatively narrow sphere, Professor Mishkin's approach does far more than either the Jackson or the Wechsler models to assure that federal judicial power is subject to meaningful limits.

But Professor Mishkin's jurisdictional theory is ultimately unpersuasive as a matter of text and unsatisfying as a matter of jurisdictional policy. From a textual perspective, the notion that a suit "arises under" a regulatory program that, despite saturating the field with federal rules and requirements, does not supply the governing law, seems backwards. If anything, when there is an articulated and active federal policy in a given area, and Congress carves out a set of transactions or occurrences to be governed by state law, cases involving activities falling within the carve-out would seem decidedly *not* to arise under the relevant federal program. Federal law, in other words, is conspicuously offstage in the disputes covered by the Mishkin theory.

I don't mean to suggest by this that Professor Mishkin's account of the Arising Under Clause is textually untenable. That Clause might mean many different things, and Mishkin's view is certainly not prohibited by its language. But his reading is not textually compelled either, and so, if his approach is to be selected from among the universe of textually and structurally plausible jurisdictional theories, this selection must be justified by reference to the jurisdictional policies advanced by his model. But Mishkin's account founders badly on this score. For while there is no doubt that important federal policies can be undermined by state court adjudication of state-law claims that relate to an active federal regulatory program, it is equally true that important federal policies can be undermined by state court

270. *See id.* at 187–88.

271. *Id.* at 192. Professor Mishkin argued that federal bankruptcy jurisdiction fit this mold as well. *See id.* at 194–95.

272. *Id.* at 196.

adjudication of state-law claims that do not relate to any such program.²⁷³ If one is committed to the notion that Congress should be permitted to establish federal court jurisdiction over state-law claims in order to protect important federal interests—and Mishkin manifestly is—then the virtues of an approach so under-inclusive as his are difficult to discern.

In this way, Professor Mishkin's approach is reminiscent of the tack taken by the Supreme Court in the *Lopez* and *Morrison* cases.²⁷⁴ The majority in those two cases took as its premise that a theory of the federal commerce power that does not contain judicially enforceable limits on congressional action could not stand, since such a theory would be incompatible with the framers' decision to enumerate federal legislative powers.²⁷⁵ The challenge, for those Justices, was to craft an account of federal power under the Commerce Clause that is bounded, textually palatable, and functionally coherent. They failed. *Lopez* and *Morrison* stand for the proposition that while Congress is authorized, under the Commerce and Necessary and Proper Clauses, to regulate activity that substantially affects interstate commerce, it may not do so if that activity is noneconomic and occurs on a purely intrastate basis.²⁷⁶ But, of course, activity that is not itself economic in character is capable of substantially affecting interstate commerce just as economic activity is. Given the Court's acknowledgement that economic effects supply the predicate for federal power in the first place,²⁷⁷ it is difficult to see the logic underlying the distinction it draws.²⁷⁸ And this is especially so given that the text of the operative constitutional clause does not clearly command the result.²⁷⁹ Like the Court's reading of the Commerce Clause in these cases, Professor Mishkin's theory of Article III succeeds in limiting the scope of congressional power, but does so in a way that makes little sense from a functional perspective.

* * *

The protective jurisdiction theories share an important characteristic with the cases examined in Part II.B. They strain mightily to fit the state-law claims they would usher into the federal courts within the enumerated pow-

273. See Rosenberg, *supra* note 97, at 962.

274. See *supra* text accompanying notes 60-66.

275. United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824), for the proposition that "the enumeration [of powers] presupposes something not enumerated"); United States v. Lopez, 514 U.S. 549, 567 (1995) (insisting that upholding the statute under review "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated").

276. *Morrison*, 529 U.S. at 617-18.

277. E.g., *Lopez*, 514 U.S. at 558-59.

278. *Morrison*, 529 U.S. at 657 (Breyer, J., dissenting) ("If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them?").

279. See Lessig, *supra* note 19, at 130 (characterizing *Lopez* as "reject[ing] a] textualist reading of the power clauses" (emphasis added)).

ers framework of Article III, Section 2. Professors Wechsler and Mishkin recognize that significant federal interests might be threatened by state court adjudication of state-law claims between non-diverse parties, and they are willing to bend and stretch Article III, Section 2 to bring such cases within the ambit of the strict enumeration theory. Thus, the protective jurisdiction theories suggest that where a jurisdictional statute is supported by a legitimate federal interest (however defined), commentators, no less than courts, can be relied upon to supply Article III window dressing. My discussion in Part III, however, indicates that none of this is necessary. It supplies a theory of federal court jurisdiction that affirms congressional power to channel cases into the federal courts in order to advance legitimate federal interests, but does not require resort to these labored constructions of Article III.

CONCLUSION

In connection with both Article I and Article III, the Supreme Court has shown little enthusiasm for confining Congress to the Constitution's enumerations of powers. It has authorized exercises of federal legislative power and federal jurisdiction that are difficult to locate in the text of the relevant enumerations, and it has construed individual enumerated powers so broadly as to raise questions as to what (if anything) falls outside the scope of federal legislative or judicial power. Meanwhile, judicial and scholarly discussions of the merits of enforcing these enumerations run along parallel tracks. Opponents of federal power have stressed the obligation of textual fidelity, highlighted the structural implications of the framers' decision to enumerate powers, and extolled the virtues of state autonomy. Proponents of federal power, meanwhile, have emphasized the value of congressional discretion to pursue legitimate national interests in the manner deemed most efficacious; and they stand at the ready with creative (though often strained) interpretive theories that endeavor to work within our tradition of clause-bound textual justification.

Despite these similarities, the dominant accounts of the enumerations of powers in Articles I and III differ markedly from one another. For while our legal culture has assimilated and (for the most part) reconciled itself to the erosion of Article I's enumeration-based limits on congressional power, the same cannot be said with respect to Article III. It is not simply that the rhetoric in the Article III case law pronounces our continued commitment to the enumeration strategy (there is, after all, plenty of rhetoric to that effect in the Article I cases as well). The point, rather, is that regardless of what the cases say, judges and commentators seem broadly attuned to the vast expansion of federal power under Article I and to its consequences for the strict enumeration view, while the strict enumeration rhetoric in the Article III case law is taken at something approximating face value.

This raises the obvious question: why? Why is there an asymmetry in the conventional wisdom relating to the enumerations in Articles I and III? Why do courts and commentators see the former for what it is (a failed strategy for constraining federal power), while we cling to the notion,

despite so much evidence to the contrary, that the Article III enumeration retains vitality?

A number of possible explanations come to mind. The first relates to the scholarly traditions associated with the study of federal courts and federal jurisdiction. I have in mind here the relationship between Professors Hart and Wechsler's field-defining casebook, *The Federal Courts and the Federal System*, and the Legal Process tradition.²⁸⁰ As Professor Fallon has explained, a defining feature of the Hart & Wechsler paradigm and the Legal Process school is that they turn our collective attention away from first-order questions relating to the proper content of particular legal rules (questions over which deep division can be expected in a pluralistic society) and focus, instead, on second-order questions of "who decides?"²⁸¹ Under the Hart & Wechsler model, these second-order questions are to be answered by reference to principles of federalism and separation of powers, which the authors imagined to be sufficiently determinate to produce stable allocations of authority between different levels and among different branches of government.²⁸² As Professor Fallon has noted, moreover, "[t]o Hart and Wechsler, preserving spheres of state sovereign autonomy was a matter of foremost importance."²⁸³ It is easy to see how deeply destabilizing it would be to scholars working within a tradition that counts these among its core commitments to acknowledge that Article III imposes only the weakest of constraints on the scope of federal judicial power and that Congress is broadly authorized to channel state-law cases into the federal courts.

To be sure, the principle of limited federal government is an extremely important feature of traditional thinking about the enumeration of powers under Article I as well, yet it has not prevented us from coming to grips with the weakness of Article I limits on congressional authority. This might be because the question of how far federal legislative authority extends, and the related question of whether and to what extent the federal government enjoys implied powers under the Constitution, has featured prominently in judicial and political debate since the earliest days of the Union.²⁸⁴ Hence, the core structural inference invited by the Article I enumeration has been under widely acknowledged pressure from the start.

Another conceivable explanation for the differences in the conventional wisdom relating to Articles I and III is rooted in the frequency and extent of congressional transgression of the limits implicit in the two enumerations.

280. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994).

281. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 964 (1994) (Fallon describes this as "the principle of institutional settlement").

282. See EDWARD R. PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: Erie, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 243-44 (2000).

283. Fallon, *supra* note 281, at 957.

284. See *New York v. United States*, 505 U.S. 144, 149 (1992) (characterizing "discerning the proper division of authority between the Federal Government and the States" as "[the] oldest question of constitutional law").

While it is clear, as I have noted, that Congress has repeatedly pushed hard on the limits of Article III, Section 2,²⁸⁵ it is also the case that the overwhelming majority of the business of the federal courts falls comfortably within Article III. In contrast, huge swaths of federal substantive regulation rely on the expansive readings of Article I (the Commerce Clause in particular), detailed in Part I of this Article. Comparatively speaking, then, a substantially larger fragment of existing federal substantive regulation presents difficulties from an enumerated powers perspective than is the case in connection with federal jurisdictional legislation.

A third (and related) explanation for the Article I/Article III asymmetry relates to the extremely high salience of the legal battles relating to the constitutionality of the New Deal and the way in which the story of those battles is typically framed. Nobody questions the magnitude of the changes in our system of governance that were brought about through the New Deal. Though commentators debate the extent to which these changes could be accommodated without overthrowing established legal tradition,²⁸⁶ there is no doubting that the national government is today empowered to do far, far more than it could in the early twentieth century, to say nothing of 1787.

Moreover, the long-dominant account of the Supreme Court's tumultuous experience during the 1930s is one in which the prevailing mode of constitutional interpretation—one that reflected reverence for the structural implications of the enumerated powers scheme—buckled under pressure geared toward the ratification of President Roosevelt's legislative agenda.²⁸⁷ It is a narrative in which the Justices "let go" after years of intransigence;²⁸⁸ and what they let go *of*, at bottom, is a commitment to restraining the scope of federal power. The casualty in this story is the strict enumeration view of Article I, and it is a story that every law student knows.

There is no Article III analog to this story. For while Congress has repeatedly tested the limits of Article III, the relevant jurisdictional enactments have not, either singly or collectively, expanded the power of the federal courts in anything like the way the New Deal remade federal legislative power. In addition, there has never been a period of sustained pushback by the Court against the expansion of federal jurisdiction into areas seemingly outside the bounds of Article III, Section 2's subject matter limitations (indeed, there has been virtually no pushback at all along this dimension). Accordingly, while the collapse of the Article I enumeration is woven into the fabric of one of the most transformative episodes in

285. See *supra* Part II.B.

286. See ACKERMAN, *supra* note 67, at 259.

287. See *supra* note 56.

288. As the discussion in Part I makes clear, it is a mistake to think that our practice prior to the New Deal revolution is easily reconciled with a strict enumeration account of Article I. Nevertheless, the New Deal is often treated as the moment at which the dam of enumeration burst, and since the question I am grappling with here relates to the place of the Article I enumeration in our collective legal consciousness, it is the content of the conventional account that matters.

the social and political life of this country, the Article III enumeration has suffered a death by a thousand cuts. The latter is easier to miss.