St. Mary's Law Journal

Volume 41 | Number 1 Article 1

1-1-2009

The Texas Supreme Court's Erroneous Doctrine of Implied Appellate Jurisdiction.

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Recommended Citation

Charles R. Flores, *The Texas Supreme Court's Erroneous Doctrine of Implied Appellate Jurisdiction.*, 41 St. Mary's L.J. (2009).
Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol41/iss1/1

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ST. MARY'S LAW JOURNAL

VOLUME 41 2009 NUMBER 1

ARTICLES

THE TEXAS SUPREME COURT'S ERRONEOUS DOCTRINE OF IMPLIED APPELLATE JURISDICTION

CHARLES R. FLORES*

I. Introduction 2
II. *Eichelberger v. Eichelberger* 7
  A. The Decision 7
  B. Increasing Mischief and *DART* 10
III. Implied Appellate Jurisdiction Under Modern Texas Law 13
  A. Constitutional Foundations 13
  B. Statutory Foundations 16
IV. The Role of Federal Law in *Eichelberger* and *DART* 21
  A. The Relevance of Federal Analogs 22
  B. Internal Restraints 26
  C. The Supremacy Clause 34
V. Conclusion 38

Published by Digital Commons at St. Mary's University, 2009

St. Mary's Law Journal, Vol. 41 [2009], No. 1, Art. 1

> Q. Let's stop beating around the bush and get to the central question. The bald truth is this, isn't it, that the power to regulate jurisdiction is actually a power to regulate rights—rights to judicial process, whatever those are, and substantive rights generally? Why, that *must* be so. What can a court do if Congress says it has no jurisdiction, or only a restricted jurisdiction? It's helpless—helpless even to consider the validity of the limitation, let alone to do anything about it if it's invalid.
>
> A. Why, what monstrous illogic! To build up a mere power to regulate jurisdiction into a power to affect rights having nothing to do with jurisdiction! And into a power to do it in contradiction to all the other terms of the very document which confers the power to regulate jurisdiction![1]

I. INTRODUCTION

In 1979, the Supreme Court of Texas decided *Eichelberger v. Eichelberger*,[2] an extraordinary case in Texas jurisprudence. A Texas statute—enacted pursuant to an explicit constitutional license[3]—gave final appellate jurisdiction over the case in question not to the Texas Supreme Court, but to the intermediate courts of appeals.[4] After losing in the court of appeals, one of the parties appealed to the supreme court despite the statute, facing what could have been a summary dismissal for lack of jurisdiction.[5] But because the underlying court of appeals decision conflicted with a

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* J.D., American University Washington College of Law; B.A., University of Texas at Austin. I owe special thanks to Justice Paul Green of the Supreme Court of Texas, Judge Jennifer Walker Elrod of the United States Court of Appeals for the Fifth Circuit, and Chase C. Hamilton for their invaluable support throughout this project.

1. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371 (1953).

2. Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979).

3. TEX. CONST. art. V, § 3 (amended 1980).

4. *See* Act of May 19, 1953, 53d Leg., R.S., ch. 424, § 2, 1953 Tex. Gen. Laws 1027 (amended 1981 & 1983) (current version at TEX. GOV'T CODE ANN. § 22.225(b)(3) (Vernon Supp. 2009)) ("[T]he judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to wit: . . . All cases of divorce."); *see also Eichelberger*, 582 S.W.2d at 397–98 (noting that under the Texas constitution, divorce cases are final in the court of civil appeals).

5. *Eichelberger*, 582 S.W.2d at 396. In fact, the supreme court had initially determined that it lacked jurisdiction over the case before entertaining a motion for rehearing. *Id.*

decision of the United States Supreme Court, the Texas Supreme Court found that its jurisdiction should be implied, citing the Texas constitution's jurisdictional provisions and the United States Constitution's Supremacy Clause.[6]

Eichelberger's holding did not go unnoticed. Retired Chief Justice Robert Calvert wrote soon after the decision that the court had "held that it had jurisdiction in a category of cases theretofore thought to have been closed to the court by our constitution and statutes which define and restrict the court's jurisdiction."[7] Calvert found the decision to be "alarming," "strictly result oriented," and a potential threat to the "integrity of constitutional provisions and statutes concerning supreme court jurisdiction which appear clearly contrary to the result reached [in *Eichelberger*] and have remained unquestioned in that regard since their adoption."[8] According to Calvert, "*Eichelberger v. Eichelberger* is an abrupt departure from all generally recognized norms and standards for judicial decisions."[9] Yet despite these criticisms, Calvert was not worried that *Eichelberger* would have great repercussions, predicting that "[c]ases in which the *Eichelberger* decision will have precedential value will arise so infrequently that it cannot add substantially to the court's workload; therefore, it can do little harm."[10]

For the next three decades, Calvert's prediction proved largely correct. Over that period, the Texas Supreme Court used *Eichelberger*'s implied jurisdiction holding only once, in a single sentence of a per curiam decision.[11] The court never extended or applied *Eichelberger* to any other set of cases, and never discussed the underlying principles of *Eichelberger*'s implied jurisdiction holding, let alone question them.

6. *Id.* at 397–400.

7. Robert W. Calvert, *Jurisdiction of the Texas Supreme Court in Divorce Cases*, 33 BAYLOR L. REV. 51, 51 (1981).

8. *Id.* at 52, 60–61.

9. *Id.* at 60.

10. *Id.* at 61.

11. *See* Mayhew v. Caprito, 794 S.W.2d 1, 2 (Tex. 1990) (per curiam) (affirming that the Texas Supreme Court has jurisdiction to correct a decision from a Texas court of appeals if contrary to a United States Supreme Court decision); *cf. Ex parte* Lowe, 887 S.W.2d 1, 4 (Tex. 1994) (enforcing "federal cases as to federal law when they conflict with a decision" from a lower Texas court).

That all changed during the court's 2007 term, when *Eichelberger* reappeared in three important opinions. In *County of Dallas v. Sempe*,[12] the court faced an interlocutory appeal that did not present a conflict between Texas cases or a dissent among justices of a court of appeals that would fall within the court's statutory jurisdiction.[13] Nonetheless, the *Sempe* petitioners argued that jurisdiction came from a conflict between the court of appeals decision and United States Supreme Court decisions—a conflict that did not fall within the court's statutory conflicts-jurisdiction provision.[14] Rather than address the validity of *Eichelberger*'s implied-jurisdiction principle, the court dismissed the petition by concluding that the substance of the federal and state cases did not conflict.[15]

Soon after *Sempe*, the court's decision in *In re H.V.*[16] avoided *Eichelberger* in a similar manner. By concluding that a sufficient conflict among Texas decisions existed, *In re H.V.* avoided *Eichelberger*'s question of whether, in the absence of a statutory grant, a conflict between a court of appeals decision and the United States Supreme Court confers appellate jurisdiction on the Supreme Court of Texas: "Because there are conflicts with Texas courts of appeals' opinions, we do not reach the question whether interlocutory appeals are within our previous holdings that conflicts with opinions of the United States Supreme Court are sufficient for jurisdiction."[17]

Then came *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338* (*DART*).[18] *DART* confronted another lack of statutory jurisdiction, caused this time by an interlocutory appeal that, but for *Eichelberger*, would have triggered none of the supreme court's statutory jurisdiction provisions.[19] In *DART*, a

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12. County of Dallas v. Sempe, 262 S.W.3d 315 (Tex. 2008) (per curiam).

13. *Id.* at 315–16.

14. *Id.* at 315.

15. *Id.* at 315–16.

16. *In re* H.V., 252 S.W.3d 319 (Tex. 2008).

17. *Id.* at 323 n.26 (citing Eichelberger v. Eichelberger, 582 S.W.2d 395, 400 (Tex. 1979)).

18. Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659 (Tex. 2008).

19. *See id.* at 665–66 (explaining the reasoning in *Eichelberger* that triggered jurisdiction without a statutory grant of jurisdiction); *see also* TEX. GOV'T CODE ANN.

unanimous court reaffirmed the doctrine of implied appellate jurisdiction: "In the nearly thirty years since we decided *Eichelberger*, we have not invoked our constitutional jurisdiction to remove a conflict between a Texas appellate court and the United States Supreme Court, but we adhere to our holding that this Court has such jurisdiction."[20]

Because of *DART*, the doctrine of implied appellate jurisdiction that began in *Eichelberger* is alive and well, and its renewal is significant, for jurisdictional debates strike at the heart of jurisprudence, the structure of courts, and separation of powers.[21] "Ultimately, jurisdiction is an essential part of what makes a court a court and distinguishes it from a group of persons who in somber robes and tone undertake to tell others how they ought to behave."[22] And even when not exercised to its fullest extent, the

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§ 22.001(a)(1)–(2) (Vernon 2004) (providing the supreme court with jurisdiction over cases where "the justices of a court of appeals disagree on a question of law material to the decision" and cases where "one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case"); TEX. GOV'T CODE ANN. § 22.225(b)(3) (Vernon Supp. 2009) ("Except as provided by Subsection (c) or (d), a judgment of a court of appeals is conclusive on the law and facts, and a petition for review is not allowed to the supreme court, in the following cases: . . . from other interlocutory appeals that are allowed by law.").

20. *Dallas Area Rapid Transit*, 273 S.W.3d at 666.

21. *Cf.* Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 158–59 (1960) ("If Congress also has plenary control over the appellate jurisdiction of the Supreme Court[,] . . . Congress can by statute profoundly alter the structure of American government. It can all but destroy the coordinate judicial branch and thus upset the delicately poised constitutional system of checks and balances. . . . It can reduce the supreme law of the land as defined in [A]rticle VI [of the United States Constitution] to a hodgepodge of inconsistent decisions by making fifty state courts and eleven federal courts of appeals the final judges of the meaning and application of the Constitution, laws, and treaties of the United States."); Laurence H. Tribe, Commentary, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 131 (1981) ("Perhaps Congress shines in the reflected glory of the Court's independence, they say, but it is no less true that the Court—indeed, the federal judiciary as a whole—shines in the reflected glory of Congress' electoral mandate—and does so only because a popularly elected Congress, armed with what such advocates allege to be plenary control over the jurisdiction of all federal courts, lends an otherwise unavailable legitimacy to these unelected tribunals by consenting, through its voluntary inaction, to whatever jurisdiction such courts are able to exercise.").

22. Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22 (1981).

legislature's ability to restrict jurisdiction can exert considerable unspoken influence on courts facing difficult decisions.[23] As *Sempe*, *In re H.V.*, and *DART* illustrate, litigants have not forgotten about *Eichelberger* and its potential to provide the court jurisdiction in cases where no statutory source applies. Nor should they, as the Texas Legislature continues to demonstrate a willingness to place finality for certain matters in the courts of appeals, not the supreme court.[24] Moreover, the cases raising the potential for implying appellate jurisdiction are invariably of significant import, for the argument most commonly arises in appeals that involve a substantive issue that, at one time, merited resolution by the United States Supreme Court.[25]

Calvert's critique of *Eichelberger* focused on the court's reading of the Texas constitution and statutes as they stood in 1979, and remains an important starting point for the doctrine's reevaluation thirty years later. Does an analysis of the court's current jurisdictional provisions, both constitutional and statutory, make *DART* subject to the same weaknesses? After Part II of this Article outlines *Eichelberger* in full, Part III discusses *DART* and the state of Calvert's critique under modern Texas law. Under old law and new, the doctrine of implied appellate jurisdiction contravenes the legislature's constitutional authority to restrict the court's appellate jurisdiction. Part IV sets out a new critique that focuses on *Eichelberger* and *DART*'s understanding of federal judicial power and the Supremacy Clause. An examination of federal analogs—Article III of the United States Constitution and Congress's authority to control the appellate jurisdiction of the

23. *See* Akhil Reed Amar, Colloquy, *Article III and the Judiciary Act of 1789: The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1500 (1990) ("While jurisdiction stripping seems for the moment to have dropped off the immediate congressional agenda, it could at any moment get put back on (perhaps in response to a particularly controversial [United States] Supreme Court opinion) . . . . What's more, we must remember that 'ordinary' adjudication, even during 'quiet' periods, takes place in the shadow of whatever jurisdiction stripping powers Congress lawfully possesses, whether or not these powers are ever exercised.").

24. *See* TEX. GOV'T CODE ANN. § 22.225 (Vernon Supp. 2009) (listing the types of cases in which the decisions by the courts of appeals are final and providing for those limited exceptions in which supreme court review is not prohibited).

25. Carried to its fullest extent, *Eichelberger* may also apply to Texas court of appeals decisions that conflict with *any* federal law, be it judicial decision (Supreme Court or otherwise), legislation, regulation, or other law. *See* discussion *infra* Part II.B.

United States Supreme Court—is instructive for Texas jurisprudence and further undercuts the doctrine.

II. *EICHELBERGER V. EICHELBERGER*

A. *The Decision*

In *Eichelberger*, a husband and wife had divorced and came to a Texas trial court disputing the proper distribution of federal retirement benefits the husband had earned.[26] After the trial court issued a final judgment awarding the wife a portion of the benefits, the husband appealed to the intermediate court of civil appeals, which affirmed the trial court's decision.[27] Still unsatisfied, the husband attempted to invoke the Texas Supreme Court's jurisdiction by filing a typical application for writ of error.[28] The court recognized the potential jurisdictional issue and addressed it first.[29]

Some context: article V of the Texas constitution establishes the initial scope of the court's jurisdiction and, at the time of *Eichelberger*, subjected the court's jurisdiction to "such restrictions and regulations as the Legislature may prescribe."[30] Accordingly, the legislature had enacted jurisdictional statutes that, in many but not all respects, paralleled the constitutional grant. The nearest available statutory basis for jurisdiction was the court's conflicts jurisdiction, which extended to cases from the courts of civil appeals "in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals, or of the Supreme Court upon a question of law material to a decision of the case."[31] Had there been a sufficient conflict between the underlying decision and some other Texas court of civil appeals decision, jurisdiction would have vested. But the

26. Eichelberger v. Eichelberger, 582 S.W.2d 395, 396 (Tex. 1979).

27. *Id.*

28. *Id.*

29. *Id.*

30. TEX. CONST. art. V, § 3 (amended 1980).

31. Act of May 19, 1953, 53d Leg., R.S., ch. 424, § 1, 1953 Tex. Gen. Laws 1026 (amended 1981 & 1983) (current version at TEX. GOV'T CODE ANN. § 22.225(c) (Vernon Supp. 2009)).

court quickly concluded that, because of the lack of conflicting Texas decisions, "no express grant of jurisdiction exist[ed]."[32]

Eichelberger is most often cited for its discussion of the source and nature of a court's "inherent" powers:

> The *inherent* judicial power of a court is not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities. The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity. Inherent power of the courts has existed since the days of the Inns of Court in common law English jurisprudence. It also springs from the doctrine of separation of powers between the three governmental branches. This power exists to enable our courts to effectively perform their judicial functions and to protect their dignity, independence and integrity.[33]

The court went on to cite examples of inherent powers, including the power to change judgments, the power to control witnesses, the contempt power, and the power to regulate the practice of law.[34] Then the court discussed "implied" powers: "The *implied* powers of a court do not stand on such an independent basis as those described as inherent. Though not directly or expressly granted by constitutional or legislative enactment, implied powers are those which can and ought to be implied from an express grant of power."[35] *Eichelberger* dealt with older precedents that may have confused the terms, explaining that "[o]ur holdings have simply been that we have no inherent power to take jurisdiction of a case when that jurisdiction has been expressly or impliedly granted to another court of this

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32. *Eichelberger*, 582 S.W.2d at 397.

33. *Id.* at 398–99 (citations omitted).

34. *Id.* at 398–99 n.1; *cf.* Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22 (1981) ("True, once a court is established and empowered to decide a group of cases, it necessarily acquires some jurisdiction from its very status as a court. An example—of some relevance to our inquiry—is 'jurisdiction to decide jurisdiction,' which is a logical necessity in courts of limited jurisdiction. But such inherent jurisdiction is not self-generated; it is implicit in the grant or grants of jurisdiction upon which the court is founded.").

35. *Eichelberger*, 582 S.W.2d at 399.

Flores: The Texas Supreme Court's Erroneous Doctrine of Implied Appellate

state. In so doing, we have recognized a distinction between implied and inherent powers, in regard to jurisdiction."[36] Having explained the distinction, the court made clear which framework it would rely upon:

> As we have said, this court does possess inherent powers separate and distinct from our jurisdictional power; however, in the case now before us the exercise of inherent powers as we have defined them here is not appropriate. Rather, we are called upon to exercise a judicial power not within our express grant of jurisdiction.[37]

Thus, *Eichelberger* purported to be a case where jurisdiction was to be found not in the text of an express grant but in the legislature's unspoken, implied grant of judicial power. Here is *Eichelberger*'s explanation of the implied source of jurisdiction:

> The constitution expressly gives this court jurisdiction to review questions of law arising in cases decided by the Court of Civil Appeals. From this express grant we hold our jurisdictional power to decide the case before us is implied. No other department of the government of Texas has the jurisdiction or the mechanism to correct such decision of a Court of Civil Appeals except the Supreme Court of Texas. A patent anomaly would exist if, within the sovereign State of Texas, no department, branch or official had the power to enforce in this case the mandate of the federal Supremacy Clause and the recognition of that supremacy by Tex. Const. Art. I, Sec. 1. We hold, therefore, that the Supreme Court of Texas has jurisdiction to correct a decision of the Court of Civil Appeals which is contrary to a decision of the United States Supreme Court.[38]

The majority's writing prompted a short dissent from Justice Sam Johnson. According to Justice Johnson, the court had improvidently decided to "expand the jurisdiction of this court beyond the limits of the Texas Constitution and statutes."[39] While Justice Johnson agreed that the Supremacy Clause required that *some* remedy be available to litigants wronged by a court of

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36. *Id.* at 399–400.

37. Eichelberger v. Eichelberger, 582 S.W.2d 395, 400 (Tex. 1979).

38. *Id.* (citations omitted).

39. *Id.* at 403 (Johnson, J., dissenting). Justice Johnson further noted, "The avenues to the federal courts have always been open to those not satisfied with the answers they received in the state courts." *Id.*

appeals (with respect to a federal matter), his solution was different. Rather than vest another *Texas* court with appellate jurisdiction, Justice Johnson preferred to rely upon the United States Supreme Court's existing appellate jurisdiction, which Justice Johnson argued would allow for a Texas court of civil appeals decision to be appealed to the United States Supreme Court (after the Supreme Court of Texas denied review).[40] Thus, Justice Johnson concluded that the *Eichelberger* majority had "ignore[d] the availability of a historically proven remedy."[41]

B. *Increasing Mischief and* DART

Because the opportunity to appeal is so valuable, it is no surprise that litigants have invoked *Eichelberger*'s principles of implied jurisdiction when the typical statutory avenues are unavailable.[42] But in the years immediately following *Eichelberger*, the court rarely employed *Eichelberger*'s rule to establish jurisdiction. *Mayhew v. Caprito*[43] brought a will contest to the court involving an interpretation of the Full Faith and Credit Clause.[44] After a short discussion of *Mayhew*'s merits, the per curiam court cited *Eichelberger* for the proposition that "[w]e have jurisdiction to correct a decision of the court of appeals which is contrary to a decision of the United States Supreme Court."[45] But for the conflict among state cases, *In re H.V.* could have confronted *Eichelberger*'s jurisdictional question head-on.[46] And but for a lack of substantive conflict between state decisions and United States Supreme Court decisions, *Sempe* could have done the same.[47] Thus, for many years there was good reason to

40. *Id.*
41. *Eichelberger*, 582 S.W.2d at 403.
42. *See, e.g.*, Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659, 664–67 (Tex. 2008) (affirming that the Texas Supreme Court had jurisdiction based on a conflict between the court of appeals and a United States Supreme Court decision).
43. Mayhew v. Caprito, 794 S.W.2d 1 (Tex. 1990) (per curiam).
44. *Id.* at 2; *see also* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given each State to the public Acts, Records, and judicial proceedings of every other State.").
45. *Mayhew*, 794 S.W.2d at 2 (citing *Eichelberger*, 582 S.W.2d at 400).
46. *In re* H.V., 252 S.W.3d 319, 323 n.26 (Tex. 2008).
47. County of Dallas v. Sempe, 262 S.W.3d 315, 315–16 (Tex. 2008) (per curiam).

believe that *Eichelberger* stood as a mere historical anomaly whose influence might fade away over time.

Not so after the doctrine's revival in *DART*. In *DART*, the trial court denied the defendant's immunity-based plea to the jurisdiction, and the defendant brought an interlocutory appeal to the court of appeals, which affirmed.[48] Unsatisfied, the defendant appealed again.[49] Accordingly, in *DART*, the court faced another iteration of the same seemingly clear statutory mandate: Government Code section 22.225 denied the court appellate jurisdiction over interlocutory appeals, instructing that "a petition for review is not allowed to the supreme court" from such orders unless there was a dissent regarding a question of law among the justices of a court of appeals or a conflict among courts of appeals or a conflict with a decision of the supreme court.[50] A unanimous court reaffirmed the principle of implied jurisdiction using similarly brief, direct language:

> From 1892 to 1953, the decisions of the courts of civil appeals were final in some cases and not subject to this Court's review, but this Court has never lacked jurisdiction to prevent an intermediate appellate court from conflicting with one of this Court's decisions. It is fundamental to the very structure of our appellate system that this Court's decisions be binding on the lower courts. We have no less authority to ensure that the lower courts follow[] the United States Supreme Court.
>
> Nor should our holding in *Eichelberger* apply with any less force in interlocutory appeals. On the contrary, the fact that provision has been made for an interlocutory appeal indicates that the Legislature has determined that appellate review before a final judgment is important. It is surely no less important when a court of appeals' decision conflicts, not with another court of appeals' decision or a decision of this Court, but with a decision of the United States Supreme Court.
>
> Accordingly, we conclude that we have jurisdiction over this case if the court of [appeals'] decision conflicts with the United States Supreme Court's decision in *Jackson Transit Authority*.[51]

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48. *Dallas Area Rapid Transit*, 273 S.W.3d at 663.
49. *Id.* at 664.
50. TEX. GOV'T CODE ANN. § 22.225(b)–(c) (Vernon Supp. 2009).
51. *Dallas Area Rapid Transit*, 273 S.W.3d at 666–67.

And with that, the doctrine was reestablished in Texas jurisprudence.

Because neither of its purported boundaries is narrow, *DART*'s holding invites the continued development of a rule that supports appellate jurisdiction over a significant set of cases. The opinion's first boundary is the absence of a statutory grant of appellate jurisdiction for the court.[52] Despite the broad reach of the Texas Government Code's jurisdictional provisions, important sets of cases remain outside the court's appellate jurisdiction. Indeed, some of the most significant issues in Texas jurisprudence continue to arise from interlocutory appeals, many of which the legislature makes final in the courts of appeals.[53]

The doctrine's second boundary also invites expansion. Read literally, *Eichelberger* and *DART* apply only to cases where the court of appeals opinion conflicts with a decision of the United States Supreme Court, a relatively small set of cases.[54] But *Eichelberger* and *DART*'s underlying rule—that Texas Supreme Court appellate jurisdiction exists where necessary to enforce the Supremacy Clause[55]—invites a much more expanded operation. If the Supremacy Clause operates to confer jurisdiction when a court of appeals decision conflicts with the law as declared by the United States Supreme Court, it does so not because of *who* made

52. *Id.* at 665.

53. *See* TEX. GOV'T CODE ANN. § 22.225(b)(3), (d) (Vernon Supp. 2009) (stating that a judgment of a court of appeals is conclusive and a petition for review is not allowed "from an interlocutory order appointing a receiver or trustee or from other interlocutory appeals that are allowed by law," except those described by section 51.014(a)(3) or (6) of the Civil Practice and Remedies Code—class certification decisions, certain First Amendment summary judgments, and certain motions to dismiss in asbestos cases).

54. *See* Eichelberger v. Eichelberger, 582 S.W.2d 395, 397 (Tex. 1979) ("We hold that under Article V, Sections 1 and 3, of the Constitution of Texas, the Supreme Court of Texas possesses the power, and thus the duty, to correct a decision of a Court of Civil Appeals that conflicts with the 'supreme law of the land' as established by the Congress and Supreme Court of the United States."); *Dallas Area Rapid Transit*, 273 S.W.3d at 667 ("Accordingly, we conclude that we have jurisdiction over this case if the court of [appeals'] decision conflicts with the United States Supreme Court's decision in *Jackson Transit Authority*.").

55. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.").

the declaration, but because of *what* the declaration was—an assertion of supreme federal power.[56] Thus, to the extent that the Supremacy Clause binds states to the decisions of the United States Supreme Court, it similarly binds states to the decisions of federal courts of appeals, federal district courts, and federal statutes. While limiting the doctrine of implied appellate jurisdiction to United States Supreme Court decisions may be a convenient rhetorical limitation, it is unlikely to be a principled one. For cases with no other route to the Texas Supreme Court, *Eichelberger* and *DART* may have created a new category of general federal-question appellate jurisdiction in the Supreme Court of Texas.[57]

III. IMPLIED APPELLATE JURISDICTION UNDER MODERN TEXAS LAW

A. *Constitutional Foundations*

According to Calvert, *Eichelberger* based its decision on a "tenuous, if not totally erroneous," construction of article V when it failed to recognize that the constitution made the court's appellate jurisdiction subject to "such 'restrictions and regulations as the Legislature may prescribe.'"[58] By excising the legislature's power to limit jurisdiction from article V in a limited case, the *Eichelberger* court left itself with a much less restrictive grant of jurisdiction over all "questions of law arising in cases decided by

56. *See Eichelberger*, 582 S.W.2d at 397 ("Article I, Section I, of the Constitution of Texas, expressly acknowledges that the State of Texas is subject to the Constitution of the United States. This court must recognize and follow the supreme law of the land.").

57. *See id.* at 403 (Johnson, J., dissenting) ("[T]he majority opinion of this court now expands the jurisdiction of this court to include decisions by the courts of civil appeals that conflict with a 'decision of the Supreme Court of the United States' or 'the supreme law of the land.' The *ratio decidendi* of the majority opinion is the Supremacy Clause and a conflict with 'the supreme law of the land.' This necessarily includes conflicts with federal statutes and the federal Constitution, as well as any United States Supreme Court decision."). Nor is it clear that *Eichelberger* will operate only as a method of filling gaps in statutory jurisdictional provisions. If the Supremacy Clause justifies inferring the Texas Supreme Court's appellate jurisdiction where statutes otherwise deny it, creative litigants will no doubt attempt to use the principle to avoid the operation of other statutory and rule-based boundaries to supreme court review.

58. Robert W. Calvert, *Jurisdiction of the Texas Supreme Court in Divorce Cases*, 33 BAYLOR L. REV. 51, 54 (1981) (quoting TEX. CONST. art. V, § 3).

St. Mary's Law Journal, Vol. 41 [2009], No. 1, Art. 1

the Courts of Civil Appeals."[59] Since *Eichelberger*'s issuance, article V has not undergone major substantive change. Section 1 continues to provide a general grant of "judicial power." In 1979, when *Eichelberger* was decided, article V, section 1 read:

> The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Civil Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.[60]

Today, article V, section 1 reads:

> The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.[61]

Section 3 addresses the Texas Supreme Court's appellate jurisdiction. In 1979, article V, section 3 read:

> The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. *Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe.* Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. . . .[62]

Today, article V, section 3 reads:

> The Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution. Its jurisdiction shall be coextensive with the limits of the State and its determinations shall be final except in criminal law matters. *Its appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or*

59. *Id.*
60. TEX. CONST. art. V, § 1 (amended 1980).
61. TEX. CONST. art. V, § 1.
62. TEX. CONST. art. V, § 3 (amended 1980) (emphasis added).

by law. . . .[63]

When applied to the current constitution, Calvert's critique remains persuasive because section 3 continues to make the court's appellate jurisdiction subject to the legislature's regulations: "except ... as otherwise provided ... by law."[64] *Eichelberger* ignored this facet of the constitution's scheme and invoked jurisdiction based on implied jurisdiction.[65] And despite the decision to spend three paragraphs on the evolution of the court's jurisdictional grants, the *DART* decision ignored it as well, opting instead to emphasize the court's jurisdiction over conflicting court of appeals decisions.[66]

Lack of precedent was not the problem, for on several occasions the court had discussed the nature of article V.[67] Citing both United States and Texas cases, *Morrow v. Corbin*[68] (decided four decades before *Eichelberger*) distinguished "judicial power"—"the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for a decision"—from "jurisdiction"—"that portion of the judicial power which it has been authorized to exercise by the Constitution or by valid statutes."[69] *Morrow* thus undermined the contention that section 1's broad allocation of "judicial power" conferred jurisdiction on the court.[70] *Morrow* also employed the *expressio*

63. TEX. CONST. art. V, § 3 (emphasis added).

64. *Id.*

65. *See* Robert W. Calvert, *Jurisdiction of the Texas Supreme Court in Divorce Cases*, 33 BAYLOR L. REV. 51, 51–52 (1981) ("What is both interesting and alarming about the court's decision is how it could get that answer, considering the strict, unambiguous limitations placed on its jurisdiction by the Texas Constitution and statutes.").

66. Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659, 664–65 (Tex. 2008).

67. *See, e.g.*, Morrow v. Corbin, 122 Tex. 553, 559–66, 62 S.W.2d 641, 644–47 (1933) (analyzing the effect of article V of the Texas constitution).

68. Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641 (1933).

69. *Id.* at 558, 62 S.W.2d at 644. Accordingly, *Morrow* identified the first two constitutional limits on the court's jurisdiction—the preliminary requirement that the case involve a question of law and that the case have been brought first to a court of appeals—as mandatory and exclusive. "We think the plain reading of the Constitution concludes the question that the Supreme Court and the Courts of Civil Appeals may exercise *only these two classes of jurisdiction.*" *Id.* at 562, 62 S.W.2d at 646 (citing Yett v. Cook, 115 Tex. 175, 180, 268 S.W.2d 715, 716–17 (1925)).

70. For a discussion of the meaning of "judicial power" in the federal context, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of*

unius principle to conclude that the constitution's affirmative grants of jurisdiction functioned simultaneously as rejections of all that went unmentioned.[71]

Later, *Harbison v. McMurray*[72] noted the legislature's constitutional authority to control appellate jurisdiction by emphasizing that "the appellate jurisdiction of the Courts of Civil Appeals in 'civil cases' is not unlimited or absolute, but is subject to control by the Legislature."[73] "This must be so because it is provided that such jurisdiction is 'under such restrictions and regulations as may be prescribed by law.'"[74] *Eichelberger* and *DART*'s failure to mention the legislature's constitutional power to make exceptions or to add to the court's appellate jurisdiction seriously undermines both decisions.[75]

B. *Statutory Foundations*

As a corollary to his constitutional critique, Calvert concluded that the 1979 statutory scheme denied the court's jurisdiction over the divorce case in question in three places: first, in the part of section 22.225's predecessor that made divorce cases final in the courts of appeals; second, in the part of section 22.225's predecessor that prohibited writs of error to the supreme court from divorce cases; and third, in the part of section 22.001's predecessor that excepted from the court's conflicts jurisdiction those cases made final in the courts of appeals.[76]

Federal Jurisdiction, 65 B.U. L. REV. 205, 233–34 (1985).

71. *Morrow*, 122 Tex. 553, 562, 62 S.W.2d 641, 646 (1933); *see also* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 318 (1810) ("Congress has not expressly made any exceptions; but they are implied from the intent manifested by the affirmative description of its powers. It would be repugnant to every principle of sound construction to imply an exception against the intent.").

72. Harbison v. McMurray, 138 Tex. 192, 158 S.W.2d 284 (1942).

73. *Id.* at 196, 158 S.W.2d at 287.

74. *Id.*

75. *See* Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659, 666 (Tex. 2008) (stating that the Texas Supreme Court has constitutional jurisdiction to "remove a conflict between a Texas appellate court and the United States Supreme Court"); Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979) ("The *inherent* judicial power of a court is not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities.").

76. Robert W. Calvert, *Jurisdiction of the Texas Supreme Court in Divorce Cases*, 33 BAYLOR L. REV. 51, 56–57 (1981); *see* Act of May 19, 1953, 53d Leg., R.S., ch. 424, §§ 1–2,

Although the relevant statutes now reside in the Government Code, the 1979 scheme has survived with a substantially similar structure. The primary jurisdictional statute denies the court jurisdiction over questions of fact[77] and over cases not first brought to a court of appeals.[78] It also denies the court jurisdiction over all but six specifically defined categories of cases.[79] Three of the categories depend on the case's subject-matter: the court has jurisdiction over statutory construction cases,[80] state revenue cases,[81] and railroad commission cases.[82] The three other categories involve conflict jurisdiction,[83] dissent jurisdiction,[84] and important-error jurisdiction.[85]

Meanwhile, nearby finality provisions addressed to the courts of appeals continue to function as limits on the supreme court's appellate jurisdiction. For example, cases concerning four specific subjects—certain county courts, certain election matters, certain receivers/trustees, and certain injunctions—cannot be appealed to the supreme court.[86] The statute also denies the court appellate jurisdiction over all but three discrete categories of interlocutory appeals—class-certification decisions,[87] certain First Amendment

1953 Tex. Gen. Laws 1026 (amended 1981 & 1983) (current version at TEX. GOV'T CODE ANN. §§ 22.225, 22.001 (Vernon 2004 & Supp. 2009)).

77. *See* TEX. GOV'T CODE ANN. § 22.001(a) (Vernon 2004) ("The supreme court has appellate jurisdiction . . . extending to all questions of law arising in the following cases . . . ."); *see also* TEX. GOV'T CODE ANN. § 22.225(a) (Vernon Supp. 2009) ("A judgment of a court of appeals is conclusive on the facts of the case in all civil cases.").

78. TEX. GOV'T CODE ANN. § 22.001(a) (Vernon 2004).

79. *Id.* § 22.001(a)(1)–(6).

80. *Id.* § 22.001(a)(3).

81. *Id.* § 22.001(a)(4).

82. *Id.* § 22.001(a)(5).

83. TEX. GOV'T CODE ANN. § 22.001(a)(2) (Vernon 2004).

84. *Id.* § 22.001(a)(1).

85. *Id.* § 22.001(a)(6).

86. TEX. GOV'T CODE ANN. § 22.225(b)(1)–(4) (Vernon Supp. 2009). However, an appeal to the court remains available for cases that trigger the court's conflicts and dissent-below jurisdiction. *See id.* § 22.225(c) (stating that a judgment is appealable if "the justices of the courts of appeals disagree on a question of law material to the decision" or when "one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court").

87. TEX. GOV'T CODE ANN. § 22.225(d) (Vernon Supp. 2009); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3) (Vernon 2008) (naming the certification of or the refusal to certify a class in a suit as an appealable interlocutory order, which Government Code section 22.225(d) states is appealable to the supreme court).

St. Mary's Law Journal, Vol. 41 [2009], No. 1, Art. 1

summary judgments,[88] and certain motions to dismiss in asbestos cases.[89]

DART recognized that the statutory scheme continues to deny the court jurisdiction to hear certain cases, including the interlocutory appeal at issue there:

> The 1892 legislation made decisions in a few types of cases final in the Courts of Civil Appeals, irrespective of conflicts among the courts. These were boundary and election disputes, slander and divorce cases, interlocutory appeals, and cases within the constitutional county courts' jurisdiction except probate matters and cases involving revenue laws or the validity of a statute. . . . That is the current law.[90]

But then *DART* asserted that, "[a]lthough the statutes governing this Court's jurisdiction have specifically addressed conflicts between our intermediate appellate courts and this Court, *none has addressed conflicts between those courts and the United States Supreme Court.*"[91]

It is true that the statute does not speak to the precise issue of conflicts with United States Supreme Court decisions. But what of the other criteria by which the statute categorizes orders, such as their subject matter, the existence of conflicts, the existence of dissents, etc.? To still conclude that Government Code sections 22.001 and 22.225 say *nothing* about the court's appellate jurisdiction over the interlocutory order in *DART*, the court must have come to two conclusions.

88. TEX. GOV'T CODE ANN. § 22.225(d) (Vernon Supp. 2009); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (Vernon 2008) (naming the denial of a motion for summary judgment in a claim arising under the First Amendment involving a member of the media as an appealable interlocutory order, which Government Code section 22.225(d) states is appealable to the supreme court).

89. TEX. GOV'T CODE ANN. § 22.225(d) (Vernon Supp. 2009); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(11) (Vernon 2008) (naming a denial of a motion to dismiss under section 90.007 as an appealable interlocutory order, which Government Code section 22.225(d) states is appealable to the supreme court); TEX. CIV. PRAC. & REM. CODE ANN. § 90.007 (Vernon Supp. 2009) (describing motions to dismiss in asbestos related claims, which section 51.014(1)(11) names as an appealable interlocutory order).

90. Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659, 664–65 (Tex. 2008) (citing TEX. GOV'T CODE ANN. § 22.225(c) (Vernon Supp. 2009)).

91. *Id.* at 665 (emphasis added).

First, to conclude that the Government Code is silent as to the court's appellate jurisdiction over this kind of interlocutory appeal, section 22.001 must be read to provide a *non-exclusive* set of appellate jurisdiction. That is, under *DART*'s view, when section 22.001 says that the court "has appellate jurisdiction . . . in the following cases," it *does not* mean that the court *lacks* jurisdiction over cases *not* within section 22.001; *DART* rejects *expressio unius*.[92] Calvert argued for the application of the principle, and for good reason.[93] As the leading jurisdictional provision in the code, section 22.001 is most naturally read as an exercise of the legislature's constitutional power to proscribe the court's jurisdiction, which would be most logically employed by defining an *exclusive* set of cases over which the court had jurisdiction. Nonetheless, *expressio unius* is not an inexorable command, and without it, section 22.001's terms do not themselves deny the court jurisdiction over *DART*'s interlocutory appeal.

But rejecting *expressio unius* does not solve the problem, because to reach *DART*'s conclusion, the court must have also ignored the explicit jurisdiction-denying language in section 22.225.[94] That provision provides that "a judgment of a court of appeals is conclusive on the law and facts, and a petition for review is not allowed to the supreme court" from certain interlocutory orders.[95] While the section excepts certain cases from that prohibition, the *DART* interlocutory order was not among them.[96]

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92. TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004); *see Dallas Area Rapid Transit*, 273 S.W.3d at 666 (deciding that although statutes had addressed which types of cases are final in the courts of appeals, the supreme court's conflicts jurisdiction extends, even though there is no statutory basis, to conflicts between decisions of the courts of appeals and those of the United States Supreme Court).

93. *See* Robert W. Calvert, *Jurisdiction of the Texas Supreme Court in Divorce Cases*, 33 BAYLOR L. REV. 51, 56–57 (1981) (asserting that because the legislature, per constitutional authority, provided exceptions in its limitations on the court's jurisdiction and provided an exception in prescribing the court's jurisdiction, the rule of *expressio unius* was clearly applicable).

94. *See* TEX. GOV'T CODE ANN. § 22.225 (Vernon Supp. 2009) (setting forth the types of cases that may not be reviewed by the supreme court).

95. *Id.* § 22.225(b).

96. *Compare id.* § 22.225(c)–(d) (providing for the types of interlocutory orders exempted from prohibition against review by the supreme court, including class-certification decisions, certain First Amendment summary judgments, and certain motions to dismiss in asbestos cases, as found in section 22.001(a)(1)–(2) of the Texas Government Code and section 51.014(a)(3), (6), and (11) of the Texas Civil Practice and Remedies

The court's failure to address this provision is particularly striking in light of its later argument that "the fact that provision has been made for an interlocutory appeal indicates that the Legislature has determined that appellate review before a final judgment is important."[97] The legislature did not just fail to provide for an appeal from the *DART* order—it expressly denied the right to appeal.

Several decisions under section 22.225 or its predecessors militate against *DART*'s result. *Stevens v. Wilson*[98] addressed an appeal from a plea of privilege that, like *DART*'s interlocutory appeal, the legislature had made final in the courts of civil appeals.[99] With little discussion, the court held that because of the statute, an appeal to the court would not lie:

> The Supreme Court has no jurisdiction to grant a writ of error to review the holding of the Court of Civil Appeals in a case where the appeal is from an interlocutory judgment of the trial court overruling a plea of privilege. In such case the judgment of the Court of Civil Appeals is final.[100]

And in *Parr v. Cantu*,[101] the court held that even when a case fell within the court's general conflicts jurisdiction, the mandate of a specific jurisdiction-stripping statute must control.[102] *Parr* admonished that, as long as the specific stripping statute was a valid enactment, "it is not within the province of this Court to question [legislative] wisdom."[103]

Rather than address these questions head-on, *DART*, like *Eichelberger*, "skipped lightly" through a critical exercise of the legislature's constitutional authority to deny the court appellate jurisdiction.[104] The upshot of Calvert's critique remains unanswered:

Code), *with Dallas Area Rapid Transit*, 273 S.W.3d at 667 (concluding that the court had jurisdiction over the interlocutory order denying a plea to the jurisdiction because the court of appeals decision conflicted with that of the United States Supreme Court).

97. *Dallas Area Rapid Transit*, 273 S.W.3d at 666–67.

98. Stevens v. Wilson, 120 Tex. 584, 39 S.W.2d 1088 (1931).

99. *Id.* at 585, 39 S.W.2d at 1088.

100. *Id.* at 585–86, 39 S.W.2d at 1088.

101. Parr v. Cantu, 161 Tex. 296, 340 S.W.2d 481 (1960) (per curiam).

102. *Id.* at 297–98, 340 S.W.2d at 481–82.

103. *Id.* at 161 at 298, 340 S.W.2d at 482.

104. *See* Robert W. Calvert, *Jurisdiction of the Texas Supreme Court in Divorce*

> It is thus abundantly clear from the most cursory examination of article 1728 [section 22.001's predecessor] that the supreme court has no *express* constitutional or statutory jurisdiction to review a court of civil appeals decision in a divorce case on the ground of conflict with a decision of the Supreme Court of the United States. Indeed, the court did not hold to the contrary; it held only that it had *implied* jurisdiction to review such a decision. How can that be? Under the court's own cited authority, implied jurisdiction exists only in conjunction with, and as an adjunct to, an express grant of jurisdiction. It cannot exist in situations where jurisdiction is expressly denied or where none is granted.[105]

Eichelberger should have held that the legislature had properly exercised its authority to deny the court appellate jurisdiction over the divorce case, and *DART* should have done the same for its interlocutory appeal. Yet neither *Eichelberger* nor *DART* survives a close analysis of the constitution and statutes that it purported to apply. Under Texas law, the *Eichelberger/DART* doctrine of implied jurisdiction is erroneous.

IV. THE ROLE OF FEDERAL LAW IN *EICHELBERGER* AND *DART*

Eichelberger's reasoning ignored a legislative enactment's clear mandate, and *DART* committed the same error. As Calvert argued, if the constitution allows the legislature to regulate the court's appellate jurisdiction and the legislature does so, the court becomes bound to those legislative limits.[106] So far, the thesis holds. But Calvert's view rests on an important unspoken

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Cases, 33 BAYLOR L. REV. 51, 56 (1981) (criticizing *Eichelberger* for ignoring clear legislative demarcation of the court's appellate jurisdiction). DART asserted that "this Court has never lacked jurisdiction to prevent an intermediate appellate court from conflicting with one of this Court's decisions." Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659, 666 (Tex. 2008). DART appended this assertion with a reference to the court's mandamus jurisdiction: "Even if appellate jurisdiction were restricted, we have noted that such a conflict could be corrected by writ of mandamus." *Id.* at 666 n.44 (citing State v. Wynn, 157 Tex. 200, 202, 301 S.W.2d 76, 78 (1957) (per curiam)). But of course, the availability of mandamus does not answer the question of whether the statutes have granted the court appellate jurisdiction.

105. Robert W. Calvert, *Jurisdiction of the Texas Supreme Court in Divorce Cases*, 33 BAYLOR L. REV. 51, 58 (1981).

106. *See id.* ("Under the court's own cited authority, implied jurisdiction exists only in conjunction with, and as an adjunct to, an express grant of jurisdiction. It cannot exist in situations where jurisdiction is expressly denied or where none is granted.").

assumption: that the legislative enactment is a valid, constitutional act.[107]

Suppose, for example, that the legislature had exercised its power to regulate the court's appellate jurisdiction only once. If the legislature's jurisdiction-limiting enactment was entirely unconstitutional, the court would not be restrained thereby and would proceed with its constitutional jurisdiction over "all cases except in criminal law matters."[108] Because of the constitution's broad initial grant of jurisdiction, *Eichelberger* and *DART* may yet be justified if, *as a matter of constitutional law*, the Supreme Court of Texas must retain jurisdiction over conflicts between court of appeals decisions and United States Supreme Court decisions. *Eichelberger* did not purport to confront this issue—its discussion of the Supremacy Clause and its fear of a "patent anomaly" are, at best, tangentially related—and neither did Calvert.[109] *DART* proceeded similarly, without purporting to employ any such principle of constitutional law.[110] But because of the argument's ability to resurrect an otherwise deeply flawed doctrine, it deserves a full vetting.

A. *The Relevance of Federal Analogs*

Article III of the United States Constitution and our understanding of Congress's power to control the appellate jurisdiction of the United States Supreme Court provide instructive models for an examination of Texas judicial structures and the constitutional

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107. *See id.* at 55–62 (questioning the court's ability to exercise jurisdiction without an express legislative grant, while assuming the constitutionality of such legislation).

108. TEX. CONST. art. V, § 3(a).

109. *See* Eichelberger v. Eichelberger, 582 S.W.2d 395, 397, 400 (Tex. 1979) (claiming inherent judicial power to decide a case, rather than construing a constitutional grant of jurisdiction in article V); Robert W. Calvert, *Jurisdiction of the Texas Supreme Court in Divorce Cases*, 33 BAYLOR L. REV. 51, 55–62 (1981) (examining the court's ability to exercise appellate jurisdiction, without exploring the constitutional limitations of the legislature's ability to restrict appellate jurisdiction).

110. *See* Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659, 664–67 (Tex. 2008) (extending the court's appellate jurisdiction while ignoring the lack of an express jurisdictional grant from the legislature). The closest DART came was this pair of assertions: "It is fundamental to the very structure of our appellate system that this Court's decisions be binding on the lower courts. We have no less authority to ensure that the lower courts follow[] the United States Supreme Court." *Id.* at 666 (footnote omitted).

issue in question here. In *Morrow v. Corbin*, the Supreme Court of Texas recognized the similarities between article V of the Texas constitution and Article III of the United States Constitution:

> The [Texas] Constitution has . . . erected a system of trial and appellate courts quite similar to that of the United States and those of the American states generally, all of which are an outgrowth of the judicial system of England, out of which the common law grew and attained its renown.[111]

Article III provides, in part:

> Section. 1. 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. . . .
>
> Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. . . .[112]

The appellate jurisdiction of the United States Supreme Court is, in several important respects, like that of the Supreme Court of Texas. First, Article III employs peculiar language not unlike Texas's article V. Take, for example, the similar juxtaposition of

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111. Morrow v. Corbin, 122 Tex. 553, 558, 62 S.W.2d 641, 644 (1933). The similar terms were, indeed, intended to be interpreted similarly. "When the Constitution declares that our appellate courts shall have and exercise *original* and *appellate* jurisdiction, it means those types of *original* and *appellate* jurisdiction which from time immemorial the common-law courts have exercised." *Id.* at 564–65, 62 S.W.2d at 647.

112. U.S. CONST. art. III, §§ 1–2.

the terms *judicial power* and *jurisdiction*, [113] which might give rise to interesting interpretive questions. More importantly, the courts share a similarly structured constitutional grant of appellate jurisdiction. As in Texas, "the appellate jurisdiction of [the United States Supreme Court] is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. *But it is conferred 'with such [e]xceptions[,] and under such [r]egulations as [the] Congress shall make.'*"[114] And like some Texas courts, federal courts regularly treat legislation that affirmatively grants some jurisdiction as impliedly rejecting what goes unmentioned.[115]

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113. *Id.*; TEX. CONST. art. V, § 3.

114. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512–13 (1868) (emphasis added) (quoting Article III); *accord* William W. Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 ARIZ. L. REV. 229, 231 (1973) ("The constitutional source for [the ability of Congress to limit the Supreme Court's appellate jurisdiction] is thought to lie in the exceptions clause of [A]rticle III, which prescribes the Court's appellate jurisdiction . . . ."); *see also* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) ("The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.").

115. *See Durousseau*, 10 U.S. (6 Cranch) at 314 ("[Congress has] not declared that the appellate power of the court shall not extend to certain cases; but [it has] 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."); *see also* Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1981) (pointing out that since the "Judiciary Act of 1789 . . . Congress has assumed the statutory voice of affirmatively granting the Court jurisdiction," and the Court looks at these grants in terms of what is omitted, construing the omissions as congressional intent (footnote omitted)). Professor Sager views this practice as "obscur[ing] the constitutional origin of the Court's jurisdiction." Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1981). According to Sager,

> Congress acts as though it were giving the Court jurisdiction in measured statutory doses, and ordinarily the Court has no occasion to take umbrage at this pretense. But the self-executing, constitutional basis of the Court's jurisdiction is quite important. If Congress were to place an unconstitutional limitation on the Court's jurisdiction, the Court would strike down the offending limitation and proceed under its constitutional grant of jurisdiction. Nothing short of a constitutional amendment can rob the Court of this ability.

Id. Sager's proposition that "[A]rticle III itself contains a direct, self-executing grant of jurisdiction, both appellate and original, to the Supreme Court" draws heavily upon the history of Article III's adoption, including the drafters' rejection of a proposition that would have required congressional execution. *Id.* at 23–24. "The fact that the Committee considered and rejected language that would have made legislative action a prerequisite

Because of these similarities, many of the principles that govern Article III and Congress's power to regulate the United States Supreme Court's jurisdiction can inform Texas jurisprudence.

For many years, federal decisions and commentators attributed to Congress an almost unlimited authority to control the jurisdiction of the federal courts.[116] The same held true with respect to the Supreme Court's appellate jurisdiction.[117] But by the mid-twentieth century, several arguments for limits on the Legislature's power to regulate jurisdiction had emerged.[118] A renewed evaluation of these theories' intricacies is beyond the

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for the exercise of part of the Court's jurisdiction strongly suggests that the Committee intended the Court to derive jurisdiction from the Constitution itself." *Id.* at 24 n.18.

116. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187–89 (1943) (upholding a district court's dismissal of a suit for an injunction for want of jurisdiction and pointing out the statutory language excluding the district court from equity jurisdiction on the matter and Congress's power to confer jurisdiction on the lower federal courts); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–66 (1953) ("Congress has plenary power to distribute jurisdiction among such federal constitutional courts as it chooses to establish."); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1628–29 (1989) ("Supreme Court decisions almost uniformly suggest (also often in dictum) that Congress's power to restrict federal court jurisdiction is unlimited . . . .").

117. *See, e.g.*, The "Francis Wright," 105 U.S. 381, 386 (1881) (refusing to exercise jurisdiction in an admiralty case on the basis that its appellate powers, and "to what extent they shall be exercised, are, and always have been, proper subjects of legislative control"); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 157–58 (1960) ("From time to time since 1796 the Supreme Court has used language in its opinions suggesting that by virtue of the exceptions and regulations clause its appellate jurisdiction is subject to unlimited congressional control, and this language has generally been regarded as establishing that Congress has such power." (footnotes omitted)); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 32 (1981) ("[I]n the pertinent opinions, the Court displays an almost unseemly enthusiasm in discussing Congress' power to lop off diverse heads of the Court's [A]rticle III jurisdiction.").

118. Readings of Article III that attribute to Congress *no* power to control the Supreme Court's appellate jurisdiction are widely disfavored. *See* Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 32–33 (1981) ("Readings of the exceptions clause that give Congress no power to limit the kinds of cases the Court can review thus have a very hard go of it. A more generous reading of the exceptions language—finding at least some power to limit the Court's jurisdiction—is less strained, is supported by nearly two hundred years of consistent behavior by Congress and the Supreme Court, and is not precluded either by the events surrounding the drafting of [A]rticle III or by the logic of the institutional arrangements created by the article." (footnote omitted)).

St. Mary's Law Journal, Vol. 41 [2009], No. 1, Art. 1

scope of this writing.[119] Instead, the Texas Supreme Court's jurisdiction can be better understood by taking a few of the theories as they stand, translating them (where possible) from the federal context to Texas, and applying them to the kind of legislative enactment involved in *Eichelberger* and *DART*.

B. *Internal Restraints*

The first set of theories deserving translation to Texas jurisprudence are the "internal restraint" theories, so termed because their definitions of Congress's power to limit the Supreme Court's jurisdiction flow from an understanding of Article III itself.[120]

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119. *See generally* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206 (1985) ("In fact, a close reading of the literature on Article III suggests that no commentator thus far has offered a complete, coherent and convincing account of congressional power to limit federal jurisdiction.").

120. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 900 (1984) (defining *internal restraints* as implied limitations on congressional authority found in Article III itself); Laurence H. Tribe, Commentary, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 134 (1981) ("[T]here will be *internal limits* set by the nature and sources of the power Congress is exercising when it attempts to define the jurisdiction of a federal court.").

There are, of course, many theories beyond the three mentioned herein that merit discussion. *See, e.g.*, Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 516 (1974) (explaining Congress can limit jurisdiction only so as to make dockets manageable, and must otherwise leave the federal courts open to all kinds of cases); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 30–31 (1981) (expressing the theory that Congress could only shift jurisdiction from appellate to original (or vice versa) and could not remove any case from the Court's jurisdiction altogether); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (noting one school of thought argues Congress's power to make exceptions did not include cases of a "constitutional dimension"). Sager, for example, suggested a combination of limits:

> First, [A]rticle III itself and the Constitution broadly considered contemplate a basic framework of judicial authority. Congress cannot exclude federal jurisdiction to the point of dismantling that framework. Second, Congress cannot selectively remove federal jurisdiction to achieve unconstitutional substantive ends. And third, Congress is obligated to leave intact some judicial forum capable of providing constitutionally adequate remedies for constitutional wrongs.

Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42 (1981).

In *Martin v. Hunter's Lessee*,[121] Justice Story's view required that Congress vest jurisdiction—either original or appellate—over cases within the federal judicial power in *some* federal court.[122] As Amar explains, Story left the decision of *which* court to Congress:

> Rather than focusing on inferior courts in isolation, Story was concerned with the jurisdiction of the federal judiciary as a whole. His argument in *Martin* can be distilled into three simple premises. First, the judicial power of the United States must extend to certain cases, and must be vested—in either original or appellate form—somewhere in the federal judiciary. Second, there are some cases, such as federal criminal prosecutions, falling within the mandatory judicial power that could not be heard as an original matter by state courts.... Third, the Supreme Court's original jurisdiction could not be expanded to take cognizance of all such exclusively federal cases.[123]

Justice Story's theory might operate in Texas, but it would not require that the Supreme Court of Texas have jurisdiction to resolve *Eichelberger*'s conflict. Nor would it operate to do the same in *DART*. Initially, the textual basis for much of Story's argument translates to Texas because both Article III of the United States Constitution and article V of the Texas constitution provide that the judicial power "*shall be* vested" in the courts of each sovereign.[124] Thus, Story might argue that, as a matter of

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121. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

122. *Id.* at 331.

123. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 211–12 (1985) (footnotes omitted). The Story theory has been carried on, with modifications, by several other commentators. *See id.* at 216–19 (examining arguments posed by commentators following the Story school of thought).

124. *See* U.S. CONST. art. III, § 1, cl. 1 ("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." (emphasis added)); TEX. CONST. art. V, § 1, cl. 1 ("The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law." (emphasis added)). Justice Story's argument for Congress's obligation to create lower courts might also translate to Texas. As Justice Hecht recognized in DART, the supreme court's effective functioning may depend largely on the existence of courts of appeals able to lessen the supreme court's ultimate workload:

> Without an intermediate appellate court in Texas, this Court's workload soon

Texas constitutional law, jurisdiction over *Eichelberger*'s divorce case and *DART*'s plea to the jurisdiction must lie in some Texas court. However, the analogy fails thereafter because the legislature satisfied Story's requirement, for in both cases the legislature had given jurisdiction over the cases in question to some Texas court. In fact, not only were the cases cognizable as original matters in Texas trial courts but they also received appellate review in the courts of appeals.

Professor Hart suggested another important theory, now often referred to as the "essential functions" thesis: Congress may exercise its power over the Supreme Court's appellate jurisdiction so long as it does not eliminate the Court's "essential role" in the constitutional plan.[125] Among others, Ratner built upon the theory and argued that the Court's essential functions included "(1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is

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> became unmanageable. The Constitution of 1876 limited the Supreme Court's appellate jurisdiction to civil cases and created a court of appeals for criminal cases and civil cases from county courts, but this did little to alleviate the burden. To preserve a right of appeal that was both broad and effective, constitutional amendments adopted in 1891 restructured the judiciary. The Supreme Court's jurisdiction remained limited to civil cases. The court of appeals became the Court of Criminal Appeals, with jurisdiction over criminal cases only. The Legislature was required to divide the State into separate judicial districts and establish in each district a court of civil appeals with appellate jurisdiction over all civil cases in that district, thereby placing appellate courts closer to the litigants and relieving the burden on the Supreme Court.

Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659, 664 (Tex. 2008) (footnotes omitted).

125. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) ("[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."); *see also* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 906–13 (1981) (analyzing the developments and criticisms of Professor Hart's "essential functions" thesis); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 44 (1981) ("[T]he essential function claim is strongest when narrowed to Supreme Court review of state court decisions that repudiate federal constitutional claims of right.").

challenged by state authority."[126] The theory relies on the premise that the drafters of Article III intended that the Supreme Court always retain some essential role that required jurisdiction over some core set of cases, and is most often defended by citing two particular kinds of historical evidence, both of which lack precise analogs in Texas.[127]

First, supporters of Hart's theory cite the text of the United States Constitution itself. As the argument goes, Article III's use of "exception" means that Congress's regulations were intended to be departures from a general rule,[128] and the remaining structure

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126. Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960); *see* Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 43 (1981) (reiterating Professor Ratner's definitions of the essential functions).

127. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 903–06 (1984) ("Proponents [of the essential functions thesis] rely above all on historical expectations and structural considerations allegedly demonstrating that appellate review must be available to assure that the Court will be able to provide the 'essential' uniformity and supremacy of important (especially constitutional) uses of federal law."); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953) (citing to case law and the language and history of the Constitution to support the proposition that the exceptions must not hinder the essential role of the Court). *But see* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 906–13 (1981) (critiquing the use of historical evidence regarding the intent of the Framers as support for the essential functions thesis).

128. *See* Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 44 (1981) (discussing the impact of Article III on Congress's ability to limit the jurisdiction of the Supreme Court and explaining that the word *exception* within that article "implies a minor deviation from a surviving norm; it is a nibble, not a bite"); Laurence H. Tribe, Commentary, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 135 (1981) (stating that the under the Exceptions and Regulations Clause of Article III, the Supreme Court's appellate jurisdiction would still remain "substantial" even after any changes enacted by Congress); *see also* Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 168–71 (1960) (analyzing the words *exceptions* and *regulations* in the context of their general usage at the time of the Constitutional Convention and concluding that Article III's Exceptions and Regulations Clause does not afford Congress "plenary control over" the Supreme Court's appellate jurisdiction); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 900 (1981) (noting that proposed legislation limiting the Supreme Court's jurisdiction typically occurred only during times of great tension between

of the Constitution—including, in particular, the Supremacy Clause—evidences the need for a court with the core ability to resolve conflicting decisions on federal law.[129] Because article V of the Texas constitution defines the legislature's power similarly—as an exception to the general rule that supreme court jurisdiction "shall extend to all cases"—this basis for the essential role argument translates reasonably well.[130] However, the argument for defining the jurisdiction in *Eichelberger* or *DART* as one of these essential functions is much weaker because the Texas constitution is agnostic as to the question of whether the supreme court possesses jurisdiction to hear appeals from court of appeals decisions that conflict with decisions of the United States Supreme Court.

Eichelberger may have suggested that the Texas constitution includes some independent mandate of this sort when it said that a "patent anomaly would exist if, within the sovereign State of Texas, no department, branch or official had the power to enforce in this case the mandate of the federal Supremacy Clause and *the recognition of that supremacy by Tex. Const. Art. I, Sec. 1*."[131] If the Texas constitution contained a unique mandate going above and beyond the Supremacy Clause, then the analogy to Hart's theory might be apposite. But unlike the federal Constitution, which contains an explicit command that federal law shall be the supreme law of the land and bind all judges, the Texas constitution contains no *additional* mandate.[132] Instead, article I merely says that "Texas is a free and independent State, subject only to the Constitution of the United States,"[133] and the constitution does

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Congress and the Supreme Court).

129. *See* Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 160–61 (1960) (arguing that the Supremacy Clause calls for a tribunal chiefly responsible for resolving conflicts regarding the supreme law—regardless of whether they arise from state or federal courts—and that any legislation restricting the Supreme Court's jurisdiction would "obstruct" such functions).

130. *See* TEX. CONST. art. V, § 3 ("[The Texas Supreme Court's] appellate jurisdiction shall be final and shall extend to all cases except . . . as otherwise provided in this Constitution or *by law*." (emphasis added)).

131. Eichelberger v. Eichelberger, 582 S.W.2d 395, 400 (Tex. 1979) (emphasis added).

132. The argument that the Supremacy Clause itself requires the Texas Supreme Court to take jurisdiction is addressed *infra* Part IV.C.

133. TEX. CONST. art. I, § 1.

not otherwise instruct that the governmental structure requires a Supreme Court of Texas with jurisdiction to decide appeals in cases like *Eichelberger* and *DART*. Rather, the most relevant provision is article V, which demonstrates a commitment to a supreme court whose jurisdiction can be controlled by the legislature.[134]

The second kind of evidence cited in support of Hart's theory is more historical. Advocates of the essential functions thesis often cite the history of the Constitutional Convention and the debates therein as evidence of an intent to create a judiciary for certain vital purposes.[135] The history of the Texas constitution does not reveal an analogous intent to preserve any particular role for the Supreme Court of Texas.

As enacted in 1876, article V granted the court almost unlimited appellate jurisdiction over final orders and gave the legislature a power to limit only the court's appellate jurisdiction over interlocutory orders:

> Section. 1. The judicial power of this State shall be vested in one Supreme Court, in a Court of Appeals, in District Courts, in County Courts, in Commissioners' Courts, in Courts of Justices of the Peace, and in such other courts as may be established by law. . . .
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> . . . .
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> Sec[tion]. 3. The Supreme Court shall have appellate jurisdiction only, which shall be co-extensive with the limits of the State; but

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134. *See id.* art. V, § 3 (designating the appellate jurisdiction of the supreme court as covering all civil cases except "as otherwise provided in this Constitution or *by law*" (emphasis added)).

135. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 906 (1984) (identifying the Constitutional Convention debates as evidencing an expectation that "essential functions" of the Supreme Court would be protected from congressional control); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161–65 (1960) (concluding from an in-depth discussion of the proceedings of the Constitutional Convention debates that the framers intended the Supreme Court to be chiefly responsible for enforcing the Supremacy Clause); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 45–55 (1981) (describing the pivotal role that judicial oversight of the states played in the Constitutional Convention and arguing that removing constitutional review of state conduct from the federal judiciary would "fundamentally and dangerously" alter the system of federalism).

St. Mary's Law Journal, Vol. 41 [2009], No. 1, Art. 1

> shall only extend to civil cases of which the District Courts have original or appellate jurisdiction. Appeals may be allowed from interlocutory judgments of the District Courts, in such cases and under such regulations as may be provided by law. . . .[136]

A study of the debates and competing proposals at the Constitutional Convention yields no evidence of a commitment to supreme court jurisdiction over any core set of cases.[137] It was not until 1891 that the constitution was amended to give the legislature the power to regulate the court's jurisdiction. The amendments to section 3 were far reaching, replacing the constitutionally fixed jurisdiction over final orders with a jurisdiction subject to important new legislative regulations and restrictions:

> The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be coextensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. . . .[138]

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136. TEX. CONST. art. V, §§ 1, 3 (amended 1891, 1977 & 1980).

137. For a complete digest of the debates, see the JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS: BEGUN AND HELD AT THE CITY OF AUSTIN, SEPTEMBER 6TH, 1875, *available at* http://tarlton.law.utexas.edu/constitutions/pdf/pdf1875/index1875.html; *see also* Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659, 664 (Tex. 2008) ("Without an intermediate appellate court in Texas, this Court's workload soon became unmanageable. The Constitution of 1876 limited the Supreme Court's appellate jurisdiction to civil cases and created a court of appeals for criminal cases and civil cases from county courts, but this did little to alleviate the burden. To preserve a right of appeal that was both broad and effective, constitutional amendments adopted in 1891 restructured the judiciary." (footnotes omitted)).

138. TEX. CONST. art. V, § 3 (amended 1977 & 1980); *accord* Tex. S.J. Res. 16, § 3, 22d Leg., R.S., 1891 Tex. Gen. Laws 197, 197–198 (quoting article V, section 3 as amended in 1891), *reprinted in* 10 *H.P.N. Gammel, The Laws of Texas 1822–1897*, at 199–200 (Austin, Gammel Book Co. 1898). Strangely, according to one newspaper report, the "judiciary amendment would have been defeated but for the fact that many of the suffrogans did not take the trouble to scratch." *All Amendments Carried: Changes to Be Made in the Constitution of Texas*, N.Y. TIMES, Aug. 12, 1891, at 5, *available at*

The legislature's motivations for proposing the amendment are not well documented, nor is the public discussion of the amendment. Without evidence of a clear intent to create a court with certain specific functions, this basis for Hart's theory does not translate to Texas jurisprudence.

Third, Amar developed a more complex two-tiered thesis in an attempt to reconcile weaknesses in the Hart and Story frameworks:

> First, Article III vests the judicial power of the United States in the federal judiciary, and not in state courts, or in Congress. Second, the federal judiciary must include one Supreme Court; other Article III courts may—but need not—be created by Congress. Third, the judicial power of the United States must, as an absolute minimum, comprehend the subject matter jurisdiction to decide finally all cases involving federal questions, admiralty, or public ambassadors. Fourth, the judicial power may—but need not—extend to cases in the six other, party-defined, jurisdictional categories. The power to decide which of these party-defined cases shall be heard in Article III courts is given to Congress .... Fifth, Congress's exceptions power also includes the power to shift final resolution of any cases within the Supreme Court's appellate jurisdiction to any other Article III court that Congress may create. The corollary of this power is that *if* Congress chooses to make exceptions to the Supreme Court's appellate jurisdiction in admiralty or federal question cases, it *must* create an inferior federal court with jurisdiction to hear such excepted cases at trial or on appeal ....[139]

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http://query.nytimes.com/gst/abstract.html?res=9402E6D7143AE533A25751C1A96E9 C94609 ED7CF&scp=1&sq=Texas+constitution+Aug+11&st=p.

139. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 229–30 (1985); *see* Akhil Reed Amar, Colloquy, *Article III and the Judiciary Act of 1789: The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1506–15 (1990) (summarizing the basic principles of the two-tiered thesis for explaining the limits of congressional control over the judiciary, as reflected in Article III and the First Judiciary Act). Much of Amar's thesis depends on a closer reading of the first paragraph of Section 2 and the difference between "all cases" and "controversies." *See* Akhil Reed Amar, Colloquy, *Article III and the Judiciary Act of 1789: The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1501–05 (1990) (analyzing Justice Story's use of *all cases* and *controversies* in *Martin v. Hunter's Lessee*, 14 U.S. 1 (1 Wheat.) 304 (1816), and discussing how the insights gained from *Martin* help determine the limits of Congress's power over the jurisdiction of federal courts).

St. Mary's Law Journal, Vol. 41 [2009], No. 1, Art. 1

Like aspects of Story's and Hart's arguments, the logic of Amar's two-tiered thesis militates against the result in *Eichelberger* and *DART*. The key for Amar's analysis is a close reading of Article III, Section 2's dissemination of judicial power. According to Amar, because the text requires that Congress "shall extend" the judicial power to "all cases" in three categories (federal question, ambassadors, admiralty), Congress must provide some federal forum for those claims, be it original or appellate jurisdiction, Supreme Court or lower court.[140] But for the next six categories, Congress need not necessarily vest federal jurisdiction because the text omits the term *all*.[141] Article V of the Texas constitution contains no such division of judicial power. Instead, it makes *all* of the judicial power subject to legislative regulation. When that is the case, the argument for preferred categories of cases disappears, and without such a division, the theory cannot be translated to Texas jurisprudence to help resurrect *Eichelberger* or *DART*.

C. *The Supremacy Clause*

In addition to internal restraints, the federal literature also discusses "external restraints," derived not from Article III itself, but from other constitutional provisions.[142] These theories object to jurisdictional restrictions using doctrines that apply to all congressional conduct under the familiar rules of suspect

140. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 239–42, 254–57 (1985) (discussing the text used in Article III, Section 2, to define the Supreme Court's jurisdiction and further analyzing that section to explain the limitations of Congress's power to make exceptions to the Supreme Court's jurisdiction).

141. *See id.* at 240 (explaining that since the word *all* was only applied to three of the nine enumerated categories within Article III, Section 2, the "not unambiguous" implication of such wording was to require "judicial power" over those three categories while leaving it optional with the other six).

142. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 900 (1984) (proposing that external restraints on congressional authority are inferable from the Constitution, rather than implied by the actual Constitution); Laurence H. Tribe, Commentary, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 134 (1981) (asserting that external limits on congressional authority are derived from relevant portions of the Constitution).

classifications, fundamental rights, levels of scrutiny, etc.[143] In this context, the most important potential limit for *Eichelberger* and *DART* is the United States Constitution's Supremacy Clause.

What was the "patent anomaly" concerning the Supremacy Clause that *Eichelberger* attempted to resolve by taking jurisdiction? Perhaps when *Eichelberger* said that "[n]o other department *of the government of Texas* has the jurisdiction or the mechanism to correct such decision of a Court of Appeals,"[144] it meant to argue that the Supremacy Clause requires that conflicts between lower state courts and the United States Supreme Court be resolved *by state courts*, as opposed to federal tribunals.

This argument fails because, as is well argued by many of the federal theorists, the Constitution intended that the Supremacy Clause's requirement of uniformity be executed in the last instance by the United States Supreme Court; it did not depend for its efficacy on the various state judicial systems.[145] The Court's decisions imply much the same. See, for example, *Cohens v. Virginia*:[146]

> Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its Courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some *single tribunal* the power of deciding, in the last resort, all cases in which they are involved.[147]

Of course, as a practical matter, the United States Supreme Court has long granted writs in cases appealed from Texas courts

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143. *See* Laurence H. Tribe, Commentary, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 134 (1981) ("Second, there will be *external limits* set by the constitutional terrain Congress has chosen (or happened) to traverse. Depending upon how the authority granted to Congress is deployed, its use may conflict with a right or prohibition that constrains *all* federal legislation, however amply 'authorized.'").

144. Eichelberger v. Eichelberger, 582 S.W.2d 395, 400 (Tex. 1979) (emphasis added).

145. *See* Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 160–61 (1960) ("[The United States Supreme Court] is thus *the* constitutional instrument for implementing the Supremacy Clause." (emphasis added)).

146. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

147. *Id.* at 416 (emphasis added).

St. Mary's Law Journal, Vol. 41 [2009], No. 1, Art. 1

of appeals,[148] and the "avenues to the federal courts have always been open to those not satisfied with the answers they received in the state courts."[149]

That *Eichelberger* had no citation for its assertion of the "patent anomaly" that would supposedly arise is no surprise. The same is true for *DART*, which found no citation for its assertion that the court "ha[s] no less authority to ensure that the lower courts follow[] the United States Supreme Court" than it does to ensure that the lower Texas courts follow the Texas Supreme Court's own precedent.[150] Instead of filling the gap in *Eichelberger*'s analysis, *DART*'s critical passage does little more than beg the question.

Part of *Eichelberger*'s error lies in its flawed perspective. Although not explicitly stated, *Eichelberger* viewed the Supremacy Clause as operating with respect to *each decision* made in a case at any court, such that state courts must always have jurisdiction to correct an error related to federal law. This is the implication in *Eichelberger*'s argument that "[n]o other department of the government of Texas has the jurisdiction or the mechanism to correct *such decision of a Court of Civil Appeals*."[151] This interpretation invites disruption of otherwise well-settled state procedural laws. For example, if Texas is obligated by the

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148. *See* Bacon v. Texas, 163 U.S. 207, 215 (1896) ("Some question was made in regard to the regularity and sufficiency of the writ of error from this court to the Court of Civil Appeals, as that court is not the highest court in the State. We think, however, the criticism is not well founded. So far as this case is concerned that court is the highest court of the State in which a decision in this suit could be had. An application was made to the Supreme Court of the State of Texas for a writ of error to the Court of Civil Appeals for the Second District by the defendants in the court below after judgment in the latter court, for the purpose of reviewing the judgment of that court, but the Supreme Court denied the application and thus prevented by its action a review by it of the judgment of the Court of Civil Appeals. The judgment of that court has therefore, become the judgment of the highest court of the State in which a decision in the suit could be had, and this court may, so far as this point is concerned, re[e]xamine the same on writ of error . . . ."); *see also* San Antonio & Aransas Pass Ry. Co. v. Wagner, 241 U.S. 476, 477 (1916) (presenting an example of the Supreme Court's granting a writ of error against a Texas court of civil appeals in 1916); Sullivan v. Texas, 207 U.S. 416, 422 (1908) (illustrating that the Supreme Court properly granted a writ of error against a Texas court of civil appeals in 1908); Stanley v. Schwalby, 162 U.S. 255, 269 (1896) (providing evidence that the Supreme Court properly granted a writ of error against a court of civil appeals in 1896).

149. *Eichelberger*, 582 S.W.2d at 403 (Johnson, J., dissenting).

150. Dallas Area Rapid Transit v. Amalgamated Rapid Transit Union Local No. 1338, 273 S.W.3d 659, 666 (Tex. 2008).

151. *Eichelberger*, 582 S.W.2d at 400 (emphasis added).

Supremacy Clause to remove any conflict between a state decision and a federal law, then the Supreme Court of Texas, upon deciding any issue of federal law, would have no grounds to deny tardy petitions for rehearing that proved a conflict on the merits. The same rule might require that normal preservation rules be set aside for a litigant who made a federal law argument at the trial court but not at the court of appeals and then sought review of the trial court's decision in the Supreme Court of Texas.

The answer to these hypotheticals is also the rebuttal to *Eichelberger* and *DART*: for the same reason that the Supremacy Clause does not require that states abandon their familiar procedural rules, the Clause does not require that state appellate courts ignore jurisdictional statutes, including those that strip them of jurisdiction to hear cases involving federal law.[152] The Supremacy Clause dictates that a state court hearing a federal matter must apply federal law, but it does not dictate the specific appellate structure within which those decisions occur.

Perhaps *DART* brought a new argument to the table when it said that it is "fundamental to the very structure of our appellate system that this Court's decisions be binding on lower courts" and that the court has "no less authority to ensure that the lower courts follow[] the United States Supreme Court."[153] The latter does not follow from the former, as the legislature recognized when it enacted the jurisdictional statutes. While the specter of intermediate courts of appeals ignoring United States Supreme Court decisions is alarming, withholding jurisdiction from the Texas Supreme Court in a case like *DART* does not threaten the structure of the appellate system in Texas. In addition to the fact that the United States Supreme Court's jurisdiction reaches courts of appeals, the otherwise broad reach of the Texas Supreme Court's jurisdiction minimizes any threat to the judicial structure.

That is, even if the court were not to have jurisdiction over *DART*, the error could present itself for review in a number of

152. *DART*'s nature as an appeal from an interlocutory order presents another procedure-based argument against the Supremacy Clause assertion: even if the Supremacy Clause were to require that the state supreme court hear an appeal, why must the appeal come at an interlocutory stage as opposed to after final judgment?

153. *Dallas Area Rapid Transit*, 273 S.W.3d at 666.

other postures. Most importantly, the court could review the issue on appeal from a final judgment under the court's important errors jurisprudence.[154] And if the courts of appeals were to divide on the *DART* question, the court could review *DART*'s conclusions under the usual conflicts provision.[155] The argument that *DART*'s holding was necessary to preserve the health of the appellate structure is unavailing.

The limits on legislative power that might spring from article V of the Texas constitution do not give *Eichelberger* or *DART* refuge, and neither do the limits that might spring from the Supremacy Clause. As a result, no justification appears to exist for *Eichelberger* and *DART*'s decision to ignore the legislative limits on the court's appellate jurisdiction.

V. CONCLUSION

Eichelberger and *DART* can be corrected in two ways: by amending the statutory provisions or by overruling the decisions. The simplest way to ensure a different result in future cases is to amend the conflicts jurisdiction provision in Texas Government Code section 22.001 to encompass conflicts between court of appeals decisions and decisions of the United States Supreme Court. Such an amendment would effectively abrogate the results in *Eichelberger* and *DART*. However, the likelihood of such an amendment is low; the only available evidence—the legislature's reaction to *Eichelberger* and Justice Calvert's critique—suggests that the legislature is either uninterested in the issue or unwilling to expend the political capital necessary to obtain such an amendment. In addition, a statutory amendment would fail to address the important flaws in the decisions' conception of article V and the distribution of control over the court's jurisdiction. And now that the court has twice engaged this theory of implied appellate jurisdiction, the prospect of expanded mischief becomes

154. *See* TEX. GOV'T CODE ANN. § 22.001(a)(6) (Vernon 2004) (providing a possibility of obtaining supreme court jurisdiction due to an error by the court of appeals that is so important as to require review by the supreme court).

155. *See* TEX. GOV'T CODE ANN. §§ 22.001(a)(2), 22.225(c) (Vernon 2004 & Supp. 2009) (allowing a means of obtaining supreme court jurisdiction over the decision of an appeals court due to a disagreement between a current appeals court holding and a prior holding of another court of appeals or the supreme court).

more realistic. Given the misconceptions that already underlie the doctrine of implied appellate jurisdiction, it is difficult to predict where the ultimate boundary will lie.

Alternatively, the Texas Supreme Court could overrule *Eichelberger* and *DART*. To the extent that the cases are construed as decisions about the meaning of the statutes, the burdens of stare decisis would be high, for the court has concluded on multiple occasions that "[s]tare decisis has its greatest force in cases construing statutes."[156] But of course, the court has been willing to overrule decisions that were "simply incorrect"[157] in areas that trigger many more of the concerns that traditionally counsel against departure from precedent.[158] Chief among the differences is that, unlike areas of law like contract interpretation or sovereign immunity, the public does not use the boundaries of the Texas Supreme Court's appellate jurisdiction to order important affairs.

To be sure, the Supreme Court of Texas should always retain the authority to say what the law is in cases properly before it. But the question of how that authority should be deployed—in what areas of law, at what point in a case, and for which litigants—is a far different one than the Texas constitution commits to the legislature, without exception. Whenever the legislature exercises that power in a legitimate manner, the court is obligated to follow. *Eichelberger* and *DART* were wrongly decided, and should now be overruled.

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156. Fiess v. State Farm Lloyds, 202 S.W.3d 744, 749 (Tex. 2006).

157. Tooke v. City of Mexia, 197 S.W.3d 325, 342 (Tex. 2006).

158. *See id.* at 360–61 (O'Neill, J., dissenting) (citing an instance where the court adhered to stare decisis absent compelling reasons to overrule established precedent, and adding that stare decisis is most compelling when dealing with issues of statutory construction); Fort Worth Osteopathic Hosp., Inc. v. Reese, 148 S.W.3d 94, 103–04 (Tex. 2004) (Smith, J., dissenting) (identifying the importance of stare decisis and outlining the factors to analyze when determining whether it might be necessary to overrule precedent); W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis, 107 S.W.3d 558, 603–04 (Tex. 2003) (providing that the application of stare decisis depends on the particular situation and is not absolute); Willis v. Owen, 43 Tex. 41, 48–49 (1875) (recognizing that former decisions of the court can be disposed of, but that this should not be done arbitrarily).