ing of jurisdiction,[1210] inherent judicial power,[1211] and a theory, variously expressed, that the Supreme Court has "essential constitutional functions" of judicial review that Congress may not impair through jurisdictional limitations,[1212] one can nonetheless see the possibilities of restrictions on congressional power flowing from such basic constitutional underpinnings as express prohibitions, separation of powers, and the nature of the judicial function.[1213] Whether because of the plethora of scholarly writing contesting the existence of unlimited congressional power or because of another reason, the Court of late has taken to noting constitutional reserva-

---

[1210] This was Justice Story's theory propounded in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329–336 (1816). Nevertheless, Story apparently did not believe that the constitutional bestowal of jurisdiction was self-executing and accepted the necessity of statutory conferral. White v. Fenner, 29 Fed. Cas. 1015 (No. 17, 547) (C.C.D.R.I. 1818) (Justice Story). In the present day, it has been argued that the presence in the jurisdictional-grant provisions of Article III of the word "all" before the subject-matter grants—federal question, admiralty, public ambassadors –mandates federal court review at some level of these cases, whereas congressional discretion exists with respect to party-defined jurisdiction, such as diversity. Amar, *A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985); Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990). Rebuttal articles include Meltzer, The History and Structure of Article III, id. at 1569; Redish, Text, Structure, and Common Sense in the Interpretation of Article III, id. at 1633; and a response by Amar, id. at 1651. An approach similar to Professor Amar's is Clinton, *A Mandatory View of Federal Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741 (1984); Clinton, *Early Implementation and Departures from the Constitutional Plan*, 86 Colum. L. Rev. 1515 (1986). Though perhaps persuasive as an original interpretation, both theories confront a large number of holdings and dicta as well as the understandings of the early Congresses revealed in their actions. *See* Casto, *The First Congress's Understanding of its Authority over the Federal Court's Jurisdiction*, 26 B.C. L. Rev. 1101 (1985).

[1211] Justice Brewer in his opinion for the Court in United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), came close to asserting an independent, inherent power of the federal courts, at least in equity. *See also* Paine Lumber Co. v. Neal, 244 U.S. 459, 473, 475–476 (1917) (Justice Pitney dissenting). The acceptance by the Court of the limitations of the Norris-LaGuardia Act, among other decisions, contradicts these assertions.

[1212] The theory was apparently first developed in Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960). *See also* Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 Vill. L. Rev. 929 (1981–82). The theory was endorsed by Attorney General William French Smith as the view of the Department of Justice. 128 Cong. Rec. 9093–9097 (1982) (Letter to Hon. Strom Thurmond).

[1213] An extraordinary amount of writing has been addressed to the issue, only a fraction of which is touched on here. *See* Hart & Wechsler (6th ed.), supra at 275–324.