

2009

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### Recommended Citation

Vladeck, Stephen I. "Boumediene's Quiet Theory: Access to Courts and the Separation of Powers." *Notre Dame Law Review* 84, no. 5 (July 2009): 2107-50.

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## BOUMEDIENE'S QUIET THEORY: ACCESS TO COURTS AND THE SEPARATION OF POWERS

*Stephen I. Vladeck\**

Ronald Dworkin may not have been exaggerating when he referred to the Supreme Court's June 2008 decision in *Boumediene v. Bush*<sup>1</sup> as "one of the most important Supreme Court decisions in recent years."<sup>2</sup> The Court there held that the Constitution's Suspension Clause<sup>3</sup> "has full effect at Guantanamo Bay,"<sup>4</sup> and that the Military Commissions Act (MCA) of 2006<sup>5</sup>—which precludes federal jurisdiction over habeas corpus petitions brought by noncitizens

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In the interests of full disclosure, I should note that I have played a role in various of the contemporary cases discussed herein, including as co-counsel in *Hamdan*, and as co-author of an amicus brief in support of the petitioners in *Boumediene*. Needless to say, the views expressed herein are mine alone.

1 128 S. Ct. 2229 (2008).

2 Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008, at 18, 18.

3 U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

4 See *Boumediene*, 128 S. Ct. at 2262. The D.C. Circuit had concluded that the Suspension Clause did *not* "apply" to Guantanamo. See *Boumediene v. Bush*, 476 F.3d 981, 990–93 (D.C. Cir. 2007).

5 Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, 42 U.S.C.).

detained as “enemy combatants”<sup>6</sup>—fails to provide an adequate alternative to the writ of habeas corpus.<sup>7</sup> As such, the *Boumediene* majority struck down section 7 of the MCA,<sup>8</sup> only the second instance in which the Supreme Court has invalidated a statute because it unconstitutionally removes federal jurisdiction,<sup>9</sup> and the first time it has ever concluded that an act of Congress violates the Suspension Clause.<sup>10</sup>

Courts and commentators alike have already felled many forests grappling with the hard questions *Boumediene* leaves in its wake. Just for starters, do *other* constitutional provisions “ha[ve] full effect” at Guantanamo?<sup>11</sup> Does the Court’s analysis of the availability of habeas corpus to noncitizens at Guantanamo open the door—and the potential floodgates—to habeas petitions from noncitizens held elsewhere overseas, particularly in Afghanistan and Iraq?<sup>12</sup> Does the right articulated by the *Boumediene* majority protect a remedy for claims *other* than “core” challenges to executive detention?<sup>13</sup> Does it even include a

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6 *Id.* § 7(a), 120 Stat. at 2635–36 (codified at 28 U.S.C. § 2241(e)(1) (2006)). On why a statute that only divests the federal courts of subject matter jurisdiction could nevertheless violate the Suspension Clause, see Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2D 71 (2008).

7 *See Boumediene*, 128 S. Ct. at 2274.

8 *Id.* at 2275.

9 The only prior example is the Court’s rather obtuse decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145–48 (1872), although the precise basis for the Court’s reasoning in *Klein* remains open to debate. *See, e.g.*, Evan Caminker, Schiavo and Klein, 22 CONST. COMMENT. 529, 537–43 (2005) (discussing two competing views of *Klein* in the context of Congress’ intervention in the Terry Schiavo saga). *See generally* Lawrence G. Sager, *Klein’s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998) (evaluating the relevance of *Klein* in our modern jurisprudence).

10 In prior cases, the Court had hesitated to even *construe* the Suspension Clause. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001) (“The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.”).

11 *See, e.g.*, *Hamdan v. Gates*, 565 F. Supp. 2d 130, 135 (D.D.C. 2008) (declining to reach whether other constitutional provisions could be invoked by a Guantanamo detainee facing trial by military commission).

12 As this article went to press, the D.C. district court concluded that at least three noncitizens detained as enemy combatants in Afghanistan are also protected by the Suspension Clause, relying heavily on *Boumediene*. *See Al Maqaleh v. Gates*, No. 06-1669, 2009 WL 863657 (D.D.C. Apr. 2, 2009). In particular, Judge Bates concluded that *Boumediene’s* logic necessarily extended to noncitizens captured outside of Afghanistan who were not themselves citizens of Afghanistan. *See id.* at \*22–23.

13 *See, e.g.*, *In re Guantanamo Bay Detainee Litig.*, 570 F. Supp. 2d 13, 17–19 (D.D.C. 2008) (rejecting merits of petitioners’ challenges regarding the constitutional adequacy of the conditions of their confinement).

right to be released (into the United States) when there is nowhere else to send those whom the government lacks the legal authority to detain.<sup>14</sup> Indeed, these questions are only a sampling; it will no doubt be years before the direct implications of *Boumediene* are fully fleshed out.<sup>15</sup>

My project in this Article is not to take up these necessarily fluid questions of application, but to look more carefully at the implications of the “quiet theory”<sup>16</sup> underlying Justice Kennedy’s lengthy and complex opinion for the *Boumediene* majority. In particular, my focus is on what we should take away from his repeated allusions to the relationship between habeas corpus and the separation of powers—a recurring (if surprising) theme of the seventy-page opinion, typified by passages like the following:

The [Suspension] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty. The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.<sup>17</sup>

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14 After the D.C. Circuit decided in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), that the government had no authority to detain Uighurs held as “enemy combatants” at Guantanamo, Judge Urbina ordered their release into the United States. See *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 43 (D.D.C. 2008). On appeal, the D.C. Circuit reversed, concluding that the federal courts are powerless to order the detainees’ release into the United States, and that the result of such analysis (that is, the Uighurs’ potentially indefinite detention) is not unconstitutional because the Guantanamo detainees are not protected by the Due Process Clause. See *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *petition for cert. filed*, 77 U.S.L.W. 3577 (U.S. Apr. 3, 2009) (No. 08-1234).

15 See, e.g., Jennifer Norako, Comment, *Accuracy or Fairness?: The Meaning of Habeas Corpus After Boumediene v. Bush and Its Implications on Alien Removal Orders*, 58 AM. U. L. REV. (forthcoming 2009) (arguing that *Boumediene*’s analysis calls into question the constitutionality of the judicial review provisions of the REAL ID Act of 2005, which preclude access to habeas corpus for immigrants challenging their removal orders).

16 I borrow this phrase from Justice Jackson, as relayed by my former colleague Pat Gudridge. See Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1959 (2003).

17 *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008) (citations omitted) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)).

The *Boumediene* majority opinion expressly invokes the separation of powers in at least ten additional passages,<sup>18</sup> even though the questions before the Court had to do with the geographic scope and substantive content of the Suspension Clause, and not with a more general alleged violation of the separation of powers (as was the case in *Hamdan*).<sup>19</sup> Reading *Boumediene*, one is left with the distinct impression that for Justice Kennedy, at least, the writ of habeas corpus is in part a means to an end—a structural mechanism protecting individual liberty *by* preserving the ability of the courts to check the political branches.

Thus, at other points in *Boumediene*, Kennedy took pains to emphasize that “the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme,”<sup>20</sup> that, per Alexander Hamilton, “the writ preserves limited government,”<sup>21</sup> and, perhaps most pointedly, that “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”<sup>22</sup> As the opinion concludes,

Security subsists . . . in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

. . . Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.<sup>23</sup>

In this respect, Justice Kennedy’s separation of powers focus is reminiscent less of his opinions in the other War on Terrorism cases<sup>24</sup>

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18 *Id.* at 2246–47, 2253, 2259, 2263, 2269–70, 2277, 2297–98, 2307.

19 *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 & n.23 (2006) (rejecting the argument that the President had the authority to convene military tribunals inconsistent with the scope of the statutory authorization that Congress had provided).

20 *Boumediene*, 128 S. Ct. at 2246.

21 *Id.* at 2247 (citing THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

22 *Id.* at 2259.

23 *Id.* at 2277.

24 *See, e.g.*, *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring in part); *Rasul v. Bush*, 542 U.S. 466, 485–88 (2004) (Kennedy, J., concurring in the judgment).

than of his majority opinion in *Legal Services Corp. v. Velazquez*,<sup>25</sup> where the Court struck down part of a federal statute that prohibited legal aid lawyers who received federal funding from challenging the validity of existing welfare laws.<sup>26</sup> Although the *Velazquez* Court concluded that the spending restriction violated the First Amendment, Justice Kennedy emphasized that such analysis was bolstered by the “severe impairment of the judicial function” such a restriction might otherwise effect.<sup>27</sup> In both cases, Justice Kennedy thereby suggested that the injury the statute inflicted upon the role of the courts was at least relevant, if not central, to the constitutional analysis.

Whereas some might view these passages in both *Velazquez* and *Boumediene* as little more than rhetorical flourishes,<sup>28</sup> it is difficult to understand the crux of Kennedy’s analysis in the latter case—of why the review available under the MCA and the Detainee Treatment Act (DTA) of 2005<sup>29</sup> failed to provide an adequate alternative to the writ of habeas corpus—without these first principles. At least where habeas corpus is concerned, the purpose of judicial review, in Kennedy’s view, appears to be as much about preserving the role of the courts as it is about protecting the individual rights of the litigants.

It was with this analytical imperative in mind that Justice Kennedy disaggregated the access-to-courts question from the adequacy-of-the-process question, suggesting that it is neither necessary nor sufficient, in resolving whether the Combatant Status Review Tribunals (CSRTs) provided an adequate substitute to habeas corpus, to ask

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25 531 U.S. 533 (2001).

26 *Id.* at 548–49.

27 *Id.* at 546; *see also id.* at 545 (“By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source.”).

28 Indeed, two of the most sustained academic critiques to date of *Boumediene* have taken a rather dismissive attitude toward the significance (and plausibility) of Justice Kennedy’s separation-of-powers analysis. *See* Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2007–2008 CATO SUP. CT. REV. 23, 23 (“[O]n inspection it becomes clear that the real basis of the opinion lies elsewhere.”); Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 2039 (2009) (“[I]t is Kafkaesque for the majority to invoke ‘separation of powers’ as a justification for dismantling two bulwarks of that doctrine, congressional control over federal jurisdiction and the political question doctrine.”).

29 Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, 42 U.S.C.).

whether their procedures comported with due process.<sup>30</sup> Even though Chief Justice Roberts argued vehemently in dissent that it was illogical to reach the constitutionality of the removal of habeas jurisdiction without deciding whether individual petitioners had actually been denied due process,<sup>31</sup> Justice Kennedy held firm, reasoning that the risk of error in CSRT proceedings was too high to trust that CSRT appeals were an adequate alternative to habeas corpus.<sup>32</sup>

Its significance to the result in *Boumediene* notwithstanding, the larger implications of Justice Kennedy's analysis remain to be seen. Only time will tell whether his not-unprecedented suggestion that habeas corpus is about *accuracy* more than *fairness* will have implications for other forms of federal habeas corpus, including review of state court convictions and of challenges to removal orders in immigration cases.<sup>33</sup> But there is one piece of this puzzle that is ripe for consideration now—namely, Justice Kennedy's suggestion that the access to courts protected by the Suspension Clause is (at least largely) about protecting the *courts* as such.

In nonhabeas cases, such a view is inconsistent with current case law. As recently as 2002, the Court has noted that, “[h]owever unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being

30 See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008) (“Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry.”); *id.* (“[W]e make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards . . .”).

31 See *id.* at 2280–83 (Roberts, C.J., dissenting).

32 See, e.g., *id.* at 2270 (majority opinion). Justice Kennedy thus invoked Justice Holmes' dissent in *Frank v. Mangum*, 237 U.S. 309 (1915), suggesting that the purpose of habeas corpus is to “‘cu[t] through all forms and g[o] to the very tissue of the [constitutional] structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.’” *Boumediene*, 128 S. Ct. at 2270 (quoting *Mangum*, 237 U.S. at 346 (Holmes, J., dissenting) (first and second alterations in original)).

33 See, e.g., Norako, *supra* note 15. Indeed, this distinction harkens back to the conflict in post-conviction habeas cases between Justice Brennan's position in *Fay v. Noia*, 372 U.S. 391 (1963), which suggested that habeas was concerned solely with the legality of detention “simpliciter,” *id.* at 430, and the “process” view first articulated by Paul Bator, see generally Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (arguing that institutional considerations support the invocation of federal habeas jurisdiction only when state courts fail to provide a satisfactory process for deciding federal questions), and later effectively adopted by the Supreme Court in a series of cases culminating in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Coleman v. Thompson*, 501 U.S. 722 (1991).

shut out of court.”<sup>34</sup> Although those cases in particular concerned access to the courts as a *practical* matter, the limited jurisprudence with respect to Congress’ power to preclude judicial review reflects a similar understanding—i.e., that a “serious constitutional question” would arise *only* “if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”<sup>35</sup>

At first blush, such logic seems entirely intuitive. Because federal courts have jurisdiction to determine their jurisdiction,<sup>36</sup> even the most complete and unambiguous denial of access to the courts leaves intact the power of the courts to pass upon the constitutionality of such preclusion.<sup>37</sup> Thus, courts can decide whether the affected litigants have substantive rights before deciding whether the physical or substantive preclusion of judicial review is constitutional, notwithstanding the Supreme Court’s 1998 decision in *Steel Co. v. Citizens for a Better Environment*<sup>38</sup> and its sweeping repudiation of “hypothetical jurisdiction.”<sup>39</sup> Because these cases hold that the “injury” inflicted by the denial of access occurs only if the litigants *do* have rights on the merits that courts are unable to vindicate, the consensus view pre-*Boumediene* seemed to be that there is simply no distinct separation of powers issue in denial-of-access cases—that there is no injury to the

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34 *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (footnote omitted).

35 *Webster v. Doe*, 486 U.S. 592, 603 (1988) (internal quotation marks omitted).

36 *See, e.g., United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947); *see also United States v. Ruiz*, 536 U.S. 622, 628 (2002) (“[I]t is familiar law that a federal court always has jurisdiction to determine its own jurisdiction.”).

37 *See, e.g., Torres de la Cruz v. Maurer*, 483 F.3d 1013, 1018 (10th Cir. 2007) (“[A]s an Article III court, we have inherent jurisdiction ‘to determine whether [a] jurisdictional bar applies.’” (quoting *Latu v. Ashcroft*, 375 F.3d 1012, 1017 (10th Cir. 2004))).

38 523 U.S. 83 (1998).

39 Specifically, *Steel Co.* held that the federal courts have no power to assume the existence of jurisdiction and decide a case on the merits, even where the result would have been the same and the jurisdictional issue was far more complicated. *See id.* at 93–102. *But see Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) (clarifying that *Steel Co.* does not preclude resolution of *other* threshold issues). For present purposes, the relevant point is that resolving the “threshold” jurisdictional question in jurisdiction-stripping cases necessarily involves resolving constitutional challenges to statutes purportedly precluding jurisdiction. *Cf. Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1272 (11th Cir. 2005) (Birch, J., specially concurring in the denial of rehearing en banc) (explaining why *Steel Co.* requires courts to decide as a threshold matter constitutional challenges to statutes *conferring* jurisdiction).



courts separate from, or even on top of, any injury to the individual litigants.<sup>40</sup>

The origins of both classes of access claims, however, tell a rather different story. With respect to the constitutional right of access to the courts,<sup>41</sup> the early cases, especially *Ex parte Hull*,<sup>42</sup> “appear [ ] to have been motivated more by notions of federalism and the power of the federal courts than [by] the rights of prisoners.”<sup>43</sup> Pointedly, the stated justification for recognizing a right of access to the courts was to ensure that *courts* (the federal courts, in particular) were the authoritative expositors of federal law.<sup>44</sup>

And at roughly the same time, as the Supreme Court was beginning to evoke the specter of what Louis Jaffe would later call the “right to judicial review,”<sup>45</sup> the key opinions focused as much on the institutional prerogative of the courts as on the rights of individual litigants.<sup>46</sup> Emblematic of this trend was a 1936 concurrence by Justice Brandeis, who emphasized that,

The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To *that* extent, the person asserting

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40 See, e.g., *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007) (ridiculing the idea that Guantanamo Bay detainees are protected by the separation of powers even if they have no other constitutional rights).

41 There is substantial disagreement about the *source* of such a right. See, e.g., *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (“Decisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses.” (citations omitted)). See generally Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477 (2008) (asserting that civil litigants have a constitutionally protected right of access to federal courts by virtue of the Fourteenth Amendment).

42 312 U.S. 546 (1941).

43 *Lewis v. Casey*, 518 U.S. 343, 379 n.7 (1996) (Thomas, J., concurring).

44 See *Hull*, 312 U.S. at 549 (“Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn . . . [is a] question[ ] for that court alone to determine.”).

45 See Louis L. Jaffe, *The Right to Judicial Review* (pts. 1 & 2), 71 HARV. L. REV. 401, 769 (1958); see also LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 327 (1965) (“The ‘right’ to judicial review is determined by common-law tradition . . . , by the statute book, and by the Constitution.”).

46 As Jaffe explains, this trend began in 1902 in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), as a “presumption” in favor of judicial review, see Jaffe, *supra* note 45, at 423–24, but did not crystallize until the aftermath of *Crowell v. Benson*, 285 U.S. 22 (1932), and its broad endorsement of administrative adjudication. See Jaffe, *supra* note 45, at 800–08.

a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.<sup>47</sup>

From Brandeis' perspective, it was the protection of judicial supremacy—of the courts' prerogative to "say what the law is"<sup>48</sup>—that required the protection of a litigant's substantive access to the courts, and not the other way around. Thus, at their origins, judicial recognition of both physical and substantive access claims was rationalized at least largely by the courts' need to protect themselves.

The real question, then, is not whether the denial of access was ever understood at least in part as an injury to the horizontal or vertical separation of powers; as Parts I and II will demonstrate in reconstructing both sets of doctrine, it clearly was. Rather, the issues I take up in this Article are why that formulation disappeared, and whether the resuscitation of that understanding, beginning perhaps with Justice Kennedy's opinion in *Boumediene*, has any contemporary significance. Put another way, other than as an interesting footnote, does the separation of powers have a meaningful contribution to make to our understanding of how the Constitution limits the power of the political branches to deny access to the courts?

In Part III, I turn to that question, using *Boumediene* as a foil. Focusing on the divide between Justice Kennedy and Chief Justice Roberts, I suggest that the answer is yes—that recognition of the distinct injury that the courts (the federal courts, in particular) suffer in denial-of-access cases helps fill in some of the gaps in extant doctrine. More fundamentally, though, the notion that courts are harmed separately from the litigants in such cases also provides the jumping-off point for reconsidering a host of federal courts doctrines relating to the availability of Article III *appellate* review, and the broader—and far more obscure—question of whether a right to judicial review is, and should ever be, a right to *federal* judicial review.

## I. PHYSICAL ACCESS TO THE COURTS: ORIGINS AND EVOLUTION

### A. *Origins: Ex Parte Hull and the Equal Access Cases*

Especially as of late, the Supreme Court has been sharply divided over the scope of the constitutional right of access to the courts.<sup>49</sup> There is no disagreement, however, that its roots lay in the Court's

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47 *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) (emphasis added).

48 *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

49 *See, e.g., Lewis v. Casey*, 518 U.S. 343, 344 (1996) (dividing 5-4 on the scope of the right of access to the courts).

terse 1941 decision in *Ex parte Hull*. *Hull*, an “original” habeas petition,<sup>50</sup> raised the question whether state officials—in *Hull*, a prison warden—could impose a pre-clearance requirement on federal post-conviction habeas petitions, requiring inmates to have their claims screened by state officials prior to filing.<sup>51</sup> In a short opinion, the Supreme Court unanimously struck down the Michigan warden’s policy, holding that,

[T]he state and its officers may not abridge or impair petitioner’s right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.<sup>52</sup>

For this proposition, Justice Murphy cited four cases—the Supreme Court’s earlier decisions in *First National Bank v. Anderson*,<sup>53</sup> *Erie Railroad Co. v. Purdy*,<sup>54</sup> and *Carter v. Texas*;<sup>55</sup> and the Federal District Court of Kansas’ decision in *Ex parte Sharp*.<sup>56</sup> Yet, as Justice Thomas would later note, the three Supreme Court cases, none of which involved habeas petitions, all concerned the (by then) entirely uncontroversial proposition that a state court’s determination of whether a complaint states a federal question neither binds the Supreme Court nor precludes it from exercising its appellate jurisdiction to decide the same.<sup>57</sup>

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50 See *Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring) (“Such a petition is commonly understood to be ‘original’ in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court’s appellate (rather than original) jurisdiction.” (citing Dallin H. Oaks, *The “Original” Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153)); see also Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1511–15 (2007) (summarizing the evolution of the Supreme Court’s “original” habeas jurisdiction).

51 See *Ex parte Hull*, 312 U.S. 546, 547–49 (1941) (describing the background and the pre-clearance requirement).

52 *Id.* at 549.

53 269 U.S. 341, 346 (1926).

54 185 U.S. 148, 152 (1902).

55 177 U.S. 442, 447 (1900).

56 33 F. Supp. 464 (D. Kan. 1940).

57 See *Lewis v. Casey*, 518 U.S. 343, 379 n.7 (1996) (Thomas, J., concurring). Such a result should have necessarily followed from Justice Story’s opinion in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), although the issue may not have been fully settled until *Cooper v. Aaron*, 358 U.S. 1, 17–19 (1958) (reaffirming that the legislative and executive branches of state governments are bound to follow the Supreme Court’s decisions on the U.S. Constitution). See generally Frederic M. Bloom, *Cooper’s Quiet Demise (A Short Response to Professor Strauss)*, 52 ST. LOUIS U. L.J. 1115 (2008) (discussing *Cooper* and its significance).

Whereas the fourth case cited by Murphy—*Ex parte Sharp*—did raise the similar issue of interference by state prison officials with a prisoner's ability to perfect his appeal, the district court decision relied on no prior authority for the proposition that such interference warranted federal habeas relief.<sup>58</sup> Instead, and tellingly, the precedents on which the *Hull* Court relied all went to the importance of the Supreme Court having the final say on questions of federal law.<sup>59</sup>

*Hull's* departure from the prior case law suggested that a state executive official's determination of federal law—in *Hull*, whether the habeas petitioner had a viable claim—is similarly incapable of precluding federal review. Even though the Court ultimately denied *Hull's* habeas petition on the merits,<sup>60</sup> it established the proposition that state executive officials could not condition a litigant's access to the federal courts on their approval of the suit when such access is otherwise available.

As importantly, to whatever extent *Hull* identified a textual source or precedent for the constitutional principle it enunciated, that principle was based upon the power of the federal courts vis-à-vis the political branches, and *not* the rights of individual litigants. In context, such analysis seems compelling, since the objection to the Michigan procedure was that the warden was substituting his own interpretation of the viability of petitioners' federal habeas claims for that of the federal courts. Access to the courts, then, was to protect the federal courts' authority to decide for themselves the viability of a federal claim, a principle that implicated *both* the individual rights of the litigant and the separation of powers (or, at least, principles of "federalism") between the federal courts and the states.

Notwithstanding the significance it would come to have in retrospect, *Hull* was largely neglected by the Supreme Court for several decades, cited only in passing,<sup>61</sup> or for the separate and entirely unrelated proposition that habeas could be available in some cases to review a second or successive conviction even if the prisoner would

58 See *Sharp*, 33 F. Supp. at 466.

59 See, e.g., *First Nat'l Bank v. Anderson*, 269 U.S. 341, 346 (1926) ("Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.").

60 See *Ex parte Hull*, 312 U.S. 546, 550–51 (1941) (holding that *Hull* had procedurally defaulted).

61 See, e.g., *Johnson v. Avery*, 393 U.S. 483, 498 n.24 (1969) (Douglas, J., concurring); *White v. Ragen*, 324 U.S. 760, 762 n.1 (1945) (per curiam).

not be released if he prevailed.<sup>62</sup> At the same time, the Court in a separate line of cases invoked the Due Process and Equal Protection Clauses of the Fourteenth Amendment to establish the right of litigants to “equal” access to the courts, an issue that was particularly implicated in lawsuits brought by indigent and/or illiterate criminal defendants and prisoners.

In *Griffin v. Illinois*,<sup>63</sup> for example, the Court struck down an Illinois law that required even indigent criminal defendants to pay for trial transcripts in order to appeal.<sup>64</sup> In *Smith v. Bennett*,<sup>65</sup> the Court invalidated an Iowa law that required indigent prisoners to pay a filing fee in order to prosecute a habeas petition.<sup>66</sup> In *Douglas v. California*,<sup>67</sup> the Court rejected a California criminal procedure rule that allowed the state courts to deny petitioners’ request for counsel if the state courts concluded that the litigants’ claims were unmeritorious.<sup>68</sup> And in *Johnson v. Avery*,<sup>69</sup> the Court struck down a Tennessee regulation that prohibited inmates from assisting each other on legal matters, on the ground that the rule interfered with the ability of illiterate or poorly educated prisoners to perfect their legal claims.<sup>70</sup>

Yet inasmuch as the equal access cases presupposed that the right of access to the courts derived from the Due Process and Equal Protection Clauses of the Fourteenth Amendment, they struggled to articulate a coherent rationale that would support a *generalized* right of access to the courts. On the contrary, as then-Justice Rehnquist pointed out in *Ross v. Moffitt*<sup>71</sup> in 1974,

The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors.<sup>72</sup>

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62 See, e.g., *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968); *Peyton v. Rowe*, 391 U.S. 54, 67 (1968).

63 351 U.S. 12 (1956).

64 See *id.* at 19–20 (plurality opinion).

65 365 U.S. 708 (1961).

66 See *id.* at 713–14.

67 372 U.S. 353 (1963).

68 See *id.* at 357–58.

69 393 U.S. 483 (1969).

70 See *id.* at 488–90.

71 417 U.S. 600 (1974).

72 *Id.* at 608–09 (footnote omitted).

The Court would nevertheless expand the equal access rationale later that same year, holding, in *Wolff v. McDonnell*,<sup>73</sup> that *Johnson* also precluded states from barring inmate assistance in the filing of civil rights actions (and not just habeas petitions).<sup>74</sup> At the same time, in rejecting the petitioners' separate claim in *Wolff* that the right of access to the courts precluded prison officials from opening a prisoner's correspondence with counsel, the Court emphasized that the scope of any such right was unclear. In Justice White's words, "the Fourteenth Amendment due process claim based on access to the courts has not been extended by this Court to apply further than protecting the ability of an inmate to prepare a petition or complaint."<sup>75</sup> But *Wolff*, like the cases before it, did little to explain why *those* cases, and only those cases, implicated the "fundamental" constitutional right the existence of which the Court effectively took for granted.

### B. *Bounds v. Smith: Access to the Courts Redefined*

To understand *Bounds v. Smith*,<sup>76</sup> it is important first to describe a case that came to the Supreme Court six years earlier—*Younger v. Gilmore*.<sup>77</sup> In *Gilmore*, a group of inmates challenged the constitutionality of a California regulation limiting the availability of materials in prison libraries. After a three-judge district court panel struck down the California regulation,<sup>78</sup> the Supreme Court summarily affirmed, noting only that it had jurisdiction,<sup>79</sup> and that it "affirm[ed] the judgment of the District Court for the Northern District of California," citing *Johnson* in support.<sup>80</sup>

Because *Gilmore* was a summary affirmance, it left the law at least somewhat unsettled,<sup>81</sup> resulting in a slew of irreconcilable (or at least

73 418 U.S. 539 (1974).

74 See *id.* at 577–80.

75 *Id.* at 576 (citations omitted); see also *id.* ("[E]ven if one were to accept the argument that inspection of incoming mail from an attorney placed an obstacle to access to the court, it is far from clear that this burden is a substantial one.").

76 430 U.S. 817 (1977).

77 404 U.S. 15 (1971) (per curiam).

78 *Gilmore v. Lynch*, 319 F. Supp. 105, 112 (N.D. Cal. 1970) (per curiam) (three-judge court).

79 *Gilmore*, 404 U.S. at 15. As remains true today, the Supreme Court's appellate jurisdiction from three-judge district courts was mandatory, so long as the three-judge district court itself properly had jurisdiction. See 28 U.S.C. § 1253 (2006); see also *Moody v. Flowers*, 387 U.S. 97, 101–02 (1967) (construing § 1253).

80 *Gilmore*, 404 U.S. at 15.

81 See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) ("[T]he precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.' A summary disposition affirms

somewhat inconsistent) lower court decisions in the ensuing years.<sup>82</sup> Then, in 1977, the Supreme Court attempted to make explicit what *Gilmore* had implicitly established, concluding in *Bounds* that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”<sup>83</sup>

At issue in *Bounds* was the access to a law library afforded to North Carolina state inmates, given that the only prison library in the state was held to be “severely inadequate” and the state provided no other legal assistance to inmates.<sup>84</sup> Writing for a 6–3 Court, Justice Marshall invoked the Court’s equal access jurisprudence for the proposition that “[m]eaningful access’ to the courts is the touchstone.”<sup>85</sup> Although the Court had never explicitly recognized that meaningful access could require the states to undertake an affirmative obligation, Marshall argued that such a conclusion was not precluded by the earlier case law, and that “[t]he inquiry is . . . whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.”<sup>86</sup> Thus, *Bounds* held that North Carolina was obligated to provide prisoners with access to law libraries or other “adequate” legal resources in order to enable the inmates to press their legal claims in the federal courts through the preparation and filing of “meaningful” legal papers.<sup>87</sup>

Concurring, Justice Powell emphasized that the majority opinion “recognizes that a prison inmate has a constitutional right of access to the courts to assert such procedural and substantive rights as may be available to him under state and federal law.”<sup>88</sup> At the same time, Powell noted, the opinion did not identify the particular types of

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only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.” (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1978)).

82 See, e.g., *Bounds v. Smith*, 430 U.S. 817, 828–29 (1977) (discussing the implications of *Gilmore*).

83 *Id.* at 828.

84 *Id.* at 818.

85 *Id.* at 823 (emphasis added) (quoting *Ross v. Moffitt*, 417 U.S. 600, 611, 612, 615 (1974)). In an analogous context, the Court had held just one month before *Bounds* that a statute displacing habeas corpus did not implicate the Suspension Clause so long as the remedy it provided was an “adequate” and “effective” substitute for habeas. See *Swain v. Pressley*, 430 U.S. 372, 379–84 (1977).

86 *Bounds*, 430 U.S. at 825.

87 *Id.* at 828.

88 *Id.* at 833 (Powell, J., concurring).

claims federal or state courts were constitutionally compelled to hear; it merely held that prisoners had a right to an adequate law library or comparable legal assistance when pressing such claims.<sup>89</sup>

Although separate dissents were penned by each of the Justices (Chief Justice Burger, Justice Stewart, and then-Justice Rehnquist) in the minority, Justice Rehnquist's dissent was by far the most significant. At the heart of Rehnquist's dissent was the (seemingly correct) proposition that *Bounds* went further than any of the Court's earlier cases entirely because it was *not* about equal access. In his words,

[I]f a prisoner incarcerated pursuant to a final judgment of conviction is not prevented from physical access to the federal courts in order that he may file therein petitions for relief which Congress has authorized those courts to grant, he has been accorded the only constitutional right of access to the courts that our cases have articulated in a reasoned way.<sup>90</sup>

On Justice Rehnquist's view, the flaw in the majority opinion was in recognizing that the right of access to the courts could be infringed even when states took no affirmative action to preclude access.<sup>91</sup> Such a right, Rehnquist reasoned, had no relationship to the Due Process or Equal Protection Clauses, and, at least according to Rehnquist, was "found nowhere in the Constitution."<sup>92</sup> The error in *Bounds* was thus in Justice Marshall's conflation of the denial-of-access cases like *Hull* with the equal access cases like *Griffin*. Even if one could find a requirement for affirmative state action in the context of remedying discriminatory policies, none of the Court's prior precedents recognized any such affirmative requirement when the denial of access was, for lack of a better word, nondiscriminatory.

Yet, regardless of who had the better of the argument, *Bounds* was unquestionably an expansion of the Court's earlier cases, and one that crystallized the very question that prior precedent had left unanswered. Was the right of access to the courts a generalized and widely sweeping right that existed to protect the ability of all litigants to press all legal claims in all cases, or was it a narrower right that only prevented executive branch officials from affirmatively obstructing access to the courts? *Bounds* clearly adopted the former reasoning, but pro-

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89 *Id.*

90 *See id.* at 839–40 (Rehnquist, J., dissenting).

91 *Id.*; *see also id.* at 836 (Stewart, J., dissenting) (describing the Court's conclusion in *Gilmore*, on which *Bounds* relied, as a "quantum jump" from the earlier case law).

92 *Id.* at 839 (Rehnquist, J., dissenting).



vided policy arguments more than legal analysis in explaining why the *Constitution* compelled such a result.

### C. *Lewis v. Casey* and the *Reconceived Origins of Access Claims*

The next two decades saw concerted efforts by the Supreme Court to clarify (and usually narrow) the scope of the right articulated in *Bounds*<sup>93</sup> and in *Anders v. California*.<sup>94</sup> In *Pennsylvania v. Finley*,<sup>95</sup> for example, the Court held that states have broad discretion in determining the nature and type of legal assistance to provide to inmates seeking post-conviction remedies, and that *Anders* did not compel any specific procedures, including a right to counsel for indigent prisoners.<sup>96</sup>

Similarly, in *Murray v. Giarratano*,<sup>97</sup> the Court reversed a lower court decision that *Bounds* compelled appointed counsel for death row inmates.<sup>98</sup> Specifically, a plurality of the Court concluded that *Finley*'s rejection of a right to counsel for an inmate's collateral challenges to a conviction applied to death row inmates as well, notwithstanding *Bounds* or the extent to which counsel might be necessary to protect those inmates' access to the courts.<sup>99</sup> Concurring, Justice O'Connor emphasized that *Bounds* "allows the States considerable discretion in assuring that those imprisoned in their jails obtain meaningful access to the judicial process. Beyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy consideration and the allocation of scarce legal resources."<sup>100</sup>

But the real mechanism through which the Court retreated from *Bounds* was its standing doctrine, as exemplified dramatically by its

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93 In this regard, the denial-of-access cases were part of a larger series of cases in which the Rehnquist Court evinced an ever growing hostility to the private enforcement of public (and particularly civil) rights. See generally Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003) (detailing how the Rehnquist Judiciary advocated against investing federal courts with obligations to enforce new rights); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (analyzing a number of areas where the Court has acted aggressively to limit the availability of remedies and rights of action, assessing the source of such hostility, and examining its effects on the Court's docket).

94 386 U.S. 738 (1967).

95 481 U.S. 551 (1987).

96 See *id.* at 559.

97 492 U.S. 1 (1989).

98 See *id.* at 11 (plurality opinion).

99 See *id.* at 7–11.

100 *Id.* at 13 (O'Connor, J., concurring).

1996 decision in *Lewis v. Casey*.<sup>101</sup> At issue in *Casey* was a class action filed by twenty-two Arizona inmates on behalf of all inmates in the Arizona state prison system, which challenged various aspects of the adequacy of Arizona's prison libraries.<sup>102</sup> The district court sustained the challenge, finding that the libraries were inadequate in providing legal assistance to inmates, particularly with respect to prisoners in lockdown (who were denied physical access) and to illiterate or non-English-speaking prisoners (who were unlikely to receive any assistance from library staff).<sup>103</sup> The court issued an injunction requiring Arizona to undertake a massive overhaul of its prison libraries,<sup>104</sup> a decision that the Ninth Circuit largely affirmed on appeal.<sup>105</sup>

On certiorari, the Supreme Court reversed, holding that the plaintiffs had failed to show the type of systematic injury that would justify the relief fashioned by the district court.<sup>106</sup> Specifically, Justice Scalia noted that,

Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. That would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by *Bounds* is concerned . . . the inmate . . . must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.<sup>107</sup>

In other words, the right of access to the courts required some showing that the denial of access had actually precluded the plaintiff from adequately presenting his legal claims—that the plaintiff's ability to vindicate his substantive rights was undermined by the denial of access. Although the majority agreed that *two* of the named plaintiffs had made such a showing, it held that the injunction was massively overbroad in requiring structural changes to the Arizona prison library system in response.<sup>108</sup>

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101 518 U.S. 343 (1996).

102 *Id.* at 346.

103 See *Casey v. Lewis*, 834 F. Supp. 1553, 1569 (D. Ariz. 1992); see also *Casey*, 518 U.S. at 346–47 (summarizing the district court's holdings).

104 *Casey*, 834 F. Supp. at 1569.

105 See *Lewis v. Casey*, 43 F.3d 1261, 1270–72 (9th Cir. 1994).

106 *Casey*, 518 U.S. at 359–60.

107 *Casey*, 518 U.S. at 351.

108 See *id.* at 360 (“Apart from the dismissal of Bartholic's claim with prejudice, and Harris's inability to file his claim, there is no finding, and as far as we can discern from the record no evidence, that in Arizona prisons illiterate prisoners cannot

Concurring in part, dissenting in part, and concurring in the judgment, Justices Souter, Breyer, and Ginsburg took issue with Justice Scalia's characterization of the relationship between standing and the merits for the two plaintiffs who clearly *did* allege an actual injury. On their view, the majority overreached in suggesting that there could never be a structural injunction based upon *Bounds* on the theory advanced by the plaintiffs; the facts in *Casey*, though, simply did not support a contrary result.<sup>109</sup>

For present purposes, what is most striking about *Casey* is the extent to which the separation of powers resurfaced as a relevant issue in denial-of-access cases. Yet, in marked contrast to *Hull*, which styled the purpose of an access-based right as protecting the federal courts from state executive branch officials, the majority in *Casey* styled the focus on standing as protecting state executive branch officials *from the courts*.<sup>110</sup> In his telling concurrence, Justice Thomas was at pains to emphasize that “[p]rinciples of federalism and separation of powers dictate that exclusive responsibility for administering state prisons resides with the State and its officials.”<sup>111</sup> Justice Thomas thus proceeded to cleave the equal access cases from the denial-of-access cases, noting that the Court had never suggested the right identified in *Hull* could impose an affirmative obligation upon the states.<sup>112</sup> Indeed, as noted above, Thomas read *Hull* as not turning in any meaningful way on the rights of the litigants, but on the relationship between the courts and the political branches, and between the federal government and the states.<sup>113</sup>

Oddly, then, *Casey*, although relying upon the plaintiffs' ability (or lack thereof) to prove an underlying injury on the merits, was a case largely about reining in the right of access to the courts in order to *protect* the separation of powers. *Casey* might thereby suggest, however implicitly, that the separation of powers is a more useful framework in the abstract for understanding both why a generalized right of access to the courts is necessary, and what limits it might necessarily include. But the majority in *Casey* saw that issue as a one-way ratchet.

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obtain the minimal help necessary to file particular claims that they wish to bring before the courts.”).

109 See *id.* at 393–404 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

110 See *id.* at 349 (“The requirement that an inmate . . . must show actual injury derives . . . from the doctrine of standing, a constitutional principle that prevents courts of law from undermining tasks assigned to the political branches.”).

111 *Id.* at 364 (Thomas, J., concurring).

112 *Id.* at 379.

113 See *id.* at 379 n.7.

The separation of powers and federalism limited the courts, and did not thereby *empower* the courts.

In the short term, the impact of *Casey* can be seen quite clearly in *Christopher v. Harbury*,<sup>114</sup> the Court's most recent denial-of-access case. At issue in *Harbury* was the claim that a government cover-up had frustrated the ability of Jennifer Harbury, a U.S. citizen, to prosecute a damages claim against the U.S. government for its alleged role in the detention, torture, and execution of Harbury's husband, a Guatemalan dissident, by the Guatemalan army.<sup>115</sup> Writing for a unanimous Court, Justice Souter concluded that Harbury had failed to allege a viable remedy that the alleged cover-up could have precluded her from pursuing.<sup>116</sup> In summarizing the extant case law, Souter succinctly characterized the relationship, after *Casey*, between standing and denial-of-access claims:

Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong. However unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court.<sup>117</sup>

Thus, notwithstanding the extent to which denial of access, at its origins, was defined at least largely by reference to the role of the federal courts in interpreting federal law, the subsequent case law inverted the inquiry, turning denial-of-access claims into questions principally—if not entirely—about the litigant's underlying rights. Today, whether a litigant has unconstitutionally been denied access to the courts turns entirely on whether there is a colorable legal question for the courts to decide, and so the issue of whether the denial of access might separately injure the *courts* has been rendered entirely superfluous, even while the constitutional foundations and scope of the right have remained unclear.

## II. THE SUBSTANTIVE RIGHT TO JUDICIAL REVIEW

In marked contrast to the constitutional right of access to the courts discussed in Part I, the Supreme Court has never formally rec-

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114 536 U.S. 403 (2002).

115 See *id.* at 406–08 (summarizing the background and allegations); see also *Harbury v. Hayden*, 522 F.3d 413, 415–16 (D.C. Cir. 2008) (same).

116 *Harbury*, 536 U.S. at 405.

117 *Id.* at 414–15 (footnote omitted).

ognized a general constitutional right of *substantive* access to the courts—what Professor Jaffe described as the “right to judicial review,”<sup>118</sup> and what might better be understood as a right of access to a judicial forum for resolution of legal (or at least constitutional) claims.<sup>119</sup> Nevertheless, as noted above, the Court has repeatedly invoked the “serious constitutional question” that would arise if an act of Congress were interpreted as precluding all judicial review of “colorable constitutional claims,” suggesting that even outside the context of habeas corpus, the Constitution *might* protect such a right.<sup>120</sup> And in the various modern decisions invoking this form of the constitutional avoidance canon, the cited authorities all trace back to the same foundational cases.

Thus, whereas Part I painstakingly summarized the evolution of the constitutional right of access to the courts by reference to the body of law expounding and defining such a right, Part II is, out of necessity, far less concrete or definite. Instead of retracing the origins of the right to judicial review, Part II attempts to retrace the origins of the *idea* that there is a right to judicial review, and the instances where that idea triggered invocation of the constitutional avoidance canon, before moving on to the unique and special case of federal habeas corpus.

#### A. *The Origins of the “Right” to Judicial Review*

Of course, any discussion of judicial review must begin no later than, if not before, *Marbury v. Madison*.<sup>121</sup> But as Professor Jaffe cogently argued a half-century ago, the true origins of the Ameri-

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118 See generally Jaffe, *supra* note 45 (analyzing the role of judicial review in the governmental process and arguing that judicial review of administrative action should be presumptively available).

119 As I explain below, even the Court’s decision in *Boumediene v. Bush* striking down a jurisdiction-stripping statute as unconstitutionally denying access to the courts, was focused on the habeas-specific access right protected by the Constitution’s Suspension Clause, and not a more general right to judicial review of a constitutional claim.

120 See, e.g., *Johnson v. Robison*, 415 U.S. 361, 366–67 (1973) (raising these questions before seeking to avoid them through statutory construction).

121 5 U.S. (1 Cranch) 137 (1803). There have been a series of recent arguments that judicial review predated *Marbury*. See, e.g., William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 456–57 (2005) (summarizing recent debate on the topic). The contemporary debate notwithstanding, it is certainly true that the principle of judicial review was established at least by the time *Marbury* was decided.

can<sup>122</sup> “right” to judicial review can be traced to a series of early twentieth-century Supreme Court decisions imposing a “presumption” in favor thereof.<sup>123</sup>

First among these cases was the Court’s 1902 decision in *American School of Magnetic Healing v. McAnnulty*,<sup>124</sup> which raised the propriety of a decision by the Postmaster General barring the plaintiff from conducting business through the mail. The Postmaster General, who had determined that the plaintiff’s advertisements were fraudulent, argued that his actions were entirely “administrative,” and were therefore not properly subject to judicial review.<sup>125</sup> The Supreme Court disagreed, concluding that the delegation of authority to the Postmaster General “does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved . . . .”<sup>126</sup> Instead, “[t]he acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.”<sup>127</sup>

*McAnnulty* did not settle the question of whether the Constitution required judicial review in certain cases, but it *did* give rise to what Jaffe described as the “presumption of reviewability”—the principle that administrative interpretations of federal law would be subject to judicial review absent clear indication of congressional intent to the con-

122 Jaffe traced the origins of judicial review (and of a potential right thereto) to early English common law, as surveyed first in Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345 (1956), and in somewhat less detail in JAFFE, *supra* note 45, at 327–34.

123 See Jaffe, *supra* note 45, at 423–37. As Jaffe notes, prior to 1902, a series of late nineteenth-century Supreme Court decisions had suggested, often implicitly, that at least some administrative law claims could be made unreviewable. See *id.* at 421–23.

I do not mean to suggest that there is nothing to gain from administrative law prior to the turn of the twentieth century. On the contrary, Professor Jerry Mashaw is in the midst of an immensely significant project reconstructing the administrative law of the early Republic, taking issue with the classical view that administrative law only “began” with the creation of the Interstate Commerce Commission in 1887. See Jerry L. Mashaw, *Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568 (2008); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007). Whatever significance we may attach to the implications of Mashaw’s work, it seems fairly clear that the Court did not begin viewing widespread administrative adjudication as a threat to judicial supremacy until the period Jaffe describes.

124 187 U.S. 94 (1902).

125 See *id.* at 109–10 (restating the position of the Postmaster General).

126 *Id.* at 108.

127 *Id.*

trary.<sup>128</sup> Presumably, the basis for the clear statement rule was a concern that the preclusion of review would raise a constitutional question, although the *McAnnulty* Court did not expressly state as much. And although the Court did not actually articulate such a presumption (or hint at the problems the absence of review might raise) until the 1930s, a series of cases over the ensuing decades reinforced the Court's concern with the increasing drift of interpretive authority to administrative agencies.<sup>129</sup>

As Jaffe would later write, “[t]he presumption of reviewability was reinforced in the twenties and thirties by a judicial zeal, often excessive, to contain administrative action.”<sup>130</sup> As importantly, the Court's concern was *not* motivated by a perceived need to protect an individual litigant's right to have an Article III court provide a definitive answer to a question of federal law, but by the possibility that the burgeoning administrative state would frustrate the courts' power to have the *final say*.<sup>131</sup> Thus, the concern implicated by the ever-increasing number of statutes delegating adjudicative authority to administrative agencies was not so much that agencies would have the *first* opportunity to interpret federal law, but that they would have the *last*, as well.

### B. *Judicial Review and the Modern Administrative State*

Nowhere was this concern more powerfully presented than in *Crowell v. Benson*,<sup>132</sup> which has been described as the “fountainhead for the stream of cases legitimating the role of the modern administrative agency.”<sup>133</sup> As Professor Fallon has summarized,

In upholding Congress's decision to vest responsibility for deciding cases under the Longshoremen's and Harbor Workers' Compensation Act in an administrative agency, *Crowell* . . . acknowledged a distinction between public rights and private rights; the Court assumed that public rights disputes may not require judicial decision at either the original or appellate level. . . . Even in private rights cases, *Crowell* held, an administrative tribunal may make findings of fact and render an initial decision of legal and constitutional questions, as long as there is adequate review in a constitutional

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128 See, e.g., Jaffe, *supra* note 45, at 423–27.

129 For a representative sampling, see *id.* at 425–28.

130 *Id.* at 428.

131 See, e.g., *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (“The responsibility of determining the limits of statutory grants of authority . . . is a judicial function . . .”).

132 285 U.S. 22 (1932).

133 Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 923 (1988) (footnotes omitted) (quoting *Crowell*, 285 U.S. at 51).

court. For the use of administrative decisionmakers to be permissible in a private rights case, *Crowell* posited that the “essential attributes” of the judicial decision must remain in an article III enforcement court, with the administrative agency or other non-article III adjudicator functioning less as an independent decisionmaker than as an adjunct to the court.<sup>134</sup>

But irrespective of the debate over the extent to which *Crowell* authorized the administrative determination of factual issues in “private rights” cases,<sup>135</sup> Chief Justice Hughes was almost dismissive of the concern that the statute arrogated the courts’ authority to interpret federal law, noting simply that “[r]ulings of the deputy commissioner upon questions of law are without finality.”<sup>136</sup> It simply was beyond the pale of the questions presented in *Crowell* whether Congress could preclude the federal courts from overturning an executive branch official’s interpretation of federal law. Moreover, the proper allocation of decisionmaking authority as between agencies and courts was, according to Chief Justice Hughes, entirely tied to the proper separation of powers, and not to the individual rights of the litigants.<sup>137</sup>

Four years later, when the Court was first asked to substantially clarify the scope of *Crowell* and the extent to which it did or did not require independent record review by the courts, the separation of powers concern was made ever more concrete. In a thorough concurring opinion in *St. Joseph Stock Yards Co. v. United States*,<sup>138</sup> Justice Brandeis—who had dissented in *Crowell* on the ground that he thought deference even to determinations of *constitutional* fact was permissible under the Longshoreman’s Act<sup>139</sup>—attempted to explain why the

134 *Id.* at 923–24 (footnotes omitted).

135 For a summary of the debate and further citations, see Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2606 n.89 (1998).

136 *Crowell*, 285 U.S. at 45; see also *id.* at 46 (“[T]he statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted.”).

137 See *id.* at 56 (“It is . . . a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend.” (footnote omitted)).

138 298 U.S. 38 (1936).

139 See *Crowell*, 285 U.S. at 77–80 (Brandeis, J., dissenting).



Court could completely defer to an agency's factual determinations, but *not* to its legal conclusions:

The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To *that* extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.<sup>140</sup>

Decades of administrative law cases and scholarship would debate (and have debated) the margins of the distinctions *Crowell* and *St. Joseph Stock Yards* presupposed. But Brandeis' defense of the significance of judicial review of questions of law provided a powerful principle (and, subsequently, perhaps the formative moment in the development of a right to judicial review). Indeed, decades later, when the Supreme Court would note the serious constitutional questions that would be raised by the complete preclusion of judicial review, Brandeis' concurrence in *St. Joseph Stock Yards* became the citation most commonly invoked in support of that conclusion.<sup>141</sup>

### C. Battaglia and the Academic Misunderstanding

Arguably, though, the focal point of the movement toward a "right" to judicial review ultimately had nothing to do with the rise of the modern administrative state. Instead, the canonical enunciation of a due process-based right to judicial review appears to have arisen out of an extended battle between Congress and the Supreme Court over the scope of the Fair Labor Standards Act of 1938 (FLSA).<sup>142</sup>

Specifically, the dispute was triggered by a trio of Supreme Court decisions in 1944, 1945, and 1946, holding that the "work week" for

140 *St. Joseph Stock Yards*, 298 U.S. at 84 (Brandeis, J., concurring) (emphasis added). On questions of fact, per his dissent in *Crowell*, Brandeis was more circumspect:

If there be any [factual] controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

*Crowell*, 285 U.S. at 87 (Brandeis, J., dissenting).

141 See, e.g., *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (citing Brandeis' concurrence); *Johnson v. Robison*, 415 U.S. 361, 366 n.8 (1974) (same).

142 Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

miners *included* the time traveling from the mouth of the mine to the drill site (from “portal-to-portal”), and that, as such, thousands of miners were entitled to significant overtime pay under the FLSA.<sup>143</sup> As one recent summary recounts,

This produced a colossal private and public liability for retroactive pay of over \$6.5 billion. (The United States would have been liable for \$1.5 billion of that under cost-plus contracts.) Congress responded with a heavy hand in the Portal-to-Portal Act of 1947, wiping out the entire liability. That alone raised two grave constitutional issues: a takings and due process question and an attempt by the legislative branch to deprive a judgment of the Supreme Court of effect, in effect “reversing” the Court by statute. But in addition, it put teeth in the substantive provisions by further specifying that no federal court (including the Supreme Court) had jurisdiction of any proceeding to enforce liability under the FLSA for portal-to-portal pay.<sup>144</sup>

Thus, in section 2(d) of the Portal-to-Portal Act,<sup>145</sup> Congress provided that,

No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under [FLSA] . . . to the extent that such action [seeks to enforce rights withdrawn by sections 2(a) and 2(b) of the Act].<sup>146</sup>

In *Battaglia v. General Motors Corp.*,<sup>147</sup> the Second Circuit suggested that section 2(d)’s preclusion of judicial review might raise a grave constitutional question, holding that “the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment.”<sup>148</sup> Thus, “while Congress has

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143 See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) (requiring that time spent walking “from time clock to work bench” be included in compensable working time); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 170 (1945) (classifying underground travel in coal mines as compensable); *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 603 (1944) (same result for iron ore mines).

144 William M. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 693 (2007) (footnotes omitted).

145 Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 86 (codified as amended at 29 U.S.C. §§ 251–254 (2006)).

146 *Id.* § 2(d), 61 Stat. at 86 (codified at 29 U.S.C. § 252(d)).

147 169 F.2d 254 (2d Cir. 1948).

148 *Id.* at 257.

the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.”<sup>149</sup>

Ultimately, *Battaglia* concluded that section 2(d) did not violate the Due Process Clause, because Congress changed the applicable substantive law while the plaintiffs’ claims were pending, and because the statute did not purport to disturb judgments that had previously become final.<sup>150</sup> Put another way, *Battaglia* concluded that the divestiture of jurisdiction had not actually precluded a meritorious claim, because the provisions wiping out all liability *were* in fact constitutional—the underlying substantive claims were ultimately meritless.

But *Battaglia*’s significance was as much for the theory it advanced: that the Due Process Clause could constrain Congress’ power over federal jurisdiction. Moreover, *Battaglia* suggested a model for how courts could decide such cases: first reach the question whether the underlying legal claim has merit, and only *then* reach the possible unconstitutionality of the foreclosure of jurisdiction.

As a result, *Battaglia*’s influence was immediately felt in the academy. Although seventy-five years had passed since *United States v. Klein*<sup>151</sup> provided the first example of the “external restraints” thesis—that Congress cannot take away jurisdiction as means to a constitutionally impermissible end<sup>152</sup>—*Battaglia* provided a far less obtuse (and far more accessible) conception of the limits on Congress’ jurisdiction-stripping power. Moreover, *Battaglia* was decided in the nascence of a profound academic reassessment of the relationship between Congress and the federal courts. As Professor Amar has explained, the early 1950s “appear as . . . ‘the golden age’ of federal jurisdiction and legal process scholarship.”<sup>153</sup> In the context of such a sweeping pedagogical revolution focused on the centrality of *process*, the idea

149 *Id.*

150 *See id.* at 259–61; *see also* Seese v. Bethlehem Steel Co. Shipbuilding Div., 168 F.2d 58, 65 (4th Cir. 1948) (“Whether the denial of jurisdiction would be valid if the provision striking down the claims were invalid is a question which does not arise.”).

151 80 U.S. (13 Wall.) 128 (1871).

152 *See id.* at 145–48; *see also supra* note 9 (citing sources).

153 Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691 (1989) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)); *see also id.* at 692 & nn.15–28 (citing articles representative of the period).

that the Constitution might itself limit Congress' power to prescribe (and proscribe) process would have reverberated rather loudly.<sup>154</sup>

Emblematic of the significance of the Portal-to-Portal Act issue (and the Second Circuit's resolution thereof) was *Battaglia's* inclusion, first in Henry Hart's legendary *Dialectic*,<sup>155</sup> and shortly thereafter in the first edition of Hart & Wechsler's *The Federal Courts and the Federal System*.<sup>156</sup> Famously, Hart equivocated at the end of the *Dialectic* on whether Congress *could* completely preclude jurisdiction in nonhabeas cases.<sup>157</sup> But *Battaglia's* inclusion in the conversation was nevertheless significant, for it provided what was, to date, the most compelling explanation for how the Constitution might limit Congress' power over the courts in such suits.

#### D. *The Rise of Avoidance and Further Obfuscations*

It would not be until over two decades later, however, in *Johnson v. Robison*,<sup>158</sup> that the Supreme Court first invoked what has been described as the "*Battaglia* principle," i.e., that an act of Congress precluding all judicial review might raise serious constitutional questions.

The specific issue in *Robison* was whether a statute purporting to preclude judicial review of particular decisions by the Administrator of the Veterans Administration could constitutionally be applied to preclude a lawsuit by a conscientious objector challenging the Administrator's denial of educational benefits on both First and Fifth Amendment grounds.<sup>159</sup> In one sentence (and a footnote), the Court noted that such a reading of the statute would "raise serious questions concerning the constitutionality of [the statute],"<sup>160</sup> and, invoking the constitutional avoidance canon, adopted an alternative interpretation that favored review.<sup>161</sup>

154 Indeed, it was during this exact period that courts and commentators were struggling with the question of whether individuals in U.S. custody overseas were entitled to judicial process, a dilemma that raised many of the same tensions. See generally Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949) (evaluating problems relating to the extent of federal jurisdiction over cases arising in military tribunals overseas).

155 Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1383–84 & n.67 (1953).

156 HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 302 (1st ed. 1953).

157 See Hart, *supra* note 155, at 1398–99.

158 415 U.S. 361 (1974).

159 *Id.* at 364–65.

160 *Id.* at 366.

161 See *id.* at 366–67 & n.8.

The footnote is perhaps even more telling than the text. For the proposition that the preclusion of all review would raise a “serious constitutional question,” the Court cited *Ex parte McCordle*<sup>162</sup> and *Sheldon v. Sill*,<sup>163</sup> on the one hand (presumably against that idea),<sup>164</sup> and *Martin v. Hunter’s Lessee*<sup>165</sup> and Brandeis’ *St. Joseph Stock Yards* concurrence on the other.<sup>166</sup> But the Court went no further, leaving for another day the separate but related questions of *why* there might be a serious constitutional question, and under which circumstances the question would be implicated.

Just one year later, the Court returned to the same principle in *Weinberger v. Salfi*,<sup>167</sup> invoking the availability of jurisdiction under the Social Security Act for constitutional challenges thereto as preempting the serious constitutional question identified in *Robison*.<sup>168</sup> To similar effect, in *Bowen v. Michigan Academy of Family Physicians*,<sup>169</sup> the Court interpreted the Medicare Act as not precluding challenges to the Secretary of Health and Human Services’ administration of Part B of the Medicare Program.<sup>170</sup> As Justice Stevens wrote, “[o]ur disposition avoids the ‘serious constitutional question’ that would arise if we construed § 1395ii to deny a judicial forum for constitutional claims arising under Part B of the Medicare program.”<sup>171</sup> Interestingly, *Bowen*

162 74 U.S. (7 Wall.) 506 (1869).

163 49 U.S. (8 How.) 441 (1850).

164 The problem with both *McCordle* and *Sill*, of course, is that neither of the statutes upheld by the Supreme Court ousted *all* jurisdiction. In *Sill*, the litigants were free to return to state court since federal jurisdiction had only been premised on diversity. And in *McCordle*, the Court famously hinted that the repeal of its appellate jurisdiction had not altered its “original” habeas jurisdiction under section 14 of the Judiciary Act of 1789. See *McCordle*, 74 U.S. (7 Wall.) at 515 (“The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.”). The Court would seize on this point less than seven months later, sustaining its original habeas jurisdiction over a similar habeas petition in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103–06 (1869). For more on the relationship between these cases, see Hart, *supra* note 155, at 1364–65 & n.14. See also Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593, 642–46 (2006) (discussing the present-day significance of *McCordle* as authority for limitations on appellate jurisdiction).

165 14 U.S. (1 Wheat.) 304 (1816).

166 *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 82–84 (1936) (Brandeis, J., concurring).

167 422 U.S. 749 (1975).

168 See *id.* at 761–62.

169 476 U.S. 667 (1986).

170 See *id.* at 680–81.

171 *Id.* at 681 n.12.

cited *Salfi* and *Robison*, but did not identify the origins of the requirement that the *claims* be constitutional.

But the most thorough articulation of the basis for the “serious constitutional question” came two years later in *Webster v. Doe*.<sup>172</sup> *Webster* concerned a lawsuit brought by a former employee of the CIA who claimed he was unconstitutionally terminated on the ground of sexual orientation.<sup>173</sup> Although the Court concluded that the National Security Act vested discretion in the Director of the CIA sufficient to frustrate judicial review, it nevertheless concluded that the plaintiff’s constitutional claims were not precluded.<sup>174</sup> As Chief Justice Rehnquist wrote for the Court,

We do not think § 102(c) may be read to exclude review of constitutional claims. We emphasized in *Johnson v. Robison* that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. In *Weinberger v. Salfi*, we reaffirmed that view. We require this heightened showing in part to avoid the “serious constitutional question” that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.<sup>175</sup>

*Webster* thus became the typical and routine citation for the proposition that a statute taking away all judicial review of a “colorable constitutional claim” would raise a “serious constitutional question.”<sup>176</sup> But why only *constitutional* claims? What is the textual constitutional basis for the infirmity such a statute might create? How would we ever begin *answering* that question, if congressional intent to force the issue were clear? Over twenty years after *Webster*, these questions remain unanswered, largely—if not entirely—because of the rigid constitutional avoidance that *Webster* and its predecessors necessarily precipitated.

#### E. *An Attempt at Clarity: Schor and Non-article III Courts*

Shortly after *Webster*, the Supreme Court was finally confronted with a case where the question of whether the Constitution protected

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172 486 U.S. 592 (1988).

173 *Id.* at 595–96.

174 *Id.* at 603.

175 *Id.* (citations omitted) (quoting *Bowen*, 476 U.S. at 681 n.12). For the “colorable” requirement, Chief Justice Rehnquist cited *Bowen*, which had rejected the government’s argument that it could dismiss the constitutional claims there at issue on grounds of frivolity. *Id.*

176 See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 495 (1999) (Ginsburg, J., concurring in judgment) (citing *Webster*, 486 U.S. at 603); *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (citing *Webster*, 486 U.S. at 603–04).

a right to Article III adjudication per se was squarely and unequivocally presented. In *Commodity Futures Trading Commission v. Schor*,<sup>177</sup> the Court was faced with the question of whether Congress could confer jurisdiction upon the Commodity Futures Trading Commission (CFTC) over state-law counterclaims.<sup>178</sup> Just four years earlier, a plurality of the Court had invalidated substantial aspects of the federal bankruptcy system on the ground that Congress had delegated too much authority over state law claims to non-Article III bankruptcy courts,<sup>179</sup> holding that “Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.”<sup>180</sup>

Writing for a majority in *Schor*, Justice O’Connor stepped back from *Northern Pipeline*, holding that the delegation of adjudicatory authority to the CFTC was permissible, and did not violate either Article III or the separation of powers more generally. In so holding, Justice O’Connor began with the observation that “Article III, § 1, serves both to protect ‘the role of the independent judiciary within the constitutional scheme of tripartite government,’ and to safeguard litigants’ ‘right to have claims decided [by] judges who are free from potential domination by other branches of government.’”<sup>181</sup> Noting that the latter concern “serves to protect primarily personal, rather than structural, interests,”<sup>182</sup> Justice O’Connor concluded that the Article III-based right to an independent Article III adjudication was subject to waiver, and had in fact been waived by Schor when he expressly demanded that the counterclaim be resolved in the administrative proceeding.<sup>183</sup>

As to the separation of powers issue, Justice O’Connor emphasized the extent to which “Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts ‘to transfer jurisdiction [to non-Article III tribunals] for the

177 478 U.S. 833 (1986).

178 *Id.* at 835–36.

179 *See* *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (plurality opinion).

180 *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) (citing *Northern Pipeline*, 458 U.S. at 84, 90–92).

181 *Schor*, 478 U.S. at 848 (quoting first *Thomas*, 473 U.S. at 583, then *United States v. Will*, 449 U.S. 200, 218 (1980)).

182 *Id.*

183 *See id.* at 848–49. Justice O’Connor further concluded that even if Schor had not expressly waived such a right, he had effectively so waived by proceeding in the CFTC in the first place. *See id.* at 849–50.

purpose of emasculating' constitutional courts, and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.'<sup>184</sup> Noting that the Court had previously declined to adopt formalistic rules delineating the limits on Congress' power to delegate adjudicatory authority to non-Article III courts, Justice O'Connor framed the issue as a balancing test:

Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.<sup>185</sup>

Reasoning that those considerations balanced in favor of the delegation of authority to the CFTC (largely by analogizing the statutory scheme to the one upheld in *Crowell*),<sup>186</sup> Justice O'Connor concluded that "the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers."<sup>187</sup> Critically, in support of this point, Justice O'Connor emphasized that Article III review remained available, and that the administrative process was triggered by the parties' consent. Thus,

Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.<sup>188</sup>

In short, then, *Schor* actually reinforced the conclusion that the separation of powers itself protected against over-delegation of Article III adjudicatory authority to administrative agencies, even while

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184 *Id.* at 850 (quoting first *Nat. Mut. Ins. Co. v. Tide-Water Transfer Co.*, 337 U.S. 582, 644 (1949), then *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

185 *Schor*, 478 U.S. at 851 (quoting first *Thomas*, 473 U.S. at 584, then *Northern Pipeline*, 458 U.S. at 84–85).

186 *See id.* at 852–53.

187 *Id.* at 854.

188 *Id.* at 855.



upholding the delegation there at issue. If the absence of a separation of powers problem turned on the conclusion that “the power of the federal judiciary to take jurisdiction of these matters [wa]s unaffected,”<sup>189</sup> then *Schor* appears unequivocally to bolster the suggestion that, at least in the administrative law context, access to the courts was as much about the *courts* as it was about the litigants.

Just as the nuances within Justice Brandeis’ logic have receded over time, so too have we neglected Justice O’Connor’s uncontested assertion that both individual rights *and* the separation of powers are impacted when Congress constrains Article III review<sup>190</sup>—and Justice Brennan’s suggestion that we can’t understand one without the other.<sup>191</sup> Instead, in recent years, the focus of courts and commentators has been directed much more to the litigants whose rights are at issue, as most of the significant cases have arisen in the context of Congress’ newfound obsession with federal habeas jurisdiction for immigrants and for noncitizens held abroad—two classes of litigants whose substantive rights may differ, in important ways, from traditional plaintiffs.

#### F. *The Special Case of Habeas Corpus*

Unlike the generalized due process-based right to judicial review invoked in the *Webster* line of cases, the right to judicial review in the context of habeas corpus is, at least at its core, far better established. For decades, the Supreme Court has understood the Constitution’s Suspension Clause as protecting the ability of individuals in state or federal custody to challenge the legality of their detention under federal law, even if that detention is incident to a facially valid criminal conviction.<sup>192</sup>

Moreover, as has been discussed elsewhere,<sup>193</sup> habeas is different in another important respect—thanks to the Supreme Court’s deci-

189 *Id.*

190 *See supra* note 140 and accompanying text (discussing Justice Brandeis’ views); *see also supra* note 181 and accompanying text (discussing Justice O’Connor’s views).

191 *See Schor*, 478 U.S. at 867 (Brennan, J., dissenting).

192 *See, e.g.*, *Brown v. Allen*, 344 U.S. 443, 512 (1953) (Frankfurter, J., concurring) (“[Habeas] bring[s] into question the legality of a person’s restraint and [requires] justification for such detention.”); *Waley v. Johnston*, 316 U.S. 101, 104–05 (1942) (holding that habeas corpus permits a challenge to a valid conviction obtained without regard for the accused’s constitutional rights). For a brief summary of the evolution of habeas, *see Felker v. Turpin*, 518 U.S. 651, 663–64 (1996).

193 *See, e.g.*, Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265 (2007) (surveying the availability of federal habeas relief in state

sion in *Tarble's Case*,<sup>194</sup> it is one of the exceedingly few examples of a federal cause of action that state courts are powerless to entertain.<sup>195</sup> And although the analytical basis for the result in *Tarble* is unclear (at best), its continuing force is beyond question.<sup>196</sup>

As a result, and unlike for most constitutional claims, the preclusion of federal jurisdiction over habeas petitions is the preclusion of judicial review *en toto*. At the time *Tarble's Case* was decided, this result was unproblematic, since the Habeas Corpus Act of 1867<sup>197</sup> had extended the jurisdiction of the federal courts over habeas petitions "to their constitutional limit."<sup>198</sup> But beginning in 1996, attempts by Congress to constrain the scope of habeas corpus gave rise to a series of difficult constitutional questions—finally confronted in *Boumediene*.<sup>199</sup>

First, in *Felker v. Turpin*,<sup>200</sup> the Court sidestepped whether a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996<sup>201</sup> violated the Suspension Clause in removing the Court's appellate jurisdiction vis-à-vis the courts of appeals in certain habeas cases.<sup>202</sup> Writing for a unanimous Court, Chief Justice Rehnquist emphasized that AEDPA did not force the constitutional question, because the statute had not completely ousted the Court's appellate

courts in the antebellum era and the Court's rejection of such authority in a pair of decisions bookending the Civil War).

194 80 U.S. (13 Wall.) 397 (1872).

195 See *id.* at 411 ("If a party . . . be illegally imprisoned [by federal authorities] it is for the courts . . . of the United States and those courts . . . alone to grant him release.").

196 For two quite different views of *Tarble*, see Daniel A. Farber, *The Trouble With Tarble's: An Excerpt from an Alternative Casebook*, 16 CONST. COMMENT. 517, 519–21 (1999) (presenting an edited version of "*Ex parte Printz*"), and Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 258–60 (2005).

197 Act of Feb. 5, 1867, ch. 27, 14 Stat. 385.

198 WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 191 (1980).

199 The implications of this history are sketched out in more detail in Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 291–92 (2008).

200 518 U.S. 651 (1996).

201 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 28, 40, 42 U.S.C.).

202 In particular, the statute required the courts of appeals to give permission to appeal adverse district court decisions in certain "gatekeeper" cases, and barred appellate jurisdiction in the Supreme Court from *denials* of such permission by the circuit courts. See 28 U.S.C. § 2244(b)(3)(E) (2006); see also *Felker*, 518 U.S. at 657 (describing the statute).

jurisdiction,<sup>203</sup> and because it did not substantially constrain the scope of the writ as compared to what was available beforehand.<sup>204</sup>

Five years later, in *INS v. St. Cyr*,<sup>205</sup> the Court engaged in a far more thorough discussion of the Suspension Clause in construing whether one of the jurisdiction-stripping provisions of AEDPA and three related provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996,<sup>206</sup> including one titled “Elimination of Custody Review by Habeas Corpus,” violated the Suspension Clause.<sup>207</sup>

Emphasizing that “[t]he fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely,”<sup>208</sup> the Court concluded that neither statute illustrated with sufficient clarity that Congress intended to bar access to habeas corpus.<sup>209</sup> In other words, the Court invoked the constitutional avoidance canon to require a clear statement of congressional intent before it would reach whether Congress even *could* so circumscribe the scope of the writ.<sup>210</sup> And all of that even though it was unclear whether the Suspension Clause actually protected the claims pressed by the petitioners,<sup>211</sup> let alone whether the preclusion of review was therefore unconstitutional.<sup>212</sup>

Yet, whereas the Court expended a good deal of effort on identifying the circumstances in which the writ of habeas corpus had tradi-

203 See *Felker*, 518 U.S. at 660–62.

204 See *id.* at 663–64.

205 533 U.S. 289 (2001).

206 Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

207 See *St. Cyr*, 533 U.S. at 298–314.

208 *Id.* at 301 n.13.

209 See *id.* at 308–14.

210 In dissent, Justice Scalia derided such analysis as requiring a “superclear statement.” See *id.* at 327 (Scalia, J., dissenting).

211 See, e.g., *id.* at 300–01 (majority opinion) (“[R]egardless of whether the protection of the Suspension Clause encompasses all cases covered by the 1867 Amendment extending the protection of the writ to state prisoners, or by subsequent legal developments, at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’” (citations omitted)).

212 The Suspension Clause does not necessarily require the habeas remedy even in cases where it applies. Rather, it requires a remedy that is at bottom an “adequate” and “effective” substitute. See *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (“[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a suspension . . .”).

tionally been available to noncitizens facing deportation,<sup>213</sup> it included exceedingly little analysis of the role of the Suspension Clause in our constitutional structure. It was enough, for the *St. Cyr* majority, that Congress was even coming close to the amorphous bounds of the Suspension Clause; the discussion of the *purpose* of those constraints was left for another day—and one where Congress had spoken far more clearly.

### III. BOUMEDIENE AND THE SEPARATION OF POWERS

With *St. Cyr*'s admonition in mind, the 109th Congress enacted two statutes that far more expressly sought to divest the federal courts of habeas corpus jurisdiction—and a third when one of the first two proved ineffective. In addition to the REAL ID Act of 2005,<sup>214</sup> and the DTA, which the Court in *Hamdan v. Rumsfeld* largely mooted (by interpreting it as not applying to pending cases),<sup>215</sup> Congress provided in the MCA one of the clearest statements imaginable:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>216</sup>

Although the MCA (like the DTA before it) does authorize an appeal to the D.C. Circuit both from a military commission conviction<sup>217</sup> and an “enemy combatant” determination, serious questions arose from the outset as to whether such remedies were “adequate” or “effective” substitutes for habeas corpus.<sup>218</sup>

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213 See *St. Cyr*, 533 U.S. at 301–03 & nn.14–23.

214 Pub. L. No. 109-13, div. B, 119 Stat. 302 (codified as amended in scattered sections of 8, 49 U.S.C.).

215 See 548 U.S. 557, 572–84 (2006). For a discussion of the Court's jurisdictional analysis, see Stephen I. Vladeck, *The Increasingly “Unflagging Obligation”: Federal Jurisdiction After Saudi Basic and Anna Nicole*, 42 TULSA L. REV. 553, 557–58 (2007).

216 28 U.S.C. § 2241(e)(1) (2006).

217 The Act fails to provide commission defendants with interlocutory relief, see *Khadr v. United States*, 529 F.3d 1112, 1117 (D.C. Cir. 2008), and the D.C. District Court has held that it constitutionally precludes pretrial habeas relief, as well, see *Hamdan v. Gates*, 565 F. Supp. 2d 130, 135–36 (D.D.C. 2008).

218 Compare, e.g., *Swain v. Pressley*, 430 U.S. 372, 381–82 (1977) (finding an alternative remedy adequate as it had the “same scope” as the pre-existing habeas remedy), with *Bismullah v. Gates*, 501 F.3d 178, 189 (D.C. Cir. 2007) (considering the scope of the remedy provided by the MCA and the DTA), and *Bismullah v. Gates*, 503 F.3d 137, 141 (D.C. Cir. 2007) (same).

### A. Boumediene

With the constitutional question thus finally and squarely presented, the D.C. Circuit held in *Boumediene v. Bush* that the Constitution's Suspension Clause simply did not "apply" to noncitizens held outside the territorial United States, and so section 7(a) was necessarily constitutional because it offended no constitutional right of the Guantanamo detainees.<sup>219</sup> Although the Supreme Court denied certiorari initially,<sup>220</sup> it took the rather unusual step of granting certiorari on rehearing,<sup>221</sup> before hearing arguments in December 2007.

On the merits, and as noted above, Justice Kennedy held for the Court both that the Suspension Clause "has full effect" at Guantanamo Bay,<sup>222</sup> and that section 7(a) violates the Clause because the alternative to habeas corpus provided by the statute—an appeal of the CSRT to the D.C. Circuit—was an inadequate substitute for habeas.<sup>223</sup> As Justice Kennedy explained:

Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.<sup>224</sup>

Thus, "when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an

219 See 476 F.3d 981, 988–94 (D.C. Cir. 2007).

220 *Boumediene v. Bush*, 127 S. Ct. 1478, 1478 (2007) (mem.). Justices Souter, Ginsburg, and Breyer dissented. See *id.* at 1479–81 (Breyer, J., dissenting from the denial of certiorari).

221 *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (mem.).

222 See *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008). For more on Justice Scalia's central critique of this first holding—that it is unfaithful to the Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950)—see Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. (forthcoming 2009) (explaining why Justice Kennedy was writing on a blank slate with respect to whether the Suspension Clause "applied" to Guantanamo).

223 See *Boumediene*, 128 S. Ct. at 2271–74.

224 *Id.* at 2270 (quoting *Bismullah v. Gates*, 514 F.3d 1291, 1296 (D.C. Cir. 2008) (Ginsburg, C.J., concurring with the denial of rehearing en banc)).

order directing the prisoner's release."<sup>225</sup> With that analytical frame in hand, Justice Kennedy concluded that the DTA and MCA did not confer such authority upon the CSRTs themselves or the D.C. Circuit on appellate review.<sup>226</sup> As such, he found the CSRT process to be an inadequate substitute for habeas corpus, and therefore in violation of the Suspension Clause.

It is possible—if not likely—that Kennedy's analysis of the Suspension Clause controls the due process question as well,<sup>227</sup> but the importance of judicial review to protect the separation of powers was a stand-alone justification for treating the Suspension Clause differently. Otherwise, as Kennedy noted, the government's conception of Guantanamo's legal status would "lead[ ] to a regime in which Congress and the President, not this Court, say 'what the law is.'"<sup>228</sup>

Writing for the four dissenters, Chief Justice Roberts sharply criticized Justice Kennedy's refusal to actually decide whether the CSRTs violated the detainees' due process rights: "It is grossly premature to pronounce on the detainees' right to habeas without first assessing whether the remedies the DTA system provides vindicate whatever rights petitioners may claim."<sup>229</sup> Thus:

If the CSRT procedures meet the minimal due process requirements outlined in *Hamdi [v. Rumsfeld]*<sup>230</sup>, and if an Article III court is available to ensure that these procedures are followed in future cases, there is no need to reach the Suspension Clause question. Detainees will have received all the process the Constitution could possibly require, whether that process is called "habeas" or something else. The question of the writ's reach need not be addressed.<sup>231</sup>

On its face, the Chief Justice's criticisms seem powerful. Indeed, Justice Kennedy's opinion does not purport at any point to directly respond to either the Chief Justice's or Justice Scalia's dissent. But the

225 *Id.* at 2271.

226 *See id.* at 2271–74.

227 At least one court has concluded to the contrary. *See Kiyemba v. Obama*, 555 F.3d 1022, 1026–27 (D.C. Cir. 2009) (reasoning that, notwithstanding *Boumediene*, the Guantanamo detainees lack due process rights).

228 *Id.* at 2259 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

229 *Id.* at 2280–81 (Roberts, C.J., dissenting).

230 542 U.S. 507 (2004).

231 *Boumediene*, 128 S. Ct. at 2281 (Roberts, C.J., dissenting) (citations omitted); *see also id.* at 2286–87 ("Declaring that petitioners have a right to habeas in no way excuses the Court from explaining why the DTA does not protect whatever due process or statutory rights petitioners may have. Because if the DTA provides a means for vindicating petitioners' rights, it is necessarily an adequate substitute for habeas corpus.").

critical point of the majority's analysis comes where Justice Kennedy explains why detention by executive order is different from detention pursuant to a criminal conviction—and why habeas corpus in the former category requires more. “[T]he necessary scope of habeas review in part depends upon the rigor of any earlier proceedings,” Kennedy wrote.<sup>232</sup> As a result, in post-conviction habeas cases, “where relief is sought from a sentence that resulted from the judgment of a court of record, . . . considerable deference is owed to the court that ordered confinement.”<sup>233</sup> Moreover, courts could properly require the exhaustion of available remedies,<sup>234</sup> “because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding.”<sup>235</sup>

Challenges to executive detention, though, were necessarily different, because “[t]he intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry.”<sup>236</sup> Thus, “[t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.”<sup>237</sup> In other words, reviewing the fairness of the underlying proceeding would not necessarily be enough, for it might not allow meaningful review of “both the cause for detention *and* the Executive’s power to detain.” Whereas the former part of that inquiry may rightly focus on the rights of the litigant, the latter focuses on the power of the courts to serve as a check on the Executive Branch,<sup>238</sup> and thereby vindicates the separation of powers concerns Kennedy so thoroughly documented.

B. *Access to the Courts After Boumediene:*  
*On Standing and Colorable Claims*

Of course, it is one thing to illustrate the role that the separation of powers played in Justice Kennedy’s analysis in *Boumediene*, it is another thing entirely to ascertain whether such a discussion will have

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232 *Id.* at 2268 (majority opinion).

233 *Id.* (citing *Brown v. Allen*, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.)).

234 *Id.* (citing *Ex parte Royall*, 117 U.S. 241, 251–52 (1886)).

235 *Id.*

236 *Id.* at 2269.

237 *Id.*

238 Indeed, as Professor Jared Goldstein has argued, the entire purpose of habeas corpus is not to ask whether the petitioner has individual rights that have been violated, but only whether the executive has the authority to detain—that “rights” should be irrelevant to the habeas inquiry. See Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1180–97.

broader implications outside the context of habeas corpus. But that is where the case law surveyed in Parts I and II factors in because it becomes clear, once the doctrine is properly reconstructed, that separation of powers concerns have long been at the heart of *all* denial-of-access cases, and not just those where the access in question is protected by the writ of habeas corpus. That is, I do not think it is a coincidence that one can find in Kennedy's opinion in *Boumediene* similar arguments as those contained in Justice Brandeis' concurrence in *St. Joseph Stock Yards*,<sup>239</sup> or, more indirectly, Justice Murphy's opinion for the Court in *Ex parte Hull*.<sup>240</sup>

The different role that the separation of powers plays may be more *evident* in the context of habeas cases, where the writ is specifically designed to serve as a check on executive detention. But in administrative cases such as *St. Joseph Stock Yards*, judicial review serves as a similar check on the executive branch, whose interpretation of legal questions might otherwise be unreviewable. And in physical access cases such as *Hull* (which, though a habeas case, seems less in line with *Boumediene* because it is a post-conviction challenge), judicial review ensures that it is the *courts*, and not prison wardens or other executive branch officials, who decide the merits of the underlying claim.

That separation of powers concerns have some role to play does not, however, automatically mean that there will be a cognizable free-standing separation of powers injury in denial-of-access cases. Article III standing limitations will still play a role, requiring the plaintiff to show an injury in fact *to himself*; demonstrating a negative impact upon the courts will not suffice if such an impact does not adversely affect the plaintiff.

But in that sense, *Boumediene* may provide an answer to a question that the earlier case law left unresolved: to show an injury, does the plaintiff have to show that he would have *prevailed* on the merits? The Court in *Boumediene* clearly thought the answer to that question was "no." Rather, the relevant issue is whether the plaintiff might *possibly* be injured by the denial of access to the courts. Thus, when cases such as *Webster* suggest that the avoidance canon should be invoked whenever a statute might otherwise deprive a plaintiff of a judicial forum for a "*colorable*" constitutional claim,<sup>241</sup> perhaps it is the separa-

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239 See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

240 See 312 U.S. 546, 549 (1941).

241 See *Webster v. Doe*, 486 U.S. 592, 603-04 (1988); see also *supra* note 175 and accompanying text (discussing the origins of the "colorable" requirement).



tion of powers—rather than the rights of the plaintiff—that explain why courts needn't resolve the merits first before deciding whether the denial of access would thereby raise constitutional problems.

*Boumediene* itself is instructive on this point. Had the Court treated the constitutional question as inextricably linked to the eventual merits of individual petitioners' claims, it could only have answered the Suspension Clause question on a case-by-case basis, having conducted the very kind of judicial review that Congress had attempted to foreclose—and having resolved in each case incredibly difficult and circumstance-specific applications of the law to the facts. Thus, such review would both frustrate Congress' purpose, and would require highly individualized considerations of the facts.

In contrast, if the relevant question is only whether the underlying claim is *colorable*, courts are necessarily in a far better position to resolve denial-of-access concerns earlier in the litigation. Moreover, such a reading is consistent with standing doctrine, which, of course, asks not whether the plaintiff will *prevail*, but instead whether the facts *as alleged* support relief on the merits.<sup>242</sup>

In sum, perhaps the central implication of reconstructing the role that the separation of powers doctrine plays in denial-of-access cases after *Boumediene* is that the notion that the denial of access raises constitutional concerns whenever it interferes with judicial resolution of viable claims, whether or not the claim ultimately proves meritorious, rests on sounder footing. Thus, state and federal legislative and executive branches may well have somewhat less leeway to interfere with the courts than has previously been accepted, and the courts' "jurisdiction to determine their jurisdiction" may be inadequate in close cases where resolving the merits of the preclusion of review requires resolution of complicated and necessarily case-specific questions of fact.

C. *Access to the Courts After Boumediene:  
A Right to Federal Judicial Review?*

On its own, such an understanding would provide at best a modest contribution to the doctrine, for it would suggest that separation of powers concerns really are linked to—even if somewhat distinct from—concerns sounding more commonly in the individual rights of the litigants. But there is another possibility raised by *Boumediene*. As noted above, one of the ways in which federal habeas petitions are unique is the fact that judicial review in that context means *federal*

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<sup>242</sup> See, e.g., *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2535 (2008).

judicial review. In the run-of-the-mill denial-of-access case, though, the plaintiff's right to judicial review is a right of access to "some judicial forum," and the prevailing understanding is that state courts of competent jurisdiction (and perhaps even non-Article III federal courts) will usually be such a tribunal.

In the typical nonhabeas case, then, it is difficult to identify an injury to the *federal* courts separate from an injury to courts in general, and so it would be difficult to determine whether a right to judicial review is ever a right to Article III *federal* judicial review. Certainly, the Due Process Clause would not require as much, so long as the state court—or administrative agency—was competent to decide the questions before it. But could there ever be a situation where the separation of powers would require the availability of an Article III judicial forum to resolve questions of federal law, at least somewhere along the line?

For the most part, this question does not often arise. As it stands today, the Supreme Court has broad appellate jurisdiction over federal questions decided in the state courts,<sup>243</sup> and the Article III courts of appeals have broad appellate jurisdiction over federal questions decided in most non-Article III federal courts, especially administrative agencies.<sup>244</sup> Under the Court's *Chevron*<sup>245</sup> jurisprudence, such agencies may receive *deference* in their interpretations of federal law,<sup>246</sup> but the critical point is that a litigant is usually entitled to challenge the agency's interpretation of federal law before a neutral Article III decisionmaker.<sup>247</sup>

Nonetheless, the possibility that there is a separate separation of powers—based right to Article III review of questions of federal law—to vindicate the role of the Article III courts in general and the Supreme Court in particular as the authoritative expositors of federal law—could well influence attempts by Congress to alter this historical balance. Put another way, perhaps the real implication of restoring the role of separation of powers concerns to denial-of-access jurispru-

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243 See 28 U.S.C. § 1257 (2006); see also, e.g., *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 41 n.15 (1989) (asserting jurisdiction under § 1257 over state court judgments where there is a dispute as to whether a state statute violates the U.S. Constitution).

244 See, e.g., 28 U.S.C. §§ 2342, 2349 (2006).

245 See *Chevron, U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

246 See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006).

247 See, e.g., *Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

dence is that we will better appreciate the constitutional problems that would arise should Congress ever attempt to give state courts or administrative agencies *final* say on questions of federal law. Such tribunals may more than adequately vindicate the underlying rights of the plaintiffs, and may provide more than the process that is constitutionally due, but what the above analysis suggests is that this would only be half of the battle.

In this light, consider the Supreme Court's fascinating (if neglected) 1977 decision in *Territory of Guam v. Olsen*.<sup>248</sup> Under the 1950 Organic Act of Guam,<sup>249</sup> Congress created the Article IV District Court of Guam and provided it with appellate jurisdiction from Guam's local courts "as the [Guam] legislature may determine."<sup>250</sup> In 1974, the Guam legislature created a new Supreme Court of Guam, and purported to transfer most of the district court's appellate jurisdiction to the new local supreme court.<sup>251</sup> At least at the time, though, neither the Ninth Circuit nor the U.S. Supreme Court possessed statutory appellate jurisdiction over the Supreme Court of Guam, which meant that the practical effect of the Guam legislature's transfer of jurisdiction would be to remove certain classes of federal questions from the original *or* appellate jurisdiction of the Article III courts.<sup>252</sup>

Writing for a 5-4 majority, Justice Brennan concluded that such a possibility warranted interpreting the Organic Act as not authorizing the Guam legislature to so transfer jurisdiction. In his words, "we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law."<sup>253</sup> This reluctance, Brennan added, stemmed from the fact that "a construction that denied Guam litigants access to Art. III courts for appellate review of local-court decisions might present constitutional ques-

248 431 U.S. 195 (1977).

249 Act of Aug. 1, 1950, ch. 512, 64 Stat. 384 (codified as amended at 48 U.S.C. §§ 1421-1428e (2006)).

250 *Id.* § 22(a), 64 Stat. at 389-90 (codified as amended at 48 U.S.C. § 1424-3(a)). The District Court of Guam's decisions in federal question (and certain other civil) cases were, in turn, appealable either to the U.S. Court of Appeals for the Ninth Circuit or directly to the U.S. Supreme Court. *See id.* § 23, 64 Stat. at 390 (codified as amended at 48 U.S.C. § 1424-3(c)).

251 *See Santos*, 431 U.S. at 197 (discussing the background).

252 After *Santos*, Congress amended the Organic Act to provide that "the [Guam] legislature may not preclude the review of any judgment or order" that raises a federal question." 48 U.S.C. § 1424-3(a).

253 *Santos*, 431 U.S. at 201.

tions.”<sup>254</sup> Even though a litigant’s due process rights would unquestionably be vindicated by the judicial review he received in the Guam local courts, Brennan nonetheless suggested that the Constitution might bar the Guam legislature’s effective preclusion of Article III appellate review in certain federal question cases.<sup>255</sup>

Whatever the significance of Brennan’s opinion in *Santos*, *Boumediene* provides a fascinating opportunity to see through the various doctrinal safety nets that the Supreme Court has erected to prevent such fundamental questions from arising. In nonhabeas cases, a litigant may never have an individualized right to Article III judicial review, but the separation of powers might nevertheless guarantee him such an opportunity, as an appellate matter if not originally. Of course, such a right could not create appellate jurisdiction where none exists. But in the case of state courts, as another example, we might see this analysis as helping to explain the relationship between the “presumption of concurrent jurisdiction”—the idea that most federal questions are properly cognizable in state courts<sup>256</sup>—and the existence of section 25 of the Judiciary Act (today’s 28 U.S.C. § 1257),<sup>257</sup> which provides the Supreme Court’s appellate jurisdiction from the state courts. Without the latter, it may well be true that the separation of powers—and not any individual right of an individual litigant—would bar the former.<sup>258</sup> More generally, it might be impossible to understand the current structure of our judicial system, and the limits

254 *Id.* at 204 (citing Hart, *supra* note 155).

255 As an amusing historical footnote, Brennan’s opinion in *Santos* repeatedly cited to (and quoted from) a similarly-themed dissenting opinion filed in an earlier Ninth Circuit case that raised the same issue—by then-Circuit Judge Anthony M. Kennedy. See *Agana Bay Dev. Co. (Hong Kong) Ltd. v. Supreme Court of Guam*, 529 F.2d 952, 958–61 (9th Cir. 1976) (Kennedy, J., dissenting). On closer inspection, Kennedy’s opinion in *Agana Bay* raised the same constitutional concerns that Brennan articulated in *Santos*. See, e.g., *id.* at 959 (“[F]or Guam to abolish all appellate jurisdiction would be a wholly irresponsible legislative act, raising serious constitutional questions. It is unlikely that Congress intended to give the Guam legislature the power to commit such an act, and such intent should not be assumed in the absence of express language to that effect.”).

256 See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990).

257 See 28 U.S.C. § 1257; see also *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816) (declaring section 25 of the Judiciary Act constitutional).

258 In that sense, the analysis herein is both consistent with (and derives support from) the intriguing argument advanced by Professor Pfander that the power of state courts to decide federal questions should be understood not as inherent in their jurisdiction, but as deriving from Congress’ decision not to make federal jurisdiction over such a claim exclusive in the first place. See James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw. U. L. REV. 191, 238 (2007).

on how it might be altered, without appreciating the separation of powers concerns that arise when tribunals *other* than the Article III courts are in a position to have the final say—and when access to the Article III courts is denied.

#### CONCLUSION

I suspect that scholars and jurists alike will find every temptation to pigeonhole *Boumediene* as a Guantanamo-specific (or, at least, War on Terrorism specific) decision: that Justice Kennedy's analysis can only be understood as being motivated by a decidedly unpopular prison run by a decidedly unpopular President, and not as being motivated by deeper principles about judicial review and the general role of the federal courts in our federal system. Such views of the decision may ultimately be proven right, although I, for one, have my doubts.

But regardless of *Boumediene's* long-term force as direct precedent, it would be unfortunate if we passed up the opportunity to take the framework of Justice Kennedy's constitutional analysis of the judicial review question seriously, and ask what it might actually mean to re-characterize the denial of access to the courts in separation of powers terms. In the analysis herein, I have suggested two possible implications: one that is exceedingly modest; the other that is probably overbroad. But if one thing is clear, Justice Kennedy was not inventing this idea from whole cloth, and there is a far richer and more thought-provoking body of case law to inform what *Boumediene* means going forward than we might previously have thought.