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ARTICLE

CONGRESSIONAL OBLIGATION TO PROVIDE A FORUM FOR CONSTITUTIONAL CLAIMS: DISCRIMINATORY JURISDICTIONAL RULES AND THE CONFLICT OF LAWS

Lea Brilmayer* and Stefan Underhill**

In recent sessions of Congress, opponents of an "activist" judiciary have attempted to divert from federal courts issues such as abortion, school busing, and school prayer. The proposals to exclude these constitutional issues from federal courts have stirred great interest in the theory of federal court jurisdiction1 because the proposals seem to threaten the continued existence of controversial rights. The prospect of exploring the limits of congressional power to control federal court jurisdiction is especially attractive

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because the issue is guided by few judicial precedents and because jurisdictional questions are peculiarly vulnerable to clever and manipulative legal logic.

Proponents of the recent proposals contend that article III of the Constitution allows Congress to strip federal courts of jurisdiction to hear certain constitutional claims. Article III provides that Congress may both create lower federal courts and regulate and create exceptions to the Supreme Court’s appellate jurisdiction. The language of article III apparently grants Congress the power to create lower federal courts that exercise only part of their constitutionally permissible power and most certainly grants it power to limit the Supreme Court’s appellate jurisdiction in some as yet unspecified way.

It is not clear whether article III allows Congress to draw jurisdictional lines that disfavor particular constitutional rights. Because the language of article III does not explicitly prohibit jurisdictional statutes of this sort, the arguments supporting the validity of court-stripping bills are founded on an allegedly straightforward reading of the constitutional text. The usual argu-

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2 Article III, § 1 states in relevant part: “The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1.

3 Article III, § 2 states in relevant part: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. Const. art. III, § 2.

4 The power to create the inferior federal courts, granted in articles I and III of the Constitution, has been held to imply the power to establish the jurisdiction of these courts. Thus, the Supreme Court stated in Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850), that “having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.” Id. at 448.

5 See Hart, supra note 1; Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 157-58 (1960); Sager, supra note 1, at 25.

We do not differentiate in this paper between district court jurisdiction and Supreme Court appellate jurisdiction even though the textual provisions are different. The requirement of equal access applies to both, even though Congress is apparently required to establish some appellate jurisdiction but need not create any lower federal courts. Once Congress recognizes general federal question jurisdiction, all limits on the district courts may be treated as exceptions, just as restrictions on the Supreme Court’s appellate jurisdiction are. See infra text accompanying notes 67-71.

6 Bator, supra note 1, at 1038; Rice, Congress and the Supreme Court’s Jurisdiction, 27 Vill. L. Rev. 959, 962-64 (1981); Wechsler, The Courts and the Constitution, 65 Colum. L.
ments against jurisdictional gerrymandering are based, in contrast, on reasoned speculation about what "our perfect Constitution" ought to say. These arguments, however, have seemed too subtle, too daring, and perhaps too motivated by sympathy for the constitutional rights in question to convince the proponents of the court-stripping bills that their proposed measures would exceed congressional power.

A more promising argument against jurisdictional gerrymandering is based on a line of authority from a less controversial area, the conflict of laws. This line of authority shows that in no other legal context within our federal system has the power to establish and regulate courts carried with it the power to enact jurisdictional statutes that discriminate against claims arising from other sources of law within that system. For example, although states have the power to create state courts and to regulate their jurisdiction, they may not refuse to adjudicate claims on grounds that the claims were created by federal law or by the laws of other states. Jurisdictional bills that discriminate without sufficient reason against causes of action that the legislature did not create are unconstitutional.

Our analogy does not require the invalidation of substantial

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9 Although the mere power to establish and regulate a court system does not carry with it the power to discriminate against other sources of law, the Constitution itself could provide for exceptions to this rule. For example, two different constitutional provisions now permit jurisdictional rules providing for unequal access to federal courts for suits based on state law. First, the diversity of citizenship requirement explicitly permits exclusion of state claims from federal courts that are not between citizens of different states. Second, the 11th amendment allows states to keep suits from federal courts by waiving sovereign immunity solely in their own courts. The result of 11th amendment immunity is that states can preempt the federal courts from hearing cases that they would otherwise be competent to hear.
10 These constitutional grants generally allow Congress to enact jurisdictional statutes discriminating against state law in the federal courts. Federal enforcement of state law is therefore distinct from federal enforcement of constitutional claims where no similar constitutional limitations exist.
11 See infra text accompanying notes 28-52.
numbers of existing jurisdictional statutes.\textsuperscript{12} We argue only that Congress cannot discriminate against constitutional claims in drafting jurisdictional bills. Congress cannot single out constitutional issues and exclude them from federal court jurisdiction without a sufficient reason, and hostility to the substantive rights at issue is not a sufficient reason. Moreover, none of the bases that have been found sufficient in the analogous area of state court jurisdiction are pertinent to the federal court-stripping bills. Therefore, unless Congress possesses a greater power over federal courts than state legislatures possess over state courts—which seems unlikely\textsuperscript{13}—the court-stripping bills are unconstitutional.

\section*{I. EQUAL ACCESS FOR OTHER SOURCES OF LAW}

Congress undeniably enjoys at least some power under article III to shape both the overall jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court.\textsuperscript{14} Indeed, the Supreme Court's expansive reading of the exceptions clause, most notably in \textit{Ex Parte McCardle},\textsuperscript{16} has led to almost consistent judicial approval of statutes limiting federal court authority.\textsuperscript{18} This broad interpretation has inspired several commentators to posit virtually unlimited congressional control over federal court jurisdiction.\textsuperscript{17}

Their position derives support from the fact that Congress has pared federal jurisdiction to a fraction of its potential reach\textsuperscript{18} with-
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out provoking even a hint of constitutional objection. For example, although the Constitution would allow diversity jurisdiction over cases in which some plaintiffs were from the same states as some defendants, Congress has not broadened the jurisdictional statutes that have been interpreted as requiring complete diversity among opposing litigants.\(^\text{19}\) Congress could also vest federal courts with the power of nationwide service of process,\(^\text{20}\) but it has chosen instead to require federal courts to conform, in most instances, to the jurisdictional reach of the courts of the states in which they sit.\(^\text{21}\) Amount in controversy requirements are yet another example of federal court jurisdictional constraints.\(^\text{22}\) Despite the withdrawal of jurisdiction that these examples represent,\(^\text{23}\) no one questions their constitutionality. To any view, these jurisdictional limits seem innocuous. Rules that restrict consideration of such constitutional issues as abortion, however, strike some as outrageous.

The currently proposed court-stripping bills differ most obviously from the accepted jurisdictional limitations because they would exclude particular rights or remedies from federal court jurisdiction.\(^\text{24}\) An amount in controversy requirement is not designed to exclude any particular substantive claim from federal courts, but rather to exclude all trivial ones. A jurisdictional ban on school


\(^{23}\) Whenever Congress omits any type of potential jurisdiction from its grant of jurisdiction to the Supreme Court, the Court treats the omission as a withdrawal of the jurisdiction it would otherwise enjoy. Thus, as Chief Justice Marshall stated in Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810):

> When the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

\(^{24}\) See, e.g., bills listed supra note 1.
prayer cases, in contrast, is aimed only at the mandate of church and state separation. This singling out of disfavored substantive rights is the focus of most theories attacking jurisdictional gerrymandering.\footnote{See, e.g., Sager, supra note 1; Tribe, supra note 1.}

Distinguishing generally accepted jurisdictional limitations from the selective exclusion of constitutional rights does not, of course, explain why one type of limitation is acceptable but the other is not. One can certainly argue that the very point of allowing Congress not to create lower federal courts and to make “exceptions” to Supreme Court appellate jurisdiction is to allow selective withdrawals of constitutional jurisdiction.\footnote{See Bator, supra note 1, at 1036, 1038; Rice, supra note 6, at 962-64; Wechsler, supra note 6, at 1005.} Apparently, no constitutional case enjoys an absolute right to be adjudicated in the lower federal courts because the Constitution would permit Congress to decline to establish such courts, nor must any particular case outside the Supreme Court’s original jurisdiction necessarily be heard in that Court.\footnote{See supra notes 2-5 and accompanying text.} Otherwise, the textual grant of congressional power in article III would be reduced to a triviality, and statutes such as amount in controversy provisions might have to be declared invalid. To understand why litigants armed with constitutional claims deserve more constitutional solicitude than, for example, proponents of expanded diversity jurisdiction, one need only turn to the analogous context of state jurisdictional statutes.

A. State Jurisdictional Statutes

State legislatures have similar power to structure state courts as Congress does to structure federal courts. If anything, state authority is broader because of the constitutional parameters within which the federal judicial system must be structured.\footnote{See supra notes 2-5 and accompanying text.} Except for the potential power to allow nationwide service of process,\footnote{Federal courts, unlike state courts, are courts of limited jurisdiction. An affirmative constitutional source of jurisdiction must be found before a federal court has jurisdiction over a cause of action. See supra note 23.} the federal court system is subject to as many constitutional strictures as the states.\footnote{See Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 442 (1946).}

\footnote{See Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 442 (1946).}

\footnote{Indeed, it is subject to more because several provisions of the Bill of Rights apply only}
The Supreme Court has had no difficulty striking down state jurisdictional statutes that discriminate against causes of action that the state did not create; although states have expansive power to structure a court system as they choose, they must sometimes provide a forum against their wishes. For example, in most instances, a state must provide a forum to adjudicate claims based on other states' law. The Supreme Court has consistently held, under the full faith and credit clause, that a state must give the same access to its court system for actions based on another state's law as it does for similar actions based on its own law. The leading case in this area is *Hughes v. Fetter.*

In *Hughes,* an accident occurring in Illinois resulted in the death of a Wisconsin resident. The decedent's administrator brought suit in Wisconsin because the defendant was also a Wisconsin resident, but based the cause of action on an Illinois wrongful-death statute. The trial court dismissed the complaint because a Wisconsin door-closing statute permitted suits only for deaths "caused in this state," and the Supreme Court of Wisconsin subsequently affirmed.

The United States Supreme Court reversed, citing the full faith and credit clause and holding that "Wisconsin cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent." The Court stated that it was "not crucial" that no other forum was available to hear the cause, and any doubt that might have existed on that score was eliminated the following term in *First National Bank of Chicago v. United Air Lines.* The crucial factor in *Hughes,* as the

against the federal government and not against the states. See Apodaca v. Oregon, 406 U.S. 404 (1972) (state constitutional provision authorizing verdict by 10 of 12 jurors in criminal cases does not violate right to jury trial under 6th and 14th amendments); McKiever v. Pennsylvania, 403 U.S. 528 (1971) (due process clause of 14th amendment does not guarantee right of jury trial in state juvenile delinquency proceedings).

*31* 341 U.S. 609 (1951).
*33* Wis. Stat. § 331.03 (1949).
*34* Hughes v. Fetter, 257 Wis. 35, 42 N.W.2d 452 (1950).
*35* 341 U.S. at 611.
*36* Id. at 613.
*37* 342 U.S. 396 (1952).
Court noted still later, "was that the forum laid an uneven hand on causes of action arising within and without the forum state."38

In *Broderick v. Rosner,*39 moreover, the Court held that merely labeling a statute "remedial" would not save it if it was in truth a refusal to enforce a sister-state's laws. In *Broderick,* the New Jersey courts refused to hear a suit based on a New York statute40 to collect assessments from 557 New Jersey stockholders of a New York bank. The New Jersey courts dismissed the claim because a New Jersey statute limited actions against stockholders based on foreign law to equitable remedies.41 On appeal, the United States Supreme Court reversed, reasoning that the state could not "under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties."42

States must also provide equal access to their courts for claims based on federal law if state courts would otherwise have jurisdiction under local jurisdictional rules. An early case recognizing this principle was *Mondou v. New York, New Haven & Hartford Railroad,*43 in which the courts of Connecticut had refused to adjudicate a claim under the Federal Employers' Liability Act. Emphasizing that Connecticut courts had power to adjudicate actions of this sort under their "ordinary jurisdiction,"44 the Supreme Court reversed. The same result was reached in *McKnett v. St. Louis & San Francisco Railway,*45 which also emphasized that "the ordinary jurisdiction of the [state] circuit court is appropriate to enforce the right . . . conferred upon the plaintiff . . . by the Federal Employers' Liability Act."46 The Court held that under such circumstances "the Federal Constitution prohibits state courts of

40 N.Y. Banking Law § 120 (Consol. 1930) (renumbered § 113-a (Consol. 1971)).
42 299 U.S. at 642-43.
43 223 U.S. 1 (1911). See also Clafin v. Housman, 93 U.S. 130 (1876) (competent state courts must hear claims under federal statutes unless exclusive federal jurisdiction is provided).
44 223 U.S. at 55-59.
45 292 U.S. 230 (1933).
46 Id. at 233.
general jurisdiction from refusing to [hear a claim] solely because the suit is brought under a federal law."\textsuperscript{47}

The best known case in this line, however, is probably \textit{Testa v. Katt}.\textsuperscript{48} In \textit{Testa}, the Supreme Court of Rhode Island had held that Rhode Island courts could refuse to adjudicate a claim based on the Federal Emergency Price Control Act. Again, the United States Supreme Court reasoned that because Rhode Island courts would have entertained a similar cause of action based on Rhode Island law, they "have jurisdiction adequate and appropriate under established local law to adjudicate the [federal] action."\textsuperscript{49} The Court therefore remanded the case for consideration by the state courts.

The vitality of \textit{Testa} was recently underscored in \textit{FERC v. Mississippi}.\textsuperscript{50} Relying strongly on \textit{Testa}, the Court in \textit{FERC} required state utility regulatory commissions to take appropriate rule-making action to implement federal policy. The Court pointed out that "dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission."\textsuperscript{51} The holding required the state affirmatively to provide a forum for implementation of federal programs, noting that "certainly \textit{Testa v. Katt} . . . reveals that the Federal Government has some power to enlist a branch of state government—there the judiciary—to further federal ends."\textsuperscript{52}

The requirement that a state provide a forum for federal and other states' law does not, however, restrict the ability of a state to structure its court system in ways that do not discriminate against other sources of law. The Supreme Court long ago recognized that

\begin{quote}
[It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions; provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any
\end{quote}

\textsuperscript{47} Id. at 233-34.
\textsuperscript{48} 330 U.S. 386 (1947).
\textsuperscript{49} Id. at 394.
\textsuperscript{50} 456 U.S. 742 (1982).
\textsuperscript{51} Id. at 760.
\textsuperscript{52} Id. at 762 (footnote omitted).
person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress.\textsuperscript{53}

These holdings do not require a state to establish courts with subject matter jurisdiction over all types of foreign claims that might arise. Once state courts are created, however, access for all claims must be comparable to the access provided for local claims.

\textit{Wells v. Simonds Abrasive Co.}\textsuperscript{54} illustrates a state’s right to enforce neutral rules that disfavor a sister state’s law. In \textit{Wells}, a Pennsylvania federal district court in a diversity case applied Pennsylvania’s one-year statute of limitations for wrongful-death actions instead of the two-year limitation included in the Alabama wrongful-death act under which the suit was brought.\textsuperscript{55} The Supreme Court affirmed by recognizing that such a ruling would allow Pennsylvania to apply the same “one-year limitation to all wrongful-death actions wherever they may arise.”\textsuperscript{56}

A line of cases has similarly recognized under the adequate and independent state ground doctrine that a state rule of practice or procedure can serve as an adequate basis for dismissal of a federal claim. The leading case to uphold such a dismissal is \textit{Herb v. Pitcairn},\textsuperscript{57} in which an FELA action had been dismissed by an Illinois court for lack of jurisdiction. The plaintiff in \textit{Herb} had filed his federal claim in a city court rather than a circuit court as required by Illinois statute.\textsuperscript{58} The Supreme Court on review affirmed that whether a case was properly pending

\noindent is a question to be determined by Illinois law, as interpreted by the Illinois Supreme Court. \ldots\ It would not be open for us to say that the state in setting up a local court could not limit its jurisdiction to actions arising within the city for which it is established.\textsuperscript{59}

Once state courts are established and defined by state legislatures, then, they must be open for actions arising under laws the

\textsuperscript{53} Missouri v. Lewis, 101 U.S. 22, 30 (1880).
\textsuperscript{54} 345 U.S. 514 (1953). Although \textit{Wells} was a diversity case in federal court, the holding clearly applies to state adjudication of other states’ claims. Id. at 516.
\textsuperscript{56} 346 U.S. at 519.
\textsuperscript{57} 324 U.S. 117 (1945).
\textsuperscript{58} The Supreme Court of Illinois had interpreted the Illinois Constitution to disallow city court jurisdiction over causes of action that arose outside the city where the court was located. See \textit{Werner v. Illinois Cent. R.R.}, 379 Ill. 559, 42 N.E.2d 82 (1942).
\textsuperscript{59} 324 U.S. at 120-21.
forum did not create to an extent consistent with their general jurisdiction. Comparable limits, we believe, apply to Congress in defining federal court jurisdiction over constitutional issues. Thus, the proposed court-stripping bills are valid only if the principle of equal access does not apply to constitutional claims—if somehow by climbing one rung on the federal ladder, the principle becomes inapplicable.

B. Foundations of the Right of Equal Access

The general issue of legislative discrimination against causes of action that the legislature did not create is endemic to any effort to achieve interjurisdictional cooperation and integration. In a world with a single sovereign lawmaking power, there would be "vertical integration" of the entire process of norm formulation, application, and enforcement. A single sovereign would supply the relevant rules of decision, adjudicate the controversy under its own rules of jurisdiction and procedure, and carry out the final judgment. There could be no question of discrimination against external sources of law, and variations in jurisdiction or procedure among different substantive rules could be explained by alluding to the sovereign's power to amend or revoke the substantive rules themselves.

Where law comes from several sovereigns, however, additional problems arise. In a confederacy or a disconnected group of nations, for example, each source of power might decline to recognize the substantive decisions of the others. Alternatively, each sovereign might agree to enforce the others' law but on terms less favorable than those it uses in enforcing its own. It was precisely to avoid such a sorry state of affairs that the Constitution created a federal system to replace the confederacy. The effects of federalism are most obvious on state courts, as the settled doctrine discussed previously demonstrates. Although the Constitution does not require states to create any particular type of court system or

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60 In using the word "sovereign," we mean "actor in the political system" and do not intend to raise deep issues of state sovereignty and federalism such as those in National League of Cities v. Usery, 426 U.S. 833 (1976).

Congress to establish a system of lower federal courts, it does demand that once such courts are created, they must be open to enforce causes of action of other equal or superior sovereigns within our federal system unless some valid reason besides "mere foreignness" can be shown.

The equal access requirement is thus a rule of necessity in American federalism. Without such a principle, coequal and lesser sovereigns could completely ignore the laws of their partners and superiors, and the nation would never have become the effective union that the framers of the Constitution intended. Furthermore, to exclude constitutional claims from the principle of equal access would be to exclude from parity the very source of law upon which the whole system of federalism rests. As the Supreme Court has plainly explained in requiring state courts to hear federal claims consistent with state jurisdiction, the requirement of equal access rests upon "the common fealty of all courts, both state and national, to both state and national constitutions, and the duty resting upon them, when it [is] within the scope of their authority, to protect and enforce rights lawfully created . . . ."\(^{63}\)

The equal access principle takes different constitutional forms. In the case of one state applying another state's law, it is embodied in the full faith and credit clause.\(^{64}\) That clause regulates the deference each sovereign state must show toward other states in our constitutional system.\(^{65}\) In the case of states applying federal law, the disintegrating influence of provincialism in jurisprudence . . . ." Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 17 (1945).

\(^{63}\) We need not argue, as did Professor Eisenberg, that:

The lower federal courts are thus indispensable if the judiciary is to be a co-equal branch and if the "judicial Power of the United States" is to remain the power to protect rights guaranteed by the Constitution and its Amendments. Abolition of the lower federal courts is no longer constitutionally permissible; with the demise of the assumption that they may be abolished it must necessarily follow that the jurisdiction of these courts is not a matter solely within the discretion of Congress.

Eisenberg, supra note 1, at 533.


\(^{65}\) As Justice Jackson explained, "By the full faith and credit clause [the Framers] sought to federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition of public acts, records and judicial proceedings [and thereby to avoid] the disintegrating influence of provincialism in jurisprudence . . . ." Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 17 (1945).
however, the supremacy clause provides the constitutional underpinnings.\textsuperscript{66}

The constitutional provision behind the equal access principle in federal jurisdiction for constitutional claims is not, of course, full faith and credit or the supremacy clause. The guiding force is the supremacy principle announced in \textit{Marbury v. Madison}.\textsuperscript{67} The \textit{Marbury} principle holds that congressional action is assessed according to the Supreme Court's interpretations of the constitutional text. The Constitution as interpreted by the courts bears the same relation to federal legislation, therefore, as federal legislation bears to state law. In neither situation does the jurisdiction-regulating body supply or control the applicable substantive law. For the same reason states may not exclude federal claims from their courts, Congress may not exclude constitutional claims from federal courts.\textsuperscript{68}

The constitutional gerrymandering problem, however, arguably differs from the state context in two ways. First, the federal courts themselves, and not some external source of law, are responsible for announcing the constitutional rules in question. Reserving courts for local law, then, does not as aptly describe the motive behind the court-stripping bills as it would in the state court setting. What motivates the bills is hostility toward both the substantive doctrines at issue and the federal courts for having "injected" the doctrines into the Constitution in the first place.\textsuperscript{69} In the eyes of their proponents, the bills are designed to retaliate against the courts for "misinterpreting" the Constitution, as opposed to retaliating against the Constitution's "true" meaning.

The court-stripping bills cannot legitimately be based on cor-

\textsuperscript{67} 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{68} Our interpretation of \textit{Marbury}, of course, assumes that \textit{Marbury} gives the Supreme Court the license to be the ultimate arbiter of the Constitution and not simply the power to decide cases and controversies before it according to constitutional values. The Supreme Court endorsed this broader view of \textit{Marbury} most emphatically in Cooper v. Aaron, 385 U.S. 1, 11-19 (1958). Some scholars, however, have argued that a narrower interpretation of \textit{Marbury} is more correct. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 25-31 (2d ed. 1973); Wechsler, supra note 6.
\textsuperscript{69} See Rice, supra note 6, at 980 ("[T]he Court has implied and defined new constitutional rights in various areas, such as abortion and school prayer. These rights are innovative creations of the Supreme Court itself.").
recting the federal courts' original decisions because according to Marbury a federal court's interpretation of the Constitution displaces a contrary congressional interpretation. Congressional dis-taste for a particular decision, therefore, cannot serve as a legiti-mate basis for jurisdictional limitations. If jurisdictional legislation stands or falls on the validity of the original court decision, any court bound by substantive precedent would have to strike down conflicting jurisdictional legislation. Surely state legislatures could not discriminate against a federal court's interpretation of a federal statute or constitutional principle on grounds that the federal court was mistaken or had "usurped" power. Even though state courts are constitutionally obligated to do their utmost to enforce the Constitution, they could not, for example, refuse to enforce the abortion decisions because they believe they were not compelled by the fourteenth amendment. Neither could a state legislature de-abbrev its courts of jurisdiction to enforce the decisions any more than it could withdraw jurisdiction in Testa. By the same token, as long as Marbury is the law, congressional disagreement with a de-cision is immaterial to the validity of the court-stripping bills.

A second possible distinction between the state and federal court contexts is that the full faith and credit and supremacy clauses protect the interests of other sovereign entities in the federal sys-tem, and the Constitution is not a separate "sovereign entity." Substantive constitutional rights, however, are beyond the control of Congress in just the same way that federal law is beyond control of the states; and it is not clear why all independent sources of law within our federal system whose mandates are insulated from the control of the jurisdiction-determining legislature should not be protected in the same way as federal legislation or the legislation of another state. It is not dispositive that the independent source of rights is a text and not a legislative body because states must afford equal access to federal constitutional claims. Moreover, if a source of "sovereignty" must be found before constitutional claims are entitled to equal access, one need only allude to the sovereignty of the people of the United States, which predates the sovereignty of Congress and is the foundation of Marbury itself.

No apparent reason, therefore, exempts Congress from the restrictions applicable to state legislatures. The rationale in both contexts is that if interjurisdictional cooperation is to succeed, sove-reigns cannot discriminate against causes of action that they did
not create. For a discriminatory jurisdictional rule to be acceptable, there must be some legitimate basis for the difference in treatment, something more than an inclination to reserve "one's own courts" for "one's own law" or for one's own version of the external law.

One sometimes encounters the dictum that "Congress must take the state courts as it finds them . . . ."70 Our thesis is that just as federal law may take state courts as it finds them, constitutional rights may take the federal courts as they find them. Congress' power to establish lower federal courts and to create exceptions to the Supreme Court's jurisdiction includes great latitude to say which statutory cases these courts may hear, but the jurisdictional rules that Congress creates for controversies of its own creation must extend across the board to constitutional cases. If a jurisdictional rule impacts adversely on substantive rights that the jurisdiction-determining legislature has created, the costs associated with the rule have presumably been assessed and overridden in favor of some valid policy.71 Where the impact falls on constitutional claims alone, however, a rational policy cannot be as readily presumed, and a noninvidious justification for the differential treatment must be shown.

II. IN SEARCH OF A RATIONAL BASIS

The principle of equal access, because it concerns itself with discrimination, is in some respects reminiscent of the equal protection doctrine. The similarity raises the question of what standard of judicial scrutiny should be applied in reviewing court-stripping legislation. Several scholars, trying to apply equal protection analysis to congressional attempts to restrict federal court jurisdiction, have insisted on strict scrutiny.72 They need not. Because any plausible explanation of the bills' purpose will be illegitimate, given the premise of constitutional supremacy underlying Marbury, the bills will fail even under rational basis scrutiny. As the Supreme Court has recognized,73 a purpose that is illegitimate under higher-tier

72 See Sager, supra note 1, at 79; Tribe, supra note 1, at 145 & n.68.
analysis is no less objectionable when cited in a rational basis challenge. Thus, we can bypass the difficult issue of the proper level of scrutiny and focus instead on why the rational basis test cannot be met in the constitutional context.

One could argue that as long as the rational basis test is not satisfied, it makes no difference whether a principle of equal access exists; equal protection law would similarly require a rational basis and dictate a similar result. The analogy to state court jurisdiction, however, is helpful because equal protection speaks to discrimination against persons, while equal access addresses discrimination against foreign rules of law. Although one could rephrase discrimination against foreign law as discrimination against the holder of the right created by the law, such a rephrasing is unnecessary when a more fitting tool of analysis is available. The established body of case law concerning state court jurisdiction has created standards for evaluating whether a particular justification for different jurisdictional treatment meets the rational basis test. This body of law helps define the bounds within which Congress must act in formulating jurisdictional legislation.

Because a federal system involves both local and national actors, different permutations of who supplies the law and who enforces it may occur. We first consider state enforcement of other states' law and list the recognized bases for different treatment of foreign claims. We then consider state enforcement of federal claims, a context in which preemption by federal law is the guiding principle. Preemption is important because the justifications for treating the law of a coequal sovereign differently may be expanded or contracted when a superior source of law enters the picture.

Federal adjudication of constitutional claims most nearly resembles state enforcement of federal claims. In the face of a valid federal law, contrary state law is preempted; given a contrary constitutional provision, federal statutes must give way. Yet to properly understand the effect preemption has in limiting the acceptable bases of discrimination, one must first identify the legitimate bases for different jurisdictional treatment when preemption is not an issue. Although hostility toward the substantive rights created by another source of law is not a legitimate basis for discriminatory

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74 "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V (emphasis added).
treatment, the source of law may be relevant for reasons other than invidious discrimination. Local implications in enforcing a foreign cause of action may supply a reasonable basis for a difference in treatment. The following sections analyze these recognized justifications for discriminating between coequal sovereigns.

A. Conflict of Laws: State vs. State

*Hughes v. Fetter* did not render invalid all jurisdictional distinctions relating to the source of the cause of action. To the contrary, it mentioned with apparent approval several common-law door-closing doctrines. Although foreignness per se is not a valid basis for discrimination, the fact that a cause of action owes its existence to an external source may indicate that the content of the right is different. This difference in content may give rise to a legitimate variation in treatment, as shown by the public policy exception acknowledged in *Hughes*.

The Supreme Court noted in *Hughes* "that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state." For a state to rely upon the public policy exception, there must be more than just a difference in the laws of the two states; the difference must be so great that application of the foreign rule would violate important moral convictions of the forum state. In *Bradford Electric Light Co. v. Clapper*, for example, the Supreme Court precluded reliance on the public policy exception, stating:

[T]here is no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire. No decision of the state court has been cited indicating that recognition of the Vermont statute would be regarded in New Hampshire as prejudicial to the interests of its citizens. . . . [T]he mere fact that the Vermont legislation does not conform to that of New Hampshire does not establish that it would be obnoxious to the latter's public policy to give effect to the Vermont statute . . . .

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77 See supra notes 31-52 and accompanying text.
78 341 U.S. at 611.
79 286 U.S. 145 (1932).
80 Id. at 161-62.
The public policy exception had been similarly unavailable in *Hughes* because "[t]he state has no real feeling of antagonism against wrongful death suits in general."80

The full faith and credit clause seeks the "maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states."81 The public policy exception to this clause insures that the forum's sovereignty will not be impaired by "extraterritorial application"82 of another state's policies. By limiting the exception to those circumstances in which the states' policies are in true conflict, the public policy exception in effect requires the maximum enforcement of other states' laws consistent with the maintenance of the forum's sovereignty.

Another permissible exception recognized in *Hughes* is the forum non conveniens doctrine.83 That doctrine allows a court to dismiss a cause of action if the forum and the case are not sufficiently related. Dismissal on forum non conveniens grounds is appropriate when most of the elements of the cause of action occurred outside the forum state and when none of the parties is a citizen of the forum state. The criteria to be considered by a court in making a forum non conveniens determination include access to evidence, the desirability of trial by jury in the locality of the relevant events, the domiciles of the parties, and the difficulty of applying unfamiliar law.84 The forum non conveniens doctrine was inapplicable in *Hughes* primarily because all the parties were from Wisconsin.85

In addition to the public policy and forum non conveniens exceptions, there are four substantive areas in which the Supreme Court has recognized exceptions to the requirement of providing a forum for foreign causes of action: divorce, workmen's compensation, penal, and tax law. Dismissal of cases in the first two areas—divorce and workmen's compensation law—is somewhat analogous to dismissal under the forum non conveniens doctrine. Unwillingness to apply another states' divorce law stems from recognizing the home state's strong interest in adjudicating the mari-

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80 341 U.S. at 612. Indeed, the two states' statutes were virtually identical.
81 Id.
82 Bradford, 286 U.S. at 158.
83 341 U.S. at 613.
85 341 U.S. at 613.
nal status of its domiciliaries. Divorce proceedings are sensitive to the social context and are highly fact specific, making the need for local adjudication paramount. Similarly, the courts of the forum state will generally refuse to enforce another state’s workmen’s compensation act if the act provides for enforcement in the home state through administrative tribunals. Again, the need for local adjudication is crucial because the forum may not have the administrative machinery available to enforce the right.

The penal and tax law exceptions, although frequently maligned by commentators, have been justified on numerous grounds. Central to most justifications is the use of the forum state’s court system to carry out the official business of the other state. Thus, the general principle that the cost of carrying out a state’s official business should be borne by the state to which the benefits accrue appears to underlie the exceptions.

These four exceptions to the full faith and credit clause are all holdovers from the common law and were originally developed as policies governing the recognition afforded to laws of another sovereign nation. This emphasizes the fact that these exceptions operate between coequal sovereigns. In contrast, the adjudication of constitutional claims by federal courts involves the enforcement of supreme law in the courts created by a subordinate sovereign. Because this relationship is analogous to state adjudication of claims based on federal law, we now examine how this change in context

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**Notes:**


90 See Leflar, supra note 89, at 201-02 (historical reasons based on intensely local character of early legal system; respect for sovereign rights of foreign states; procedural difficulties—e.g., nonavailability of equivalent remedies; local public policy; practical difficulties—e.g., distance, expense, proof of foreign law; United States constitutional guarantee of right to trial by jury in vicinity of criminal offense).
affects the recognized exceptions to the equal access principle.

B. State Enforcement of Federal Claims

States may refuse to adjudicate federal claims when the jurisdictional restriction applies neutrally to exclude claims based on state laws as well. Discriminatory door-closing statutes are another matter and, as with state enforcement of sister-state laws, a legitimate justification for a discriminatory jurisdictional statute must exist. Certain exceptions that were acceptable between coequal sovereigns, however, no longer apply. The "public policy" exception, for example, is inapplicable to state enforcement of federal claims. The supremacy clause precludes states from maintaining policies inconsistent with federal law. As the Supreme Court has observed:

The suggestion that the [federal law at issue] is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

When a superior source of law enters the picture, then, the public policy rationale evaporates.

One of the primary rationales behind the forum non conveniens doctrine—unfamiliarity with the foreign law—is also unavailable in the state/federal context. States are bound by the supremacy clause and state courts are presumed to be as expert at interpreting federal law as are the federal courts. The Supreme Court has also discounted the possibility that the differences between state and federal law would confuse state courts that had to apply both. The forum non conveniens doctrine can, of course, still be

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91 See supra notes 57-59 and accompanying text.
applied by state courts if the forum is simply not the appropriate one to adjudicate the claim. A dismissal on this ground, however, would be a neutral classification based on the characteristics of the parties and their evidence, not on the presence of federal law.

Finally, the four substantive exceptions that are recognized between states are not applicable to state enforcement of federal law. Workmen's compensation and divorce law are not significantly present at the federal level, and federal courts have exclusive jurisdiction over federal tax litigation. The only remaining exception, the penal law, has been explicitly rejected by the Supreme Court. This rejection is perfectly consistent with the hierarchical relationship of state courts and federal law. The citizens of the forum state would bear the cost of enforcing the federal penal law even if it was handled by the federal courts because they are financially responsible to both sovereigns. The state and its citizens also share in the benefits of federal law enforcement.

Although states may not avoid enforcement of federal claims by characterizing them as "penal," states still do not necessarily become involved in enforcement of federal criminal laws. By statute, exclusive jurisdiction to try federal criminal cases is vested in the federal district courts. Perhaps the only justifiable nonneutral basis for state refusal to entertain federal claims is that jurisdiction is denied by federal statute. Just as federal substantive policy preempts any contrary state policies that might otherwise provide an excuse for door-closing under the public policy exception, federal jurisdictional rules preempt contrary state ones.

The entire analysis of door-closing rules when a superior source of law is involved can thus be reduced to two issues: facial neutral-

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**See, e.g., Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1, 3-5 (1950).**

**See M. Garbis & S. Struntz, Tax Procedure and Tax Fraud: Cases and Materials 226 (1982).**

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

**28 U.S.C. § 1355 (1976).**

**In contrast, the right to localize jurisdiction by asserting exclusive jurisdiction is unavailable to coequal sovereigns. See, e.g., Nevada v. Hall, 440 U.S. 410 (1979) (state's doctrine of sovereign immunity does not protect it from suit in other states); Crider v. Zurich Ins. Co., 380 U.S. 39 (1965) (under full, faith, and credit clause, state may enforce remedy of another state's workman's compensation law in own courts without also adopting special procedures of foreign statute); Tennessee Coal, Iron & R.R. Co. v. George, 233 U.S. 354 (1914) (state may not create transitory cause of action and also destroy right to sue on that cause of action in any court having jurisdiction).**
ity and preemption. Facially neutral rules are the only type of laws that are acceptable when a superior source of law is involved. Justifications based on local public policy are preempted by the superior source. Jurisdictional preemption allows the superior source to require different treatment. Thus, the lesser sovereign must adjudicate claims based on the superior source of law unless the superior sovereign retains the exclusive right to adjudicate a certain type of claim.

III. CONSTITUTIONAL CLAIMS IN FEDERAL COURTS

A. Equal Access and Precedent

Although we argue that application of the equal access principle to constitutional claims is well grounded in constitutional theory, a theory must nevertheless comport to some degree with established law to make itself attractive as legal doctrine. One scholar claims that an unbroken line of cases has upheld legislation restricting federal court jurisdiction.\(^\text{100}\) On examination, however, all the restrictions that have been upheld appear to have involved facially neutral restrictions and not selective withdrawal of constitutional claims from federal court jurisdiction.

The most successful court-stripping bill was the one involved in *Ex parte McCardle*.\(^\text{101}\) The petitioner in *McCardle* had appealed to the Supreme Court based upon a Reconstruction statute authorizing issuance of the writ of habeas corpus "in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States."\(^\text{102}\) While the appeal was pending, this statute was repealed.\(^\text{103}\) That the repeal disadvantaged statutory claims as well as constitutional ones is clear from the face of the original provision. The repealed jurisdictional provision had been enacted only a short time earlier expressly to implement the Reconstruction Congress' policy towards southern states' recalcitrance.\(^\text{104}\) Congress was thus willing

\(^{100}\) Van Alstyne, supra note 1, at 254-60. See also Bator, supra note 1, at 1032.

\(^{101}\) 74 U.S. (7 Wall.) 506 (1869). See generally Van Alstyne, supra note 1.

\(^{102}\) Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. A special jurisdictional grant was necessary to create federal court jurisdiction over McCardle's claim because general federal question jurisdiction was not established until 1875.

\(^{103}\) Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

\(^{104}\) Van Alstyne, supra note 1, at 234-36.
to pay the price of facial neutrality, namely frustration of its own substantive goals. *McCardle,* therefore, does not support a congressional privilege to discriminate against constitutional rights by manipulating jurisdiction, even if the effect in *McCardle* itself was to deny jurisdiction to a constitutional claim.\textsuperscript{105}

Other jurisdictional withdrawals approved by the Supreme Court were also facially neutral. For example, *Sheldon v. Sill*\textsuperscript{106} upheld a statute eliminating from circuit court jurisdiction suits by assignees of notes unless the suit would have been proper in the absence of an assignment. The statute did not discriminate against constitutional rights but only removed from federal jurisdiction a certain range of cases involving assignments.\textsuperscript{107} A legislature does not have to create jurisdiction for all constitutional claims that arise,\textsuperscript{108} and *Sill* was an instance of Congress exercising that power.

Another well-documented jurisdictional withdrawal was the Norris-LaGuardia Act,\textsuperscript{109} which restricts federal court power to issue injunctions in labor disputes. Although the legislation relegated to the state courts certain constitutional objections to the breach of labor contracts, the Act also disfavored federal statutory rights. Most notably, the Act deprived the federal courts of power to consider Sherman Act challenges to union organizations.\textsuperscript{110} The Act simply removed a certain remedy—labor injunctions—from federal court jurisdiction. Thus, it cannot be characterized as an invidious discrimination against constitutional rights.

The Emergency Price Control Act of 1942,\textsuperscript{111} which only allowed a price control regulation to be challenged in the Emergency Court

\textsuperscript{105} It is also possible that *McCardle* was influenced by congressional control over the writ of habeas corpus in a situation of arguable emergency shortly after the Civil War. Article I, § 9, which allows suspension of the writ by Congress in cases of “Rebellion or Invasion,” may indicate that Congress possessed some degree of control over the substantive rights in question in these precise circumstances. U.S. Const. art. I, § 9

\textsuperscript{106} 49 U.S. (8 How.) 441 (1850).

\textsuperscript{107} Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

\textsuperscript{108} See supra notes 53-59 and accompanying text.


\textsuperscript{110} See B. Meltzer, Labor Law 31 (1977).

of Appeals, was also neutral. Besides not differentiating between statutory and constitutional challenges, the Act only limited the challenges to a certain court; it did not deprive anyone of the right to a constitutional or statutory challenge, but only required that challenges be brought in the Emergency Court of Appeals. The Act was as innocuous as an amount in controversy requirement in a state court.\[112\]

*United States v. Klein,*\[113\] a Reconstruction period case, is the only example of the Supreme Court invalidating a jurisdictional restriction enacted under the exceptions clause.\[114\] *Klein* involved the use of an executive pardon to prove loyalty to the Union so that the holder of the pardon could retrieve property seized during the Civil War.\[115\] An executive pardon is a constitutionally recognized and thus coequal external source of substantive rights.\[116\] The Supreme Court had indicated in earlier cases that a pardon could be used as prima facie evidence of loyalty,\[117\] but Congress, frustrated with the President's policies, took jurisdiction away from the federal courts in cases based on presidential pardons.\[118\]

This jurisdictional statute was invalidated by the Supreme Court in *Klein* as infringing the constitutional power of both the judiciary and the executive.\[119\] The ambiguities in the opinion and the possibility of other explanations for the holding\[120\] make it impossible to cite *Klein* as a definitive source for the principle that discriminatory denial of jurisdiction over pardon cases is unconstitut-

\[113\] Other jurisdictional statutes are also facially neutral. See, e.g., Tax Injunction Act, 28 U.S.C. § 1341 (1976). Only two statutes appear to differentiate between statutory and constitutional claims. The Three Judge Act, 28 U.S.C. § 2284 (1976), favors constitutional claims and does not, therefore, violate the equal access principle. The Johnson Act, 28 U.S.C. § 1341 (1976), only two statutes appear to differentiate between statutory and constitutional challenges, the Act only limited the

\[114\] See Rice, supra note 6, at 971.

\[115\] See generally Young, supra note 1.

\[116\] U.S. Const. art. II, § 2.


\[118\] Act of July 12, 1870, ch. 251, 18 Stat. 230. One commentator, however, has argued that despite the plain language of the Act requiring the Supreme Court to "dismiss the appeals" of presidential pardon cases, *Klein* should not be read as a withdrawal of appellate jurisdiction. Young, supra note 1, at 1221. See infra note 121.


\[120\] *Klein* is often cited for the proposition that Congress cannot use jurisdiction as a means of regulating the merits of a case. See, e.g., P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, supra noto 68.
tional under the exceptions and regulations clause. Yet it is suggestive that the only regulation of jurisdiction to have been invalidated by the Supreme Court was the only regulation that selectively closed the door for legal rights that Congress did not create. The Court stated last term in a different, but related, context:

[I]t is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated.

[But it does not follow] that Congress possesses the same degree of discretion in assigning traditionally judicial power to [other tribunals] engaged in the adjudication of rights not created by Congress.

... In such a situation, substantial inroads into functions that have traditionally been performed by the judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

Application of the equal access principle to constitutional claims would thus not simply leave Supreme Court precedent undisturbed: it would actually be supported by that precedent. Had the Court condoned federal jurisdictional statutes that exclusively discriminated against other sources of law, it would have been difficult to argue that the equal access principle should be applied to constitutional claims. But because the Court has yet to validate a jurisdictional statute that discriminated exclusively against foreign sources, and has instead overturned the only statute to do so, both theory and practice require that federal jurisdiction not be excused

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121 In a stimulating discussion of Klein, Professor Young argues that the case imposes restrictions upon waiver of sovereign immunity such that Congress may not waive immunity in ways that discriminate against, for example, presidential pardons. Young, supra note 1, at 1230-32. His thesis somewhat resembles ours, but he is focusing not on exceptions to federal court jurisdiction but rather on exceptions to sovereign immunity. Id. Although the Klein decision is admittedly ambiguous, the statute itself is susceptible to the interpretation that the Court of Claims and the Supreme Court were to have no jurisdiction over cases where loyalty was to be established by reliance upon executive pardon. We thus conclude that the case lends support to our thesis.

from the requirements of equal access.

B. The Rational Basis Requirement and Constitutional Claims

Because the cases are compatible with a general right of equal access for constitutional claims, the only question that remains is whether there are rational bases for different treatment such that a differentiation might rest on some neutral ground. As with state consideration of federal claims, the public policy exception does not apply in this context. Congress is no more entitled to rely upon a policy of hostility to constitutional rights than states are to maintain policies inconsistent with federal statute. Proponents of the court-stripping bills are prone to respond that hostile motivation per se does not necessitate invalidation. They argue that there is no invidious foreclosure of constitutional rights because state courts are still available to adjudicate the rights in question. This point, however, misses the mark. A rationale for the differential access to adjudication must be affirmatively advanced and hostility does not supply one. Moreover, even if state courts alone could adequately enforce constitutional claims, this simply suggests that hostility is not in fact the motivating rationale because court-stripping does not further that end. The question thus remains: once substantive disagreement is rejected as an explanation for the difference in treatment, what rationale is left?

The rationales that allowed dismissal in the conflict of laws setting, namely forum non conveniens or the penal and tax law exceptions, are not available here. Unfamiliarity with the foreign law, the only nonneutral justification for the forum non conveniens doctrine, is not a convincing justification in the constitutional context. Constitutional claims are not analogous to the penal and tax law exceptions. Interpreting the Constitution is certainly not a special burden on the federal courts nor do the benefits from interpretation accrue to a separate sovereign.

The only acceptable reason for different treatment when a superior source of law is involved—exclusive jurisdiction by the superior sovereign—will also not serve as a rational basis in the consti-

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123 E.g., Bator, supra note 1, at 1036.
124 E.g., Rice, supra note 6, at 982.
125 See supra note 93 and accompanying text.
126 See supra note 99 and accompanying text.
tutional setting. The Constitution in no way exclusively reserves constitutional claims for a court system other than the federal courts. To the contrary, the Constitution specifically provides that the judicial power of the federal courts potentially includes "all Cases in Law and Equity arising under this Constitution. . . ." No commentator has suggested this as a rationale; it is so far-fetched that probably no one ever will.

Finally, Professor Bator has argued that the rationale for the court-stripping bills might be the desirability of allowing state courts to pass on federal constitutional questions. The putative benefits of state adjudication are that state courts are closer to the problems at hand and that it is politically healthy to give state courts the first opportunity to rule on restrictions of their own power. To the extent this rationale contemplates different substantive results than would be reached by federal courts themselves, it comes uncomfortably close to justifying the jurisdictional restrictions on a desire to reverse federal court decisions on the merits. As mentioned previously, the basis for the court-stripping bills cannot be hostility to the constitutional issues in question. But it is not otherwise clear why vesting exclusive power to hear these cases in the state courts would be thought desirable. Although state courts may be as good as federal courts in interpreting the Constitution, it is hard to argue that they are better.

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128 Bator, supra note 1, at 1037.
129 Id.
130 Other commentators who favor the court-stripping bills have similarly premised their arguments on the assumption that hostility to a judicial interpretation can serve as a justification for the bills. See, e.g., Rice, supra note 6, at 980-81.
131 The principle that hostility to judicial interpretation cannot serve as a rational basis for the court-stripping bills is, of course, contingent upon the assumption that Congress cannot change the contours of the rights in question under its enforcement power of § 5 of the 14th amendment. U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of the article."). For support of this interpretation, see 127 Cong. Rec. E2383-85 (daily ed. May 18, 1981) (testimony of Prof. Brilmayer on Human Life Statute).
132 In fact, several commentators have argued that the federal courts should have "protective jurisdiction" over federal claims because of institutional competence. See, e.g., Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 184 (1953). Perhaps the strongest case for arguing that the state courts have greater institutional competence is in abortion cases because family law issues are peculiarly a matter of state concern. The initial abortion decisions, however, deliberately eroded this judicially recognized state enclave.
The bills thus appear to lack any rational basis. If the bills were facially neutral instead of discriminatory, a presumption of validity would be appropriate because Congress would not disadvantage statutory claims without a good reason. But the bills are not facially neutral, and no intelligible rationale has been or probably can be articulated to justify them. It is hard to argue that federal court jurisdiction does not extend to controversies of this sort when federal courts have general federal question jurisdiction.

Our thesis resembles somewhat an argument that many defenders of these bills would probably accept. To some degree at least, the power to hear statutory claims carries with it the power to hear constitutional ones because sometimes both claims arise in the

133 It might at first appear that the requirements of the equal access principle provide proponents of jurisdictional gerrymandering with an obvious method of circumventing its effect. If facial neutrality and the absence of hostility are the tests, what is to stop opponents of, say, abortion from creating a federal statutory right to an abortion and then relegating all abortion claims, both statutory and constitutional, to the hostile state courts? The jurisdictional restriction would undoubtedly affect all claims equally since the object would be to rid the federal courts of every opportunity to pronounce judgment in an abortion case. Congress could then make the argument that it was not acting out of hostility, for it had created a new federal statutory right to an abortion.

Despite this outward show of neutrality, however, if the motive of Congress in enacting the jurisdictional restriction was to discriminate against the constitutional right to an abortion, the statute would still fail to meet the standards of the equal access principle. The Supreme Court has recognized in the equal protection context that even facially neutral statutes must not be motivated by an intent to discriminate. Washington v. Davis, 426 U.S. 229 (1976). The argument against this principle's applicability to jurisdictional matters is that the Supreme Court expressly indicated in *Ex parte McCardle* that it could not consider the motives of Congress when reviewing the constitutionality of limitations on federal jurisdiction. This judicial posture seems dated. The modern development of the law of discrimination recognizes the importance of motive in deciding whether legislative action constitutes discrimination. For this reason, as Justice Douglas noted in his dissent in *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n.11 (1962), "[t]here is a serious question whether the *McCardle* case could command a majority view today."

Even if the foes of abortion could clear the hurdle of avoiding discriminatory motive, it seems highly unlikely that they would want to create a federal statutory right to abortion in order to strip federal courts of jurisdiction to hear abortion claims generally. By so doing, they would create a new right to abortion enforceable in state courts. It is unlikely, given an explicit federal statutory cause of action, that even hostile state judges could find a justifiable reason to deny relief to plaintiffs seeking enforcement of abortion rights. Denial of federal court jurisdiction under such a scheme would at best secure only a Pyrrhic victory.

Proponents of the court-stripping bills may also argue that any bill to limit federal court access for constitutional claims would similarly limit statutory claims for the violation of constitutional rights under 42 U.S.C. § 1983 (1976) and thus be neutral. Because § 1983 merely "piggybacks" constitutional violations, however, it can hardly be considered a separate violation of a statutory rule.
same case. Even restrained interpretivists agree that Congress cannot grant jurisdiction over a case but compel courts to ignore the constitutional claims and thus to exercise jurisdiction in an unconsti-
tutional way. 134 So much is conceded to follow from Klein. 135 Professor Hart therefore argued that as long as Congress depends upon the courts for enforcement purposes, constitutional guaran-
tees are reasonably secure. 136

Our argument, while somewhat broader, likewise depends upon congressional use of federal courts for purposes of enforcing federal rights generally. We agree that once Congress vests power to enforce a federal statute it cannot deny jurisdiction to entertain constitutional challenges to that statute that arise in its enforcement. The difference between Professor Hart's thesis and ours is that his only bars entertaining a case without considering the constitutional aspects of that same case. Hart's theory would apparently approve a jurisdictional statute that granted jurisdiction to hear all cases involving enforcement of a federal statute except those that raised constitutional objections. Such a jurisdictional distinction between statutory and constitutional challenges, however, would violate the equal access principle. Thus, we argue that once Congress vests the power to adjudicate cases arising out of enforcement of the rule, it may not exclude cases raising constitutional challenges to the rule. For example, if federal courts have jurisdiction to enforce constitutionally approved portions of abortion regulations, they must also have jurisdiction to consider constitutional challenges to the regulations as a whole.

Furthermore, just as power to enforce a statute sweeps in power to entertain constitutional challenges to that statute, power to enforce statutes generally sweeps in power to enforce constitutional provisions generally. If Congress desired, it could build up federal

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134 See, e.g., Bator, supra note 1, at 1035.
135 See Young, supra note 1, at 1221.
136 Hart, supra note 1. See also Eisenberg, supra note 1, at 529-30 (assuming that on case-
by-case basis, power to enforce statutes includes power to entertain any constitutional chal-
lenes arising out of case).

Professor Hart does not explain why article III is violated any more by exclusion of consti-
tutional issues within a case than by exclusion of constitutional issues arising out of the same statute in other cases. Certainly the power to regulate appellate jurisdiction would allow power to give appellate jurisdiction in some issues in the case but not others. This might well result in the "incorrect" final outcome of certain adjudications because some improperly resolved issue was not considered on appeal.
court jurisdiction statute-by-statute, and then Congress would only be required to vest the federal courts with power to consider constitutional challenges to the statutes over which they have jurisdiction. Congress, however, has decided to bestow general federal question jurisdiction upon the federal courts instead of using a statute-by-statute approach. If Congress wishes to take advantage of establishing a general federal question jurisdiction for statutes and federal common law, it must extend that federal question jurisdiction to constitutional claims also.

Little doubt has been expressed that the Constitution requires establishment of a Supreme Court with some sort of appellate jurisdiction. Against a background of appellate jurisdiction extending to federal questions, congressional action defines which cases may be excepted. Similarly, a statutory grant of general federal question jurisdiction to the lower federal courts defines the backdrop against which the court-stripping bills create exceptions. Were it not for these general grants, it would arguably be permissible for Congress to create a purely statutory jurisdiction by affirmatively building it up, statute-by-statute, without discriminating against any constitutional claims at any step. Once there is a general grant, however, exceptions must be recognized for what they are: exceptions.

**Conclusion**

The requirement of equal access is appropriately permissive. Existing federal jurisdictional statutes escape objection because they are facially neutral—only door-closing rules that single out constitutional claims without valid reason are prohibited. We do not argue that some core of cases must be heard by article III tribunals. If an absolute right to federal adjudication exists, its foundations lie elsewhere than in these pages.

The most serious defect in the usual criticisms against congressional gerrymandering of disfavored constitutional rights is that they reduce the congressional role to triviality and thus interpret the regulations and exceptions clause and the power to create lower federal courts into absurdity. So extreme a stand is entirely unnecessary when equal access is kept in mind. No one can seri-

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137 Indeed, this was the situation that existed until 1875. See supra note 102.
ously argue that this principle has reduced state legislative control over state court jurisdiction to a triviality. Certainly it has not been necessary to grant state courts the power to exclude federal or sister-state causes of action to preserve some intelligible meaning for their jurisdiction-regulating activities. The normal decision-making functions of state regulation of its adjudication have proceeded unimpeded. The congressional regulations of jurisdiction that have been challenged and upheld or deemed beyond reproach correspond to this run-of-the-mill state use of domestic regulatory power.

The congressional power to allocate jurisdiction need not be broader to give the constitutional text a meaningful interpretation. Congress need not establish lower federal courts, vest them with general jurisdiction, or leave the Supreme Court's jurisdiction totally intact. Yet to the extent Congress does leave federal question jurisdiction intact, it may not deny constitutional claims equal access to federal courts. The obligation to cooperate and coordinate with other coequal or superior sources of law, whether stemming from full faith and credit, the supremacy clause, or the *Marbury* principle, is as much a part of "Our Federalism" as any other "comity" doctrine regulating the respect of one sovereign law-making source for another.188
