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# LIMITING FEDERAL COURT JURISDICTION TO PROTECT MARRIAGE FOR THE STATES

## HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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# LIMITING FEDERAL COURT JURISDICTION TO PROTECT MARRIAGE FOR THE STATES

**THURSDAY, JUNE 24, 2004**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order. Good morning. This is the Subcommittee on the Constitution. This is the fourth hearing that we've had relative to the issue at hand.

When the Supreme Court in *Lawrence* v. *Texas* struck down a State law criminalizing same-sex sodomy last year, Justice Scalia in his dissent pointed out that, quote, "State laws against bigamy, same-sex marriage, adult incest, prostitution, adultery, fornication, bestiality and obscenity" are all "called into question" by the Court's decision. That is a very disturbing prospect, and it should concern legislators nationwide.

The threat posed to traditional marriage by Federal judges whose decisions can have an impact across State boundaries has renewed concern over the abuse of power by Federal judges. This concern has roots as old and venerable as our Nation's history.

Thomas Jefferson lamented that, quote, "the germ of dissolution of our Federal Government is in the constitution of the Federal judiciary; . . . advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped . . ." Jefferson wrote of Federal judges, quote, "Their power is the more dangerous as they are in office for life and not responsible . . . to the elective control," unquote. And Abraham Lincoln said in his first inaugural address in 1861, quote, "The candid citizen must confess that if the policy of the Government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having, to that extent, practically resigned their Government into the hands of that eminent tribunal," unquote.

A remedy to abuses by Federal judges has long been understood to lie, among other places, in Congress' authority to limit Federal court jurisdiction, and that is the subject of our hearing today.

Regarding the Federal courts below the Supreme Court, article III of the Constitution provides that, quote, "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*." Regarding the Supreme Court, article III provides that, quote, "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 other cases the Supreme Court shall have appellate Jurisdiction *with such Exceptions and under such Regulations as the Congress shall make*," unquote.

Consequently the Constitution provides that the lower Federal courts are entirely creatures of Congress, as is the appellate jurisdiction of the Supreme Court, excluding only its very limited original jurisdiction; that is, cases involving ambassadors or in which one of the States is a party.

In Federalist Paper No. 80, Alexander Hamilton made clear the broad nature of Congress' authority to amend Federal court jurisdiction to remedy perceived abuse. He wrote, describing the Constitution, that, quote, "it ought to be recollected that the national legislature," us, the Congress, "will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove the inconveniences" posed by the decisions of the Federal judiciary.

That understanding prevails today. As a leading treatise on Federal court jurisdiction has pointed out, quote, "Beginning with the first Judiciary Act in 1789, Congress has never vested the Federal courts with the entire 'judicial power' that would be permitted by article III" of the Constitution. And as eminent Federal jurisdiction scholar Herbert Wechsler has stated, "Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction. . . ."

Limiting Federal court jurisdiction to avoid abuses is not a partisan issue. Senate Minority Leader Daschle has supported provisions that would deny all Federal courts jurisdiction over the procedures governing timber projects in order to expedite forest clearing. Democratic Senator Robert Byrd introduced an amendment to a Senate bill during the 96th Congress which was adopted by a Senate controlled by Democrats with large bipartisan support. That amendment provided that neither the lower Federal courts nor the Supreme Court would have jurisdiction to review any case arising out of State laws relating to voluntary prayers in public schools and buildings. In this Congress, several similar bills limiting Federal court jurisdiction are pending, including H.R. 3313, the Marriage Protection Act, which was introduced by Mr. Hostettler from Indiana, who serves on this Subcommittee. H.R. 3313 would remove from Federal court jurisdiction certain cases involving the Federal Defense of Marriage Act.

Federal legislation that precludes Federal court jurisdiction over certain constitutional claims to remedy perceived abuses and to preserve for the States and their courts the authority to determine constitutional issues rests comfortably within our constitutional system. The Supreme Court has clearly rejected claims that State courts are less competent to decide Federal constitutional issues than Federal courts. Even Justice William Brennan has written, in an opinion joined by Justices Marshall, Blackmun and Stevens,

that, quote, "virtually all matters that might be heard in article III courts could be also be left by Congress to State courts," unquote.

Far from violating the "separation of powers," legislation that reserves to State courts jurisdiction to decide certain classes of cases would be an exercise of one of the very "checks and balances" provided for in the Constitution. No branch of the Federal Government can be entrusted with absolute power, and certainly not a handful of tenured judges appointed for life. The Constitution allows the Supreme Court to exercise "judicial power," but it does not grant the Supreme Court unchecked power to define the limits of its own power. Integral to the American constitutional system is each branch of Government's responsibility to use its powers to prevent overreaching by the other branches.

We look forward to hearing from all of the witnesses here this morning, and I'll now yield to the Ranking Member of the Committee, the gentleman from New York Mr. Nadler for his opening statement.

[The prepared statement of Mr. Chabot follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

When the Supreme Court in *Lawrence* v. *Texas* struck down a state law criminalizing same-sex sodomy last year, Justice Scalia, in his dissent, pointed out that—quote—"[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution . . . adultery, fornication, bestiality, and obscenity" are all "called into question" by the Court's decision. That is a very disturbing prospect, and it should concern legislators nationwide.

The threat posed to traditional marriage by federal judges whose decisions can have an impact across state boundaries has renewed concern over the abuse of power by federal judges. This concern has roots as old and venerable as our Nation's history.

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Far from violating the "separation of powers," legislation that reserves to state courts jurisdiction to decide certain classes of cases would be an exercise of one of the very "checks and balances" provided for in the Constitution. No branch of the federal government can be entrusted with absolute power, and certainly not a handful of tenured judges appointed for life. The Constitution allows the Supreme Court to exercise "judicial power," but it does not grant the Supreme Court unchecked power to define the limits of its own power. Integral to the American constitutional system is each branch of government's responsibility to use its powers to prevent overreaching by the other branches.

I look forward to hearing from all our witnesses today.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, today we begin our fourth in a series of five hearings on the topic of same-sex marriage. We have already devoted more time in this Committee to this topic than to the means by which we might preserve our democratic form of Government if terrorists wipe out our Government. One would think that the possibility that somewhere a lesbian or gay couple might live out their years peacefully and happily were a greater threat to the United States than is al Qaeda.

Today, however, the topic is a very serious one. The hysteria over the marriage question has brought some to the point of suggesting that Congress should strip the Federal courts of the jurisdiction to hear cases involving alleged violations of an individual's rights protected under the Constitution. These proposals are neither good law nor good public policy. Past attempts to restrict court jurisdiction have followed many civil rights decisions, including the reapportionment cases. Fortunately, cooler heads in Congress prevailed at the time, and the decisions that gave rise to these outlandish proposals are now no longer controversial for the most part. Unless I am greatly mistaken, no one in this room would question the constitutional protection of one person, one vote. I trust that decades from now these debates will find their way into the textbooks next to the segregationist backlash, the Court-pack-

ing plan of the 1930's and other attacks on our system of Government.

The disabilities that lesbian and gay families suffer are widely known. Today I will be introducing the Equal Access to Social Security Act, for example, that would allow same-sex couples to receive the same Social Security benefits as every other couple, that would allow the children of same-sex couples to receive survivors' benefits and disability benefits, benefits for which these people pay taxes just the same as everyone else. While this would address only a small portion of the more than 1,000 benefits denied to same-sex families, it would correct one terrible injustice.

In today's hearing, Mr. Chairman, it is our very system of Government and the constitutional system of checks and balances that are under attack. If the Congress by statute were to prevent the Federal courts from applying the Constitution to any subject matter it chooses, then the protections of an independent judiciary, the protections to our individual liberties afforded by the institution of the independent judiciary and by the existence of the Bill of Rights would be no more than a puff of smoke. The Bill of Rights, in other words, could be undone by a simple refusal by Congress to allow the courts jurisdiction to enforce any particular one of the Bill of Rights.

Imagine if we passed a bill stripping the courts of jurisdiction to hear alleged violations of the freedom of the press or freedom of religion. It would be unpopular minorities, of course, whether religious minorities, political minorities, lesbians or gays, or whoever is unpopular at the moment, who will lose their rights. After all, it is the unpopular whose rights must be protected from the majority by a Bill of Rights. The majority rarely needs its rights protected.

As Hamilton said in Federalist No. 78, the complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it should pass no bills of attainder, no ex post facto laws and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.

Gay marriage does not threaten the future of this country. The evisceration of our Constitution and the Bill of Rights does threaten the future of the liberties of our citizens. We are playing with fire at this hearing, and that fire could destroy our liberties. I hope we don't use that fire.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you.

It's my understanding that the gentleman from Indiana would like to make an opening statement. He's the principal sponsor of 3313.

Mr. HOSTETTLER. I thank the Chairman.

Mr. Chairman, as a nonlawyer, I count it a high privilege to serve as a Member of this Subcommittee. However, as a student of the United States Constitution, I would not be truthful if I said

that I have always understood as perceived by this nonlawyer to be a disconnect between the plain wording and construction of the Constitution and the opinions handed down by the Federal judiciary as, quote, "constitutional," end quote.

But this perceived disconnect was explained to me with such clarity by, and rightfully so, a lawyer when I read the testimony of Dr. Leo Graglia, before the House of Representatives Judiciary Committee's Subcommittee on Courts and Intellectual Property, of May 15, 1997. Dr. Graglia, who is the A. Dalton Cross Professor of Law at the University of Texas law school, profoundly observed that, quote, "the first and most important thing to know about constitutional law is that it has virtually nothing to do with the Constitution," end quote. At that point, the scales fell from my eyes, and I realized that I cannot confuse what is taught in our Nation's law schools and what is expounded by so-called constitutional scholars on the 24-hour news talk shows with the work of folks like Madison, Hamilton, Jay, and Washington, and others at Philadelphia in 1787, or for that matter the first Congress in 1789 or the 39th Congress in 1866.

While we will hear today what is considered to be, quote, "constitutional," end quote, according to the desires of the Federal judiciary, this is not the House Subcommittee on Constitutional Law. This is the House Subcommittee on the Constitution. Today we will hear a wide range of means by which we can deal with the situation of a judiciary that has time and time again worked outside of its boundaries, and that response can be everything from doing nothing to an amendment to the Constitution. And that amendment to the Constitution can be, in the most extreme case, repeal of article III of the Constitution itself.

Now, I am not suggesting that we go that far, but rather, we are to know that the Constitution grants Congress the authority, a wide range of authority, from impeachment of justices and judges to the limitation of funds for the enforcement of their decisions, to the limitation of jurisdiction, as well as constitutional amendments.

My bill, H.R. 3313, employs one of those checks on the judiciary, a constitutional check, a constitutional check that is found explicitly, not implicitly, but explicitly, in the Constitution itself, in article III, section 2 of the Constitution; for example, where it says, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make," end quote.

The word "all" is very clear even to this nonlawyer, that, in fact, the Supreme Court's appellate jurisdiction can be limited in all other cases before mentioned, and those cases are mentioned in article III, section 2, subsection 1. Congress has the authority to limit the jurisdiction of the—the appellate jurisdiction of the United States Supreme Court in all the other cases that have been mentioned in article III, section 2, and because the lower courts are creations of the Congress, as a result of article I, section 8, and article III, section 1, it is obvious that Congress has the authority; if we have the authority to create these inferior Federal courts by stat-

ute, then we have also the constitutional authority by our lawmaking powers to eliminate these inferior Federal courts.

And so, from the spectrum of creating courts as well as eliminating courts, there can be assumed within that spectrum the idea of limiting the jurisdiction of the inferior Federal courts. And so if we can, according to the plain text of the Constitution, limit the Federal jurisdiction, limit the jurisdiction of inferior Federal courts, and we have by explicit wording of article III of the Constitution the power to limit the appellate jurisdiction of the Supreme Court, it is obvious that the Marriage Protection Act is something that Congress can do. The idea that it is something that Congress should do is going to be a matter of debate of this Subcommittee, the full Committee and this House, but it is my hope that after today's hearing we will conclude that it is definitely something that the Constitution grants Congress the power to do.

Yield back the balance of my time.

Mr. CHABOT. I thank the gentleman.

Without objection, all Members will have 5 days to submit written opening statements.

Also I'd ask unanimous consent that the gentlelady from Wisconsin, although she's not a Member of this Subcommittee, have the opportunity to question the witnesses like any other Member. Without objection, so ordered.

And we will now introduce our witnesses here this morning. Our first witness today is Phyllis Schlafly, the founder and president of the Eagle Forum, a national organization of volunteer citizens who participate in the public policymaking process. Mrs. Schlafly is a Phi Beta Kappa graduate of Washington University, and she received her master's in government from Harvard University. Mrs. Schlafly is the author or editor of 20 books on subjects as varied as family and feminism, history, education and child care, and her radio commentaries are heard daily on 460 stations. She was named one of the 100 most important women in the 20th century by Ladies Home Journal.

We welcome you here this morning, Mrs. Schlafly.

Our second witness is Michael Gerhardt, a Hanson Professor of Law at the William and Mary School of Law. I want to especially welcome Professor Gerhardt here since I'm a product of not William and Mary's law school, but an undergraduate; spent 4 of the best years of my life there and enjoyed it tremendously. It's a tremendous university. And we welcome you here this morning. We may not necessarily agree on all our views on everything, but I certainly think you picked a great school to teach law at.

Professor Gerhardt clerked for Judge Gilbert Merritt of the U.S. Court of Appeals for the Sixth Circuit, and he has practiced law at Miller, Cassidy, Larocca & Lewin in Washington, D.C. He has also served as dean of Case Western University School of Law, taught at Wake Forest University School of Law, and he has been a visiting professor at Cornell and Duke University law schools.

And we welcome you here this morning, Professor.

Our third witness is Martin Redish, the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law. Professor Redish is a nationally renowned authority on the subject of Federal jurisdiction. He received his A.B. With

honors, with highest honors, in political science from the University of Pennsylvania and his J.D. Magna cum laude from Harvard law school. He has been described in a review of his book, *The Federal Courts in the Political Order*, as quote, "without a doubt the foremost scholar on issues of Federal court jurisdiction in this generation," unquote.

Professor Redish is the author or coauthor of 70 articles and 13 books, including *Federal Jurisdiction: Tensions in the Allocation of Federal Power*. He was recently included on a list of the 100 most cited legal scholars of all time.

And we welcome you here this morning, Professor.

And our fourth and final witness is William "Bill" Dannemeyer. Mr. Dannemeyer was first elected to the U.S. House of Representatives in 1978 where he served 7 terms, 14 years, serving on the Budget, Judiciary and Energy and Commerce Committees. He also was elected Chairman of the Republican Study Committee. Mr. Dannemeyer is a graduate of Valparaiso University and the Hastings College of Law. He has served as a special agent in the Army Counterintelligence Corps during the Korean War. He has also been a lawyer in private practice, a deputy district attorney, and judge pro tem and a California State assemblyman. In January 1995, Mr. Dannemeyer helped organize Americans for Voluntary School Prayer.

We welcome all our witnesses here today. And it's the practice of the Committee to swear in all witnesses appearing before it, so if you would please stand and raise your right hand.

[Witnesses sworn.]

Mr. CHABOT. Okay. We thank all the witnesses for being here, and as a number of you have testified here before, as you know, we have a 5-minute rule, and there is a lighting system, so the green light will be on for 4 minutes. The yellow light will be on when you have 1 minute to wrap up. When the red light comes on, we'd appreciate it if you would stop close to that time. We will give you a little leeway, but if you could stay within the 5 minutes, and then we have to stay within those same 5 minutes ourselves, so we expect nothing less of the folks up here.

So we will begin with you, Mrs. Schlafly. You are recognized for 5 minutes.

## TESTIMONY OF PHYLLIS SCHLAFLY, FOUNDER AND PRESIDENT, EAGLE FORUM

Mrs. SCHLAFLY. Thank you, Mr. Chairman and Members of the Committee. The assault on the Defense of Marriage Act has already begun. A lawsuit claiming that the Federal DOMA violates the U.S. Constitution was filed last month in Federal district court in Miami. A similar case claiming that a State DOMA violates the U.S. Constitution is pending in Federal district court in Nebraska, where a Clinton-appointed Federal judge ruled that the case can proceed to trial. The very idea that unelected, unaccountable judges could nullify both other branches of Government and the will of the American people is an offense against our right of self-government and must not be tolerated.

DOMA was adopted 8 years ago by an overwhelming majority of both Houses of Congress and signed by President Clinton. DOMA

provides that whenever the word "marriage" or "spouse" is used in Federal law, marriage means only a legal union between one man and one woman as husband and wife, and spouse refers only to a person of the opposite sex who is a husband or a wife.

DOMA also protects each State's right to adopt the same traditional definition of marriage, and so at least 39 States have passed State DOMAs which refuse recognition to same-sex marriages performed elsewhere.

DOMA is a splendid, well-written law that fully comports with our great Constitution. So what's the problem? You said at the last hearing on May 13, Mr. Chairman, that it is increasingly clear that activist judges will probably declare Federal and State DOMAs unconstitutional. When you polled the witnesses at last month's hearing, all agreed that DOMA would not be given its intended effect by the Federal courts.

President Bush says repeatedly in his speeches around the country, "We will not stand for judges who undermine democracy by legislating from the bench and try to remake the culture of America by court order." He's right. We won't stand for such judicial arrogance.

Congress must back up this rhetoric with action. The American people expect Congress to use every constitutional weapon at its disposal to protect marriage from attack. Congress cannot stand by and let activist judges cause havoc in our system of marriage law. The General Accounting Office has compiled a list of over 1,000 Federal rights and responsibilities that are contingent on DOMA's definition of marriage. This GAO report states that the marital relationship is "integral" to Social Security and "pervasive" to our system of taxation.

We know that Congress has the unquestioned power to prevent an activist judge from doing what your previous witnesses have predicted. In 2002, Congress passed Senator Daschle's law taking away jurisdiction from the Federal courts to hear lawsuits about brush-clearing in South Dakota. Surely the definition of marriage is as important as brush-clearing in South Dakota.

The long list of Federal statutes in which Congress successfully restricted the jurisdiction of the Federal courts includes the Norris-LaGuardia Act of 1932, the Emergency Price Control Act of 1942, the Portal-to-Portal Pay Act of 1947, the 1965 Medicare Act, the Voting Rights Act of 1965, and the 1996 immigration amendments. Isn't the protection of marriage just as important as any of those issues on which Congress effectively withdrew jurisdiction from the Federal courts? I think the American people think so.

I urge Congress to protect us from the judicial outrage that your previous witnesses have predicted by passing legislation providing that no court of the United States shall have jurisdiction to hear or determine any question pertaining to the interpretation or validity of the Defense of Marriage Act or any State law that limits the definition or recognition of marriage to the union of one man and one woman. It is urgent that this law be passed now. This is Congress' proper way to dismiss the pending lawsuits challenging marriage, exactly like the Daschle law that terminated pending lawsuits about brush-clearing.

The Founding Fathers gave Congress the power to curb the judicial supremacists by deciding what cases they can or cannot hear. We don't trust the courts to respect the wishes of the Congress or of the American people on the matter of marriage. Instead of basing their rulings on the U.S. Constitution, activist judges are more likely to use unconstitutional criteria such as "emerging awareness," used in *Lawrence* v. *Texas*, or "evolving paradigm," used in *Goodrich* v. *Department of Public Health*.

My written testimony recites the long historical record which conclusively proves that Congress has the power to regulate and limit court jurisdiction, that Congress has used this power repeatedly, and that the courts have consistently accepted Congress' exercise of this power. This record is impressive, authoritative and unquestioned.

And thank you, Mr. Chairman.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mrs. Schlafly follows:]

PREPARED STATEMENT OF PHYLLIS SCHLAFLY

The assault on the Defense of Marriage Act (DOMA) has already begun. A lawsuit claiming that the federal DOMA violates the U.S. Constitution was filed last month in federal district court in Miami, Florida. A similar case claiming that a state DOMA violates the U.S. Constitution is pending in federal district court in Nebraska, where a Clinton-appointed federal judge ruled on November 12, 2003 that the case has legal sufficiency to proceed to trial.

The very idea that unelected, unaccountable judges could nullify both other branches of government and the will of the American people is an offense against our right of self-government that must not be tolerated.

The federal Defense of Marriage Act (DOMA) was adopted eight years ago by an overwhelming majority of both Houses of Congress and signed by President Clinton.[1] DOMA provides that whenever the word "marriage" or "spouse" is used in federal law, "marriage means only a legal union between one man and one woman as husband and wife," and "spouse refers only to a person of the opposite sex who is a husband or a wife."[2]

DOMA also protects each state's right to adopt the same traditional definition of marriage.[3] In response to the shelter offered by the federal DOMA, at least 39 states passed state DOMAs, which refuse recognition to same-sex marriages performed elsewhere. Four state DOMAs have been put in state constitutions; proposals to do likewise are on the ballot in several other states this year.

DOMA is a splendid, well-written law that fully comports with our great U.S. Constitution. So, what's the problem? You said at the last hearing on May 13, Mr. Chairman, that it is "increasingly clear" that activist judges will probably declare federal and state DOMAs unconstitutional. When you polled the witnesses at last month's hearing, all agreed that DOMA would not be given its intended effect by the federal courts.

President Bush says repeatedly in his speeches around the country: "We will not stand for judges who undermine democracy by legislating from the bench and try to remake the culture of America by court order."[4] He's right—we won't stand for such judicial arrogance.

Congress must back up this rhetoric with action! The American people expect Congress to use every constitutional weapon at its disposal to protect marriage from attack.

Congress cannot stand by and let one activist judge cause havoc in our system of marriage law. The General Accounting Office has compiled a 58-page list of 1,049 (since revised to 1,138)[5] federal rights and responsibilities that are contingent on DOMA's definition of marriage. The GAO report states that the man-woman marital relationship is "integral" to the Social Security system and "pervasive" to our system

[1] Public Law 104-199 (Sep. 21, 1996)
[2] 1 U.S.C. Sec 7
[3] 28 U.S.C. Sec 1738C
[4] Dallas, March 8, 2004
[5] GAO-04-353R (Feb. 24, 2004), revising and updating GAO/OGC-97-16 (Jan. 31, 1997)

of taxation. The widespread social and familial consequences of DOMA also impact on adoption, child custody, veterans benefits, and the tax-free inheritance of a spouse's estate.

We know that Congress has the unquestioned power to prevent an activist judge from doing what all your previous witnesses have predicted. For example, in 2002, Congress passed a law at Senator Tom Daschle's urging to prohibit all federal courts from hearing lawsuits challenging brush clearing in the Black Hills of South Dakota. Surely the definition of marriage is as important as brush fires in South Dakota! [6]

The long list of federal statutes in which Congress successfully restricted the jurisdiction of the federal courts (restrictions upheld by the federal courts) includes the Norris-LaGuardia Act of 1932, the Emergency Price Control Act of 1942, the Portal-to-Portal Pay Act of 1947, the 1965 Medicare Act, the Voting Rights Act of 1965, and the 1996 Immigration Amendments. The Voting Rights Act of 1965 is a dramatic manifestation of what Congress can constitutionally do when it wants to limit court jurisdiction. This law denied jurisdiction to southern federal district courts, requiring the southern states to bring their cases in the District Court for the District of Columbia.

Isn't the protection of marriage just as important as any of the issues on which Congress effectively withdrew jurisdiction from the federal courts? The American people think so.

I urge Congress to protect us from the judicial outrage that your previous witnesses have predicted by passing legislation providing that no court of the United States shall have jurisdiction to hear or determine any question pertaining to the interpretation or validity of the Defense of Marriage Act or any state law that limits the definition or recognition of marriage to the union of one man and one woman.

It is urgent that this legislation be passed now. This is Congress's proper way to dismiss the pending lawsuits challenging marriage exactly as the Daschle law terminated pending lawsuits about brush clearing.

The Founding Fathers in their wisdom put into the United States Constitution the power for Congress to curb the power of the judicial supremacists by deciding what cases they can or cannot hear. The argument will be made that such legislation means we don't trust the federal courts or the Supreme Court, and that's exactly right—we don't trust the courts to respect the wishes of Congress or of the American people on the matter of marriage. Instead of basing their rulings on the U.S. Constitution, activist judges are more likely to use unconstitutional criteria such as "emerging awareness" (as in *Lawrence* v. *Texas* [7]) or "evolving paradigm" (as in *Goodridge* v. *Department of Public Health* [8]).

My written testimony recites the long historical record which conclusively proves that Congress has the power to regulate and limit court jurisdiction, that Congress has used this power repeatedly, and that the courts have consistently accepted Congress's exercise of this power. The record is impressive, authoritative, and unquestioned.

The record supports Congress's power to limit court jurisdiction

In *Turner* v. *Bank of North America* (1799),[9] Justice Chase commented: "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the Constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal."

Even Chief Justice John Marshall, who defined the power of judicial review in *Marbury* v. *Madison*,[10] made similar assertions. For example, in *Ex parte Bollman* (1807),[11] Marshall said that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

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[6] The Daschle law about brush clearing, Public Law 107-206, Sec. 706(j), states: "Any action authorized by this section shall not be subject to judicial review by any court of the United States." The law authorized the Interior Department to clear timber in the Black Hills of South Dakota in order to fight and prevent forest fires. Environmental groups had filed several lawsuits to stop timber clearing. At least one court had issued an order and other suits were pending. The Daschle law terminated all these suits so that timber clearing could continue without judicial interference.

[7] *Lawrence* v. *Texas,* 539 U.S. 558 (2003)

[8] *Goodridge* v. *Department of Public Health,* 440 Mass. 309 (2003)

[9] *Turner* v. *President, Directors and Company, of the Bank of North America,* 4 U.S. 8 (1799)

[10] *Marbury* v. *Madison,* 5 U.S. 137 (1803)

[11] Ex parte Bollman, 8 U.S. 75 (1807)

Early decisions of the Supreme Court were sprinkled with the assumption that the power of Congress to create inferior federal courts necessarily implied, as stated in *U.S.* v. *Hudson & Goodwin* (1812),[12] "the power to limit jurisdiction of those Courts to particular objects." The Court stated, "All other Courts [except the Supreme Court] created by the general Government possess no jurisdiction but what is given them by the power that creates them."

The Supreme Court held unanimously in *Sheldon* v. *Sill* (1850)[13] that because the Constitution did not create inferior federal courts but rather authorized Congress to create them, Congress was also empowered to define their jurisdiction and to withhold jurisdiction of any of the enumerated cases and controversies. This case has been cited and reaffirmed numerous times. It was applied in the Voting Rights Act of 1965,[14] in which Congress required covered states that wished to be relieved of coverage to bring their actions in the District Court for the District of Columbia.

The Supreme Court broadly upheld Congress's constitutional power to define the limitations of the Supreme Court "with such Exceptions, and under such Regulations as the Congress shall make" in *Ex parte McCardle* (1869).[15] Congress had enacted a provision repealing the act that authorized the appeal McCardle had taken. Although the Court had already heard argument on the merits, it dismissed the case for want of jurisdiction: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

*McCardle* grew out of the stresses of Reconstruction, but the principle there applied has been affirmed and applied in later cases. For example, in 1948 Justice Frankfurter commented: "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice* [already before the court]."[16]

In *The Francis Wright* (1882),[17] the Court said: "While the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. . . . Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not."

Numerous restrictions on the exercise of appellate jurisdiction have been upheld. For example, Congress for a hundred years did not allow a right of appeal to the Supreme Court in criminal cases except upon a certification of divided circuit courts.

In the 1930s, liberals in Congress thought the federal courts were too pro-business to fairly handle cases involving labor strikes. In 1932 Congress passed the Norris-LaGuardia Act[18] removing jurisdiction in this field from the federal courts, and the Supreme Court had no difficulty in upholding it in *Lauf* v. *E. G. Shinner & Co.* (1938).[19] The Supreme Court declared, "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."

Liberals followed the same procedure when they passed the Hiram Johnson Acts in order to remove jurisdiction from the federal courts over public utility rates and state tax rates. These laws worked well and no one has suggested they be repealed.

Another celebrated example was the Emergency Price Control Act of 1942, in which Congress removed from federal courts the jurisdiction to consider the validity of any price-control regulation. In the test case upholding this law in *Lockerty* v. *Phillips* (1943),[20] the Supreme Court held that Congress has the power of "withholding jurisdiction from them [the federal courts] in the exact degrees and character which to Congress may seem proper for the public good."

After the Supreme Court ruled in *Tennessee Coal* v. *Muscoda* (1944)[21] that employers had to pay retroactive wages for coal miners' underground travel to and

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[12] *United States* v. *Hudson and Goodwin,* 11 U.S. 32 (1812)
[13] *Sheldon* v. *Sill,* 49 U.S. 441 (1850)
[14] 42 U.S.C. Sec. 1973c
[15] Ex parte McCardle, 74 U.S. 506 (1869)
[16] *National Mutual Insurance Co.* v. *Tidewater Transfer Co.,* 337 U.S. 582 (1949)
[17] The Francis Wright, 105 U.S. 381 (1881)
[18] 29 U.S.C. Sec. 101-115
[19] *Lauf* v. *E.G. Shinner & Co.,* 303 U.S. 323 (1938)
[20] *Lockerty* v. *Phillips,* 319 U.S. 182 (1943)
[21] *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123,* 321 U.S. 590 (1944)

from their work station, Congress passed the Portal-to-Portal Act of 1947[22] prohibiting any court from enforcing such liability.

Even one of the leading judicial activists, Justice William Brennan, acknowledged Congress's constitutional power to limit the jurisdiction of the federal courts. In 1982 he wrote for the Court in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*:[23] "Of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts . . . [and] the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges."

In 1999 the Supreme Court upheld Congress's power to restrict the jurisdiction of the federal courts to interfere in certain immigration disputes (*Reno* v. *American-Arab Anti-Discrimination Committee*).[24] In 2003 the Supreme Court upheld a 1996 law signed by President Clinton that gave exclusive authority to the U.S. Attorney General to deport certain illegal aliens and specified that federal courts have no jurisdiction to review such removal orders *(Hatami* v. *Ridge)*.[25]

Another statute that prohibits judicial review is the Medicare law,[26] on which nearly everyone over age 65 relies for health care. Congress mandated that "there shall be no administrative or judicial review" of administrative decisions about many aspects of the Medicare payment system. When someone sued in federal court anyway, the court dismissed the lawsuit based on this prohibition of judicial review (*American Society of Dermatology* v. *Shalala,* 1996).[27]

Article I, Section 8 of the Constitution states: "The Congress shall have power . . . to constitute tribunals inferior to the Supreme Court." Article III, Section 1 states: "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." These two sections mean that all federal courts except the Supreme Court were created by Congress, which defined their powers and prescribed what kind of cases they can hear. Whatever Congress created it can uncreate, abolish, limit or regulate.

The Supreme Court explained this in *Lockerty* v. *Phillips* (1943)20: "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. . . . The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'"

Article III, Section 2 states: "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." This section means that Congress can make "exceptions" to the types of cases that the Supreme Court can decide. This is the most important way that Congress can and should bring an end to the reign of judges legislating from the bench.

The American people expect Congress to use its constitutional power so clearly available, and the voters are currently alienated because of Congress's failure to put down the attacks on marriage. We believe it is Congress's constitutional duty to protect the American people from judicial supremacists who might commit the outrage of overruling the federal and all state laws about marriage. Do we have self-government by our elected representatives, or don't we?

The argument will be made that we should accept any activist judge's ruling as "the law of the land" and that it is impertinent for Congress to preempt the courts. However, House Judiciary Committee Chairman Sensenbrenner made it clear in a speech to the U.S. Judicial Conference on March 16 of this year that he stands up for Congress's "constitutionally authorized" and "appropriate" powers over the judiciary. Mr. Sensenbrenner was not referring to the subject of this hearing, but it seems to me that the principle is the same. Congress must not shrink from subjecting activist judges to criticism or from Congress's use of its "constitutionally authorized" powers.

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[22] 29 U.S.C. Sec. 252(d)

[23] *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982)

[24] *Reno* v. *American Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999)

[25] *Hatami* v. *Ridge,* 270 F. Supp. 2d 763 (E.D. Va. 2003)

[26] 42 U.S.C. Sec. 1395w-4(i)(1)

[27] *American Society of Dermatology* v. *Shalala,* 962 F. Supp. 141 (D.D.C. 1996)

It is imperative that Congress to stop federal judges from asserting judicial supremacy over our rights of self-government.

Mr. CHABOT. Professor Gerhardt, you're recognized for 5 minutes.

**TESTIMONY OF MICHAEL GERHARDT, ARTHUR B. HANSON PROFESSOR OF LAW, WILLIAM AND MARY LAW SCHOOL**

Mr. GERHARDT. Thank you, Mr. Chair. It's a great privilege to be here this morning. I appreciate the opportunity to be here and to be on a panel of such distinguished people, including someone I would certainly acknowledge as one of the Nation's leading experts on Federal jurisdiction.

You've got my written statement. I will only make a few comments that reiterate the points therein.

While the Supreme Court has broad authority to regulate Federal jurisdiction, this power is not unlimited. There's nothing magical about the power to regulate Federal jurisdiction

Mr. NADLER. Excuse me, Professor. You said the Supreme Court. I assume you meant Congress has authority.

Mr. GERHARDT. I'm sorry. Forgive me. That's correct. I'm sorry. That is certainly correct. There is certainly nothing magical about this great body's power to regulate Federal jurisdiction. It is susceptible to the same limits as all the other great powers that this body has got. It is limited by federalism, it is limited by separation of powers, it is limited by due process, it is limited by equal protection.

Hence, if Congress acts with the purpose and effect of violating a constitutional right, that violates the Constitution. If Congress acts in a way to prevent the Federal courts from ensuring a State complies with the Constitution, that violates article VI of the Constitution. If Congress keeps article III courts from invalidating an unconstitutional law, that violates separation of powers. If Congress withdraws jurisdiction in such a way that eviscerates the Supreme Court's basic function in deciding cases arising under the Constitution and ensuring finality and uniformity in the interpretation and enforcement of Federal law, that, too, violates separation of powers. If Congress withdraws Federal jurisdiction for a particular class of American citizens or based on their exercise of fundamental rights, that violates the fifth amendment.

In short, Congress cannot use its power to regulate Federal jurisdictions in ways that violate rights and equal protection, offends federalism, or infringes separation of powers.

A few other points bear repeating. First, I think it is noteworthy that Congress has shown admirable restraint in the past in not endorsing numerous proposals for withdrawing Federal jurisdiction in particular classes pertaining to constitutional claims or particular plaintiffs. Moreover, Congress needs a neutral justification to withdraw Federal jurisdiction, I think, in classes with respect to particular classes of constitutional claims or particular plaintiffs.

Distrust of unelected judges is not a neutral justification. Unelected judges in the form of our Federal judiciary are integral to protecting the rule of law in our legal system, the balance of power among the branches, and protecting unpopular minorities from the tyranny of the majority. For good reason the Supreme Court has never upheld efforts to use the regulatory power over

Federal jurisdictions to regulate substantive constitutional law. At the same time, I think that it would be impermissible for you to relegate a particular class of citizens of the United States, gays and lesbians, to litigate their claims in retaliation against either them or judicial decisions that might conceivably be in their favor. With all due respect, I urge the Committee not today to do as its predecessors have done in recognizing the benefits of our constitutional systems of separation of powers and federalism far outweigh whatever their costs.

Thank you.

Mr. CHABOT. Thank you, Professor.

[The prepared statement of Mr. Gerhardt follows:]

PREPARED STATEMENT OF MICHAEL J. GERHARDT

It is an enormous privilege to participate in today's hearing, "Limiting Federal Court Jurisdiction to Protect Marriage for the States." I understand the purpose of today's oversight hearing is to examine the Congress' power to limit federal jurisdiction, or to employ what are commonly called jurisdiction-stripping measures, in response to recent court decisions on marriage. As members of this Committee well know, jurisdiction-stripping raises some profound questions of constitutional law. While the Supreme Court acknowledges that the Congress has broad power to regulate federal jurisdiction, this power is not unlimited. In my judgment, the Congress cannot exercise any of its powers under the Constitution—not the power to regulate interstate commerce, not the Spending power, and not the authority to define federal jurisdiction—in a manner that violates the Constitution. If Congress acts with the purpose and effect of violating a constitutional right, that violates the Constitution. If Congress acts in a way that prevents the federal courts from ensuring state law complies with the Constitution, that violates Article VI of the Constitution. If Congress keeps Article III courts from invalidating an unconstitutional law, that violates basic separation of powers. If Congress withdraws jurisdiction in such a way that eviscerates the Supreme Court's basic function in deciding cases arising under the Constitution and ensuring finality and uniformity in the interpretation and enforcement of federal law, that, too, violates separation of powers. If Congress withdraws or restricts federal jurisdiction for a particular class of American citizens or based on the exercise of fundamental rights, that violates the Fifth Amendment. In short, Congress cannot use its power to restrict federal jurisdiction in ways that violate rights and equal protection, offends federalism, or infringes separation of powers.

Distrust of "unelected judges" does not qualify as a legitimate basis, much less a compelling justification, for congressional action. "Unelected judges," in the form of our federal judiciary, are integral to protecting the rule of law in our legal system, balance of power among the branches, and protecting unpopular minorities from the tyranny of the majority. For good reason, the Supreme Court has never upheld efforts to use the regulatory power over federal jurisdiction to regulate substantive constitutional law. With all due respect, I urge the Committee today to do as its predecessors have done in recognizing the benefits of our constitutional systems of separation of powers and federalism far outweigh whatever their costs. Below, I explain in greater detail the basic principles restricting congressional regulations of jurisdiction in retaliation against, or in efforts to influence, substantive judicial outcomes.

I. GENERAL PRINCIPLES

The Constitution allows judicial decisions on constitutional means to be displaced by two means and two means only. The first is by a constitutional amendment. Article V of the Constitution sets forth the requirements for amending the Constitution. In our history, constitutional amendments have overruled only a few constitutional decisions, including both the Eleventh and Fourteenth Amendments. Thus, it would not be constitutional for the Congress to enact a statute to overrule a court's decision on constitutional law. For instance, it would be unconstitutional for the Congress to seek to overrule even an inferior court's decision on the Second Amendment by means of a statute. The second means for displacing an erroneous constitutional decision is by a court's overruling its own decisions or by a superior court. For instance, the United States Supreme Court has expressly overruled more than a hundred of its constitutional decisions. On countless other occasions, the Court has

modified, clarified, but not overruled its prior decisions on constitutional law. It is perfectly legitimate to ask the Court, but not to command it, to reconsider a constitutional decision.

To be sure, Article III grants the Congress authority to regulate federal jurisdiction. This power is acknowledged almost universally as a broad grant of authority, but it is not unlimited. The Congress has no authority to overrule a judicial decision on constitutional law, even under the guise of regulating federal jurisdiction. Indeed, the Supreme Court has long recognized that the Congress may not use its power to regulate jurisdiction—or, for that matter, any other of its powers—in an effort to influence substantive judicial outcomes. *See, e.g.,* City of Boerne v. Flores, 521 U.S. 507 (1997); Dickerson v. United States, 530 U.S. 428 (2000). *See also* Ex Parte Klein, 80 U.S. 128 (1871). Efforts, taken in response to or retaliation against judicial decisions, to withdraw all federal jurisdiction or even jurisdiction of inferior federal courts on questions of constitutional law are transparent attempts to influence, or displace, substantive judicial outcomes. For several decades, the Congress, for good reason, has refrained from enacting such laws. The closest the Congress has come to doing this has been in insulating certain war-time measures from judicial review, but I am unaware of any jurisdiction-stripping proposals pending in the House designed to protect national security.

Moreover, proposals that would limit the methods available to Article III courts to remedy constitutional injuries are constitutionally problematic. The problem with such restrictions is that, as the Task Force of the Courts Initiative of the Constitution Project found, "remedies are essential if rights are to have meaning and effect." Indeed, the bipartisan Task Force was unanimous "there are constitutional limits on the ability of legislatures to preclude remedies. At the federal level, where the Constitution is interpreted to vest individual rights, it is unconstitutional for Congress to preclude the courts from effectively remedying deprivations of those rights." While Congress clearly may use its power to regulate jurisdiction to provide for particular procedures and remedies in inferior federal courts, it may do so in order to increase the efficiency of Article III courts not to undermine those courts. The Congress needs a neutral reason for procedural or remedial reform. While national security and promoting the efficiency of the federal courts qualify plainly as such reasons, distrust of the federal judiciary does not.

## II. RESTRICTING ALL FEDERAL JURISDICTION OVER PARTICULAR FEDERAL LAWS OR CLAIMS

Sometimes the House considers proposals to restrict all federal jurisdiction with respect to certain federal laws (or actions). For instance, bills have been introduced to preclude inferior federal courts from deciding cases involving abortion rights, school prayer, and gay marriage. In effect, such proposals would restrict both inferior federal courts and the Supreme Court from enforcing, interpreting, or adjudicating certain substantive matters. Consequently, the courts of last resort for interpreting, enforcing or entertaining challenges to laws restricting federal jurisdiction over such matters are the highest courts in each of the fifty states.

Any proposal to withdraw all federal jurisdiction over a particular federal law has several constitutional defects, in my judgment. The first is that it eviscerates an essential function of the United States Supreme Court—namely, to declare what the Constitution means in "cases arising under the Constitution." Perhaps the most famous statement of this principle can be found is Professor Henry Hart's observation a half century ago that restrictions on federal jurisdiction are unconstitutional when "they destroy the essential role of the Supreme Court in the constitutional system." Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362 (1953). The Court's essential function includes at the very least, as the Supreme Court famously declared in Marbury v. Madison, 5 U.S. 137 (1803), to "say what the law is," particularly in cases involving the interpretation of the Constitution or federal law;[1] and Congress may not undermine this function under the guise of regulating federal jurisdiction.[2] As the Task

[1] For more elaborate discussions of the Court's essential functions, *see, e.g.,* Leonard Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction,* 27 Vill. L. Rev. 929 (1982); Lawrence Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts,* 95 Harv. L. Rev. 1 (1981); Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court,* 109 U. Pa. L. Rev. 157 (1960).

[2] Some authorities suggest a different, or additional basis, for the unconstitutionality of excluding all federal jurisdiction over a particular federal law or constitutional claim. In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) (1816), Justice Story construed the vesting clause of Article III as requiring, inter alia, "the whole judicial power of the United States should be, at all

Force of the Courts Initiative of the Constitution Project recognized, "legislation precluding court jurisdiction that prevents the judiciary from invalidating unconstitutional laws is impermissible. Neither Congress nor state legislatures may use their powers to keep courts from performing their essential functions of upholding the Constitution."

Moreover, Congress cannot vest jurisdiction in courts to enforce a law but prohibit it from considering the constitutionality of the law that it is enforcing. The Task Force of the Courts Initiative of the Constitution Project unanimously concluded "that the Constitution's structure would be compromised if Congress could enact a law and immunize that law from constitutional judicial review." This is precisely what a measure excluding all federal jurisdiction with respect to a federal enactment seeks to do. For instance, it would be unconstitutional for a legislature to assign the courts with enforcing a criminal statute but preclude them from deciding the constitutionality of this law. It would be equally unlawful to immunize any piece of federal legislation from constitutional judicial review. If Congress could immunize its laws from the Court's judicial review, then this power could be used to insulate every piece of federal legislation from Supreme Court review. For instance, it is telling that in response to a Supreme Court decision striking down a federal law criminalizing flag-burning, many members of the Congress proposed amending the Constitution. This was an appropriate response allowed by the Constitution, but enacting the same bill but restricting federal jurisdiction over it would be unconstitutional.

In addition, courts must have the authority to enjoin ongoing violations of constitutional law. For example, the Congress may not preclude courts from enjoining laws that violate the First Amendment's guarantee of freedom of speech. If an article III court concludes that a federal law violates constitutional law, it would shirk its duty if it failed to declare the inconsistency between the law and the Constitution and proceed accordingly.

Proposals to exclude all federal jurisdiction would, if enacted, open the door to another, equally disastrous constitutional result—allowing the Congress to command the federal courts on how they should resolve constitutional results. In Ex Parte Klein, 80 U.S. at 146–47, the Supreme Court declared that it

> seems to us that it is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power . . . What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department or the government in cases pending before it? . . . We think not . . . We must think that Congress has inadvertently passed the limit which separates the legislature from the judicial power.

The law at issue in Ex Parte Klein attempted to foreclose the intended effect of both a presidential pardon and an earlier Supreme Court decision recognizing that effect. The Court struck the law down. In all likelihood, the same outcome would arise with respect to any other law excluding all federal jurisdiction, for such a law is no different than a law commanding the courts to uphold the law in question, a command no doubt Article III courts would strike down even if they thought the law in question was constitutional. There is no constitutionally meaningful difference between these laws, because the result of a law excluding all federal jurisdiction over a federal law and a command for the courts to uphold the law are precisely the same—preserving the constitutionality of the law in question.

A proposal to withdraw all federal jurisdiction with respect to a particular federal matter conflicts with a second, significant limitation on the Congress' power to regulate jurisdiction: The Congress may not use its power to regulate jurisdiction to control substantive judicial outcomes. The obvious effect of a prohibition of all federal jurisdiction is to make it nearly impossible for the law to be struck down in every part of the United States. The jurisdictional restriction seeks to increase the likelihood that the federal statute will not be fully struck down.

Moreover, a proposal excluding all federal jurisdiction regarding a particular federal question undermines the Supreme Court's ability to ensure the uniformity of federal law. In effect, such a proposal would allow the highest courts in each of the

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times, vested in an original or appellate form, in some courts created under its authority." His point was that at least some article III court ought to be empowered to wield the entire judicial power of the United States. Yale Law School professor Akhil Amar has modifed this argument. He contends that article III requires that "all" cases arising under federal law, "all" cases affecting ambassadors, and "all" cases of admiralty or maritime jurisdiction must be vested, either as an original or appellate matter, in some Article III court. Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction,* 65 Boston U. L. Rev. 205 (1985).

fifty states to become courts of last resort for interpreting, enforcing, or adjudicating challenges to the law. This allows for the possibility that different state courts will construe the law differently, and no review in a higher tribunal is possible. The Court's essential functions include ensuring finality and uniformity across the United States in the enforcement and interpretation of federal law.

The third major problem with a proposal to exclude all federal jurisdiction is that it may violate the equal protection component of the Fifth Amendment Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (recognizing, inter alia, that congruence requires the federal government to follow the same constitutional standard as the Fourteenth Amendment Equal Protection Clause requires states to follow). The Court will subject to strict scrutiny any classifications that explicitly burden a suspect class or fundamental right. A federal law restricting all federal jurisdiction with respect to it or some other federal law does both. First, it may be based on a suspect classification. A jurisdictional regulation restricting access by African-Americans, or a particular religious group, to Article III courts to vindicate certain interests ostensibly because of mistrust of "unelected judges" plainly lacks a compelling justification and thus violates the equal protection class. While the usual constitutional measure of a jurisdictional regulation is the rational basis test, a court might find that even that has not been satisfied if the court finds the argument in support of burdening African-Americans, women, or Jews is illegitimate. While the Court has not employed strict scrutiny to analyze the constitutionality of laws burdening gays and lesbians, the Court has found two such fail even to satisfy the rational basis test. A court analyzing whether a classification precluding a gay or lesbian citizen from petitioning any Article III court would probably conclude that such a restriction is no more rational than the classification struck down by the Supreme Court in Romer v. Evans, 517 U.S. 620 (1996). In *Romer*, the Court found that the state referendum disadvantaging gays and lesbians failed to pass the rational basis test, because it had been motivated by animus. In all likelihood, a majority of the Supreme Court would strike down such a measure as having been driven by the same illegitimate concerns, or attitudes, that it rejected in that case.

A federal law restricting all federal jurisdiction may also run afoul of the Fifth Amendment by violating a fundamental right. Such is the case with a proposal restricting all federal jurisdiction over flag burning or school prayer. It is unlikely that the Court would find a compelling justification for burdening fundamental rights. I cannot imagine that the justices would agree that distrusting "unelected judges" qualifies as a compelling justification. Nor is a regulation excluding all federal jurisdiction over a matter involving the exercise of fundamental rights, for it precludes Article III courts even from enforcing the law.

In addition, a proposal excluding all federal jurisdiction may violate the Fifth Amendment's Due Process Clause's guarantee of procedural fairness. Over a century ago, the Court declared that due process "is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be construed to leave congress free to make 'any due process of law,' by its mere will." For instance, the Court has explained "that the Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs seeking to redress grievances." A proposal excluding all federal jurisdiction effectively denies a federal forum to plaintiffs whose constitutional interests have been impeded by the law, even though Article III courts, including the Supreme Court, have been designed to provide a special forum for the vindication of federal interests.

Excluding all federal jurisdiction with respect to some federal law forces litigants into state courts, which are often thought to be hostile or unsympathetic to federal interests. To the extent that the federal law burdens federal constitutional rights, it is problematic both for the burdens it imposes and for violating due process. Basic due process requires independent judicial determinations of federal constitutional rights (including the "life, liberty, and property" interests protected explicitly by the Fifth Amendment). Because state courts are possibly hostile to federal interests and rights and under some circumstances are not open to claims based on those rights, due process requires an Article III forum.

Last but not least, as the authors of a leading casebook on federal jurisdiction have observed, "At least since the 1930s, no bill that has been interpreted to withdraw all federal court jurisdiction with respect to a particular substantive area has become law." R. Fallon, D. Meltzer, D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 322 (2003). This refusal, for good reasons, constitutes a significant historical practice that argues for, rather than against, precluding all federal jurisdiction in retaliation against judicial decision(s).

III. RESTRICTING THE JURISDICTION OF INFERIOR FEDERAL COURTS

Another kind of proposal sometimes made in the Congress is to preclude the jurisdiction of the inferior federal courts. Unlike the kinds of laws considered in the prior section, this kinds of law allows for the possibility of Supreme Court review albeit by way of petition for certiorari from the state courts. Nevertheless, this proposal has at least three constitutional defects. First, this proposal may violate the equal protection component of the Fifth Amendment Due Process Clause because it may burden a suspect class without a compelling justification or narrow tailoring. It is well settled that a group, or class, that is characterized by its exercise of a fundamental right is a suspect class. Hence, a bill that barred inferior federal courts from hearing any constitutional challenges may be directed at a suspect class, particularly if the group it burdens is defined by its exercise of a fundamental right that the restriction at issue is burdening.

The second major problem with withdrawing jurisdiction over a particular class of cases from inferior federal courts is that it may violate separation of powers.[3] Imagine, for instance, that an inferior court had struck down a state law prohibiting flag-burning before the Supreme Court had decided on the constitutionality of that law. If Congress had enacted a law precluding any other inferior courts jurisdiction over the flag, its law would be unconstitutional for both attempting to override the effects of a substantive judicial decision and for hindering the exercise of a first amendment right.

The third problem with a proposal undertaken in retaliation against the federal judiciary is that it may violate the Fifth Amendment due process clause. The Congress' power to regulate jurisdiction may withdraw jurisdiction in Article III courts for neutral reasons, such as promoting their efficiency, national security, or improving the administration of justice. Neither mistrust of the federal judiciary nor hostility to particular substantive judicial decisions (or to particular rights) qualifies as a neutral justification that could uphold a congressional regulation of federal jurisdiction. It is hard to imagine why an Article III court, even the Supreme Court, would treat such distrust as satisfying the rational basis test required for most legislation. By design, Article III judges have special attributes—life tenure and guarantee of undiminished compensation—that are supposed to insulate them from majoritarian retaliation. They are also supposed to be expert in dealing with federal law and more sympathetic to federal claims than their state counterparts. See Martin v. Hunters' Lessee, 14 U.S. 304 (1816). Yet, a proposal that excludes inferior federal court jurisdiction is ill-designed to achieve its purported purpose, because it still allows state courts to hear challenges to the Pledge of Allegiance and retains possible jurisdiction over those challenges in the Supreme Court. As long as Supreme Court review is possible (and it appears to be), "unelected" justices will decide the merits of the challenges. It is hard to see that there is even a rational basis for believing that the "unelected judges" on the nation's inferior federal courts—all nominated by presidents and confirmed by the Senate (with the exception of two recess appointees)—cannot be trusted to perform their duties in adjudicating claims relating to the Pledge of Allegiance. If a district court judge fails to do this or an appellate federal court fails to do this, their decisions may be appealed to higher courts.

Congress has shown admirable restraint in the past when it has not approved legislation aimed at placing certain substantive restrictions on the inferior federal courts. (I note that pending before the Court is the question whether the President's, rather than the Congress', authority to preclude all jurisdiction over claims brought by people detained in Guantanemo Bay based on their detention.) Over the years, there have been numerous proposals restricting jurisdiction in the inferior courts in retaliation against judicial decisions, but the Congress has not enacted them. The Congress has further refused since 1869 not to expand or contract the size of the Court in order to benefit one party rather than another. These refusals, just like those against withdrawing all federal jurisdiction in a particular class of constitutional claims, constitute a significant historical practice—even a tradition—that argues against, rather than for, withdrawing jurisdiction from inferior courts over particular classes of constitutional claims.

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[3] Professor Theodore Eisenberg has argued that the Framers understood "that the federal courts, whatever their form, could be expected to hear any litigant whose case was within the federal constitutional jurisdiction, either at trial or on appeal." Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction,* 83 Yale L.J. 498 (1974). He suggests that the Framers assumed that the Supreme Court could accomplish this objective, but argues, as do many other scholars, that this assumption is no longer practical. Eisenberg argues that Congress may exclude cases from federal jurisdiction for "neutral" policy reasons, such as to avoid case overloads or promote the efficiency of federal courts.

Beyond the constitutional defects with proposals to exclude certain cases from all federal jurisdiction or inferior federal courts, they may not be good policy. They may send the wrong signals to the American people and to people around the world. Under current circumstances, they express hostility to Article III courts, in spite of their special function in upholding constitutional rights and enforcing and interpreting federal law. If a branch of our government demonstrates a lack of respect for federal courts, our citizens and citizens in other countries may have a hard time figuring out why they should do otherwise. Rejecting proposals to exclude all federal jurisdiction or inferior court jurisdiction for some constitutional claims extends an admirable tradition within the Congress and reminds the world of our hard-won, justifiable confidence in the special role performed by Article III courts throughout our history in vindicating the rule of law.

Mr. CHABOT. Professor Redish, you're recognized for 5 minutes.

**TESTIMONY OF MARTIN H. REDISH, LOUIS AND HARRIET ANCEL PROFESSOR OF LAW AND PUBLIC POLICY, NORTHWESTERN LAW SCHOOL**

Mr. REDISH. Thank you, Mr. Chairman.

I believe that as a matter of constitutional text, structure and history, many of the issues that we are discussing today are far simpler than numerous complex constitutional issues that the courts deal with. The power of this Congress to limit the jurisdiction of the Federal courts is clear. It is equally clear, however, and I cannot emphasize this enough, about the absence of this Congress' power to exclude all judicial review of constitutional issues. If this Congress limits the jurisdiction of the Federal courts, and as I said before, I believe that power is extremely broad, it must recognize that there still must be available a constitutionally adequate judicial forum to adjudicate constitutional rights and interpret the Constitution.

This is clearly the plan of the Constitution. There was a reason that the Federal judiciary was insulated from direct popular election and power to be regulated by the majoritarian branches. However, if this Congress limits the jurisdiction of the Federal courts, the State courts may provide that constitutionally adequate forum.

As I tell my students, the State courts are soldiers in the Federal judicial army. They are both empowered and obligated under article VI, clause 2, the supremacy clause, to interpret and enforce the Constitution. However, this Congress should not limit Federal court jurisdiction in the very mistaken belief that it can exclude all judicial review.

As to the power of this Congress over the jurisdiction of the Federal courts, I believe the text and the history are both quite clear that it is not necessarily the way I would have chosen to structure it, but when the text and the history are inexorable, we have no choice. It's what I refer to as the "I just work here" view of constitutional interpretation.

Article III explicitly vests in Congress the power not to have created lower Federal courts in the first place. The Framers' assumption was quite clear that if Congress chose not to create the lower Federal courts, the State courts could provide an adequate forum to interpret and enforce Federal law, including the Federal Constitution. While this Congress did create the lower Federal courts immediately, it is well established in the case law that that power to, from time to time, ordain and establish the lower Federal courts includes the power to abolish the lower Federal courts, and the

greater power to abolish the lower Federal courts logically subsumes within it the power to leave the courts in existence, but limit their jurisdictions.

Similarly, as Congressman Hostettler quite accurately pointed out, the Exceptions Clause in article III inescapably says that this Congress may make exceptions to the Supreme Court's appellate jurisdiction. There are external constitutional limits on this power; the Due Process Clause, the concept of separation of powers, and the equal protection directive in the fifth amendment apply. However, there are no internal constitutional limits, no limits in article III on Congress' power. Its power is plenary.

There have been respected constitutional scholars, and I include certainly Professor Gerhardt in this category, who have suggested that Congress may not use its power to limit the so-called essential functions of the Federal judiciary. I find that to be a textual phantom. I consider it to be the equivalent of constitutional wishful thinking. There is nothing that refers to any limit on essential functions from—on this Congress' power. If this Congress wishes to combine its power over the article III lower courts and the Supreme Court under the exceptions clause, the end result is that it can completely exclude Federal judicial power over pretty much any issue, as long as the State courts remain available.

Despite the extent of this power, I consider it as a matter of the American political process highly inadvisable to exercise it. My view has nothing to do with my particular views on the substantive merits of the issue of gay marriage. I claim no expertise on that, and you wouldn't be interested in my views anyway. I'm referring more to the broader issues of American judicial and political process.

I think this Congress should view its power to be the moral equivalent of nuclear war to take away Supreme Court and lower court jurisdiction. There are serious negative consequences. And we would be left with 50 State supreme court interpretations of Federal law. I don't think that's an unconstitutional result. I consider it an inadvisable result.

Thank you.

Mr. CHABOT. Thank you, Professor.

[The prepared statement of Mr. Redish follows:]

PREPARED STATEMENT OF MARTIN H. REDISH

INTRODUCTION

I have been asked to express my views concerning the scope of Congress's constitutional power to limit federal court jurisdiction over particular classes of cases. While I have both taught and written about the subject on numerous occasions over the last thirty years, I must concede at the outset that it is virtually impossible to say definitively what the outer limits of this congressional power actually are. This confusion results from the relatively limited case law that exists on the subject. In a certain sense, of course, the lack of doctrinal development on this subject may well be a good thing, because the issue arises in the courts only when the judicial and legislative branches are involved in a tense political confrontation, a situation that has occurred only rarely in the nation's history. Yet the fact remains that relatively few decisions have considered the issue, and what little doctrine does exist is occasionally vague or inconsistent. Adding to the confusing state of the law are the dramatically different views expressed by federal jurisdiction scholars over the years. Thus, the most I can do today is to provide my own theoretical take on the subject. While I believe that this approach flows inexorably from both the text and structure of the Constitution and is consistent with what little case law exists, for purposes

of full disclosure I must concede that many respected scholars, both current and past, would disagree with all or part of the approach I suggest here.

In this testimony, I plan to describe my approach to the question and explain why I believe it derives from constitutional text and structure. I will then briefly describe alternative theoretical models, and explain why I consider them to be unacceptable.

## CONCLUSIONS

I believe that, at least as a constitutional matter, the issue of congressional power to control federal jurisdiction is far simpler than many other scholars think. The text and internal logic of Article III of the Constitution make clear that congressional power to control the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court is extremely broad. There is nothing in the provision's text that in any way confines congressional authority in either area. It is highly likely, however, that the federal courts would construe congressionally imposed, substantively based restrictions on their jurisdiction in a highly grudging manner. Thus, if Congress wishes to exercise its vast authority, it would be advised to state its intent explicitly in the text of the relevant statutes.

To be sure, several other guarantees contained in the Constitution—due process, separation of powers, and equal protection—may well impose limitations on the scope of congressional power. The Due Process Clause of the Fifth Amendment requires that a neutral, independent and competent judicial forum remain available in cases in which the liberty or property interests of an individual or entity are at stake. But as long as the state courts remain available and adequate forums to adjudicate federal law and protect federal rights, it is difficult to see how the Due Process Clause would restrict congressional power to exclude federal judicial authority to adjudicate a category of cases, even one that is substantively based. Separation of powers, on the other hand, imposes more far reaching restrictions. That doctrine prevents Congress from (1) itself adjudicating individual litigations, (2) directing a federal court how to decide a particular case, (3) employing the federal courts for purposes of enforcement without simultaneously allowing them to interpret the law being enforced or consider its constitutionality, or (4) overturning individual decisions or classes of decisions already handed down by a federal court. However, it is difficult to see how any of those constitutional guarantees would restrict congressional authority completely to exclude substantively based categories of future or presently undecided cases from either the jurisdiction of the lower federal courts or the appellate jurisdiction of the Supreme Court. The constitutional directive of equal protection restricts congressional power to employ its power to restrict jurisdiction in an unconstitutionally discriminatory manner

It should be noted that the fact that Congress possesses such broad constitutional power in no way implies that it would be either wise or appropriate, as a matter of the American political process, for Congress to exercise its authority to remove specific categories of substantive cases from federal jurisdiction. Purely as a matter of policy, I believe that Congress should begin with a very strong presumption against seeking to manipulate judicial decisions indirectly by selectively restricting federal judicial authority. I also firmly believe that were Congress to take such action it would risk undermining public faith in both Congress and the federal courts. Due to their constitutionally granted independence and insulation from the majoritarian branches of the federal government, the judiciary possesses a unique ability to provide legitimacy to governmental action in the eyes of the populace. Congressional manipulation of federal judicial authority therefore threatens the legitimacy of federal political actions. Moreover, to exclude federal judicial power to interpret or enforce substantive federal law undermines the vitally important function performed by the federal judiciary in the American political system. The expertise and uniformity in interpretation of federal law that is provided by the federal judiciary should generally not be undermined.

## CONGRESSIONAL POWER TO CONTROL THE JURISDICTION OF THE LOWER FEDERAL COURTS

Article III, section 1 of the Constitution provides that "[t]he 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." On its face, this language vests in Congress complete discretion whether or not to create the lower federal courts, and the established historical understanding of the so-called "Madisonian Compromise" makes clear that this view is accurate. For an extended discussion of the Madisonian Compromise, see Martin H. Redish & Curtis Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U. Pa. L. Rev. 45, 52–55 (1975). The framers' as-

sumption appears to have been that were Congress to have chosen not to create the lower federal courts, the state courts—who are explicitly bound to enforce federal law under the Constitution's Supremacy Clause, Article VI, cl. 2—would be available to serve as the trial forums for the adjudication of claims arising under federal law. See generally Martin H. Redish, 15 Moore's Federal Practice sec. 100.20 (3d ed. 1997). The Supreme Court has proceeded on the logical assumption that if Congress possessed discretion not to create lower federal courts in the first place, it also has the power to abolish the lower federal courts. See, e.g., *Lockerty* v. *Phillips,* 319 U.S. 182 (1943); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850). Since it has been assumed that Congress possesses the authority to abolish the lower federal courts completely, the Court has assumed that it has the logically lesser power to "abolish" them as to only certain cases by limiting their jurisdiction.

Scholars have on occasion raised questions about the validity of the assumption that the power to create the lower courts logically dictates a corresponding power to abolish them. See, e.g., Ronald Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 Geo. L.J. 839, 842–43 (1976). Nevertheless, since the constitutional text provides Congress with the power "from time to time" to ordain and establish the lower courts, I believe it is reasonable to infer from this language the power periodically to alter what Congress has already created. And if one accepts congressional power to abolish the lower courts, the power to leave them in existence but simultaneously restrict their jurisdiction seems to flow inexorably. If Congress possesses such authority, it is difficult to see how Article III itself implicitly imposes any restrictions on how that authority is to be employed. Thus, Article III would seem to provide no constitutional bar to the congressional exclusion of substantively based categories of cases from the jurisdiction of the lower federal courts.

Early in the nation's history, Justice Joseph Story argued that the words, "shall be vested" in Article III dictate that the lower federal courts must exist to exercise judicial power in those cases constitutionally excluded from both the highly limited original jurisdiction of the Supreme Court and the jurisdiction of the state courts. Were the jurisdiction of the lower federal courts not to exist in such cases, the command of Article III that some federal court be available to adjudicate the case—either a lower court or the Supreme Court—would be violated. However, even if Story were correct in his assumption that the words, "shall be vested" are to be construed to be a command—by no means an obviously correct construction—he ignored the fact that, given the nature of the Madisonian Compromise that led to the drafting of Article III, there are absolutely no federal cases *constitutionally* excluded from state court jurisdictional authority. Thus, the entire logic of Story's theory breaks down. It is therefore not surprising that, while the theory has acquired some modern scholarly support, it has been virtually ignored by the courts. See Linda Mullenix, Martin Redish & Georgene Vairo, Understanding Federal Courts and Jurisdiction 7–9 (Matthew Bender 1998).

### CONGRESSIONAL POWER TO CONTROL THE APPELLATE JURISDICTION OF THE SUPREME COURT

Article III, section 2 of the Constitution extends extremely limited original jurisdiction to the United States Supreme Court. In all other cases to which the federal judicial power is extended, the Court is given appellate jurisdiction, "both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." On its face, this provision provides seemingly unrestrained congressional authority to exclude categories of cases from the Supreme Court's appellate jurisdiction. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), the post-Civil War Supreme Court appeared to recognize the unlimited authority explicitly authorized in the text. See Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 25–27 (2d ed. 1990). However, in a subsequent decision the same year, the Court construed *McCardle* narrowly, leaving open the possibility that the Exceptions Clause is not to be extended as far as its text suggests. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868). See also *Felker* v. *Turpin*, 518 U.S. 651 (1996). Nevertheless, the Supreme Court has to this day not resolved the outer reaches of the Exceptions Clause, and I fail to comprehend how a textually unlimited power to make exceptions to the Supreme Court's appellate jurisdiction can be construed to be limited in any way. While it is at least conceivable that other constitutional provisions might confine this congressional power, at least the text of the Exceptions Clause itself does not do so.

SUGGESTED SCHOLARLY LIMITATIONS ON CONGRESSIONAL POWER TO CONTROL FEDERAL JURISDICTION

As I have already indicated, I believe that the textual directives of Article III make clear, on their face, that Congress possesses broad constitutional authority to control the jurisdiction of both the lower federal courts and the United States Supreme Court. Nevertheless, several respected scholars have questioned the text's seemingly clear directives. However, none of these scholarly theories can withstand careful critical analysis. Ultimately, all of them amount to what I have described as a form of "constitutional wishful thinking." Redish, Tensions, supra at 28. My prior work has provided detailed critiques of each of these theories (see the previously cited sources). Here I will briefly describe those theories and the fundamental problems with each.

*Henry Hart's "Essential Functions" Thesis*

Many years ago, Henry Hart cryptically suggested that the Exceptions Clause is somehow restrained by a textually nonexistent limitation that prevents Congress from interfering with the "essential functions" of the Supreme Court. Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1365 (1953). Though Hart never explained either what those supposedly essential functions actually are or from where in the Constitution he derived them, it appears from subsequent work by his supporters that the concept is intended to include the unifying function of federal law interpretation and the policing of state court interpretations of federal law. See Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court,* 109 U. Pa. L. Rev. 157, 201–02 (1960). As I have previously argued, however, the historical evidence relied upon to support the "essential functions" thesis is "[a]t best . . . speculative and at worst . . . simply useless." 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, 908 (1982). In any event, as already noted, the text provides absolutely no suggestion of such a limitation, regardless of what the history demonstrates.

*Akhil Amar's Theory*

Professor Akhil Amar has suggested an alternative theory that provides that for certain categories of cases to which the federal judicial power is extended in Article III, section 2, Congress may not revoke *all* federal judicial jurisdiction. Unlike Professor Hart (who confined his constitutional restriction on congressional power to the Supreme Court's appellate jurisdiction), Professor Amar asserts that at least one level—the lower federal courts or the Supreme Court—(but not necessarily both) must remain open to adjudicate any category of cases delineated in Article III, section 2 preceded by the word, "all." He reasons that the selective use of that word, combined with the mandatory "shall be vested" language at the start of section 1, provides a textual basis for his conclusion. See generally Akhil Amar, *The Two-Tiered Structure of the Judiciary Act of 1789,* 138 U. Pa. L. Rev. 1569 (1990).

If Professor Amar's theory were accepted (and I am unaware of any support for it in the modern case law), it would severely restrict congressional power to remove simultaneously from *both* the lower federal courts *and* the Supreme Court cases that arise under federal law, since that is one of the categories preceded by the "all" qualifier. However, it is difficult to imagine that the drafters of Article III would have attempted to reach the result Professor Amar advocates simply by the cryptic and selective use of the word, "all." This is especially true, when at the very same time they explicitly provided Congress with unlimited discretion not to create the lower federal courts in the first place and to make exceptions to the Supreme Court's appellate jurisdiction.

In any event, purely as a matter of textual construction, Amar's theory makes no sense: If the words, "shall be vested" are, in fact, intended to be mandatory, *all* of the categories of cases enumerated in Article III, section 2, are modified by it. This is so, whether or not those categories are preceded by the word, "all." Thus, if we are to take seriously Amar's out-of-context focus on the words, "shall be vested," his textual argument must logically lead to the conclusion that *every* category of cases enumerated in Article III, section 2 must be heard by *some* Article III court, regardless of whether or not it is preceded by the word, "all." For my detailed critique of Professor Amar's theory, see Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III,* 138 U. Pa. L. Rev. 1633 (1990). See also John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III,* 64 U. Chi. L. Rev. 203 (1997) (criticizing Amar's theory). For a defense of Amar's theory, however, see Robert Pushaw, *Congressional Power Over*

*Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III,* 1997 B.Y.U. L. Rev. 847.

*Professor Sager's Theory*

Professor Lawrence Sager has argued that Congress may not use its authority to revoke jurisdiction from both the Supreme Court and the lower federal courts in a substantively selective manner. Lawrence Sager, *The Supreme Court 1980 Term, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Lower Federal Courts,* 95 Harv. L. Rev. 17 (1981). However, for the most part Professor Sager's focus appears to be on jurisdictional exclusions for *state* behavior when *constitutional rights* are at stake. See id. at 69. Thus, were Congress to exclude the jurisdiction of all Article III federal courts in cases involving questions of purely sub-constitutional law not involving state action, Sager's theory is at best of diluted force. In any event, I have argued that Sager's theory ignores the clear textual directives of Article III. See Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager,* 77 Nw. U. L. Rev. 143 (1982). For further criticism of Sager's theory, see Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate,* 36 Stan. L. Rev. 895, 915 (1984).

RELEVANCE OF OTHER CONSTITUTIONAL PROTECTIONS

*Due Process*

While the outer reaches of the right remain somewhat unclear, it is established that the Due Process Clause requires adjudication by a neutral, independent forum before government may revoke protected liberty or property interests. See, e.g., *Tumey* v. *Ohio,* 273 U.S. 510 (1927). See generally Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process,* 95 Yale L.J. 455 (1986). Thus, where constitutional rights are at stake, Congress may not revoke all forms of access to an independent judicial forum. *Bartlett* v. *Bowen,* 816 F.2d 695 (D.C. Cir. 1987). But even the exclusion of both lower federal court and Supreme Court jurisdiction would not bring about such a result, as long as the state courts remain a viable alternative. I have long expressed concern about exactly how viable the state court remedy is (see Redish, 77 Nw. U. L. Rev. 143; Redish & Marshall, supra), but the case law is quite clear that the state courts are deemed to satisfy the due process requirement of a neutral judicial forum. Thus, as long as state courts remain open, congressional exclusion of federal jurisdiction raises no issue of due process.

*Separation of Powers*

The separation-of-powers limitations on congressional power to control federal jurisdiction are somewhat more complex than the due process limitation. Derived from both the text and structure of Article III, the separation-of-powers doctrine imposes significant restrictions on congressional authority. Before exploring those restrictions, however, it is important to note that as long as Congress completely excludes federal court jurisdiction over a particular category of cases, including the enforcement power, generally separation-of-powers problems are unlikely to arise. The only concern would be were Congress to exclude federal court jurisdiction and itself attempt to adjudicate individual cases, a clearly unconstitutional usurpation of the judicial power by the legislative branch.

Most of the difficulties occur, however, primarily when Congress vests jurisdiction in the federal courts (lower courts or Supreme Court) while simultaneously imposing restriction on federal judicial ability to interpret the law being enforced or to review its constitutionality. See generally *United States* v. *Klein,* 80 U.S. (13 Wall.) 128 (1871). For a more detailed description of the case and its implications, See Redish, Tensions, supra at 48–49. This limitation flows from the theory of the "quid pro quo:" the notion that where Congress wishes to invoke the unique legitimacy that the independent federal judiciary possesses, it must allow the judiciary full authority to interpret and review the law that it is asked to enforce. In addition, the Supreme Court has made clear that while Congress may alter the general substantive sub-constitutional law to be applied by the federal courts, it may not reverse specific judgments already entered by the federal courts. *Plaut* v. *Spendthrift Farm, Inc.,* 514 U.S. 211 (1995).

*Equal Protection*

The equal protection directive, deemed to be implicit in the Due Process Clause of the Fifth Amendment, can conceivably also play a role in limiting congressional power to control federal jurisdiction. Despite its seemingly unlimited authority under Article III, Congress quite clearly may not revoke or confine federal jurisdic-

tion in a discriminatory manner. For example, Congress could not successfully argue that its greater constitutional power to exclude federal judicial power completely logically subsumes the lesser power of excluding federal judicial power, for example, in cases brought by African Americans, Jews, or Women.

POLITICAL PROCESS CONSIDERATIONS

It is clear to me that Article III of the Constitution vests broad power in Congress to exclude the jurisdiction of both the Supreme Court and the lower federal courts. While externally derived constitutional doctrines impose distinct limits on that power, I can see absolutely no textual or structural basis for denying Congress power completely to exclude substantive categories of cases from the jurisdiction of the federal courts. This is true, even in cases in which constitutional rights are at stake, as long as an alternative adequate judicial forum has been made available.

It does not follow, however, that Congress should choose to exercise this power. To the contrary, I firmly believe that Congress should choose to exercise this power virtually never. There has long existed a delicate balance between the authority of the federal judiciary and Congress, and the exclusion of substantively selective authority from all federal courts seriously threatens that balance. I firmly believe, therefore, that whatever the scope of its constitutional power, Congress should be extremely reluctant to exercise that power.

Mr. CHABOT. And, Congressman Dannemeyer, you're recognized for 5 minutes.

## TESTIMONY OF THE HONORABLE WILLIAM E. DANNEMEYER, FORMER U.S. REPRESENTATIVE

Mr. DANNEMEYER. Thank you, Mr. Chairman.

I think it's appropriate to put this whole issue in the perspective of why we are here this morning in that there is an intense cultural war waging in this Nation over values, and the issue for the political leadership of this country is whether you, the elected Members of Congress, will have the courage to affirm that God exists. That's the issue. This issue over how we define marriage is an important aspect of that cultural war.

Another issue that deserves attention by this Congress deals with whether or not we will affirm in the Pledge of Allegiance and the national motto that God exists.

There's no question that the homosexual political movement is a powerful force in this culture not because of its numbers, but because of the people controlling the media of this country who look upon that movement as an idea and a civil right whose time has come. We need to recognize this.

And so, what exists in the system to correct this effort for political power? This political movement of homosexuals has chosen the judiciary of America as the means of achieving their goals. Why? Because they know they can't get their agenda through the elected representatives in the State legislatures and in the Congress of the United States, and so they've chosen a judiciary in the State of Massachusetts as a happy hunting ground for their goal. And then they rely upon provision of Full Faith and Credit Clause of the U.S. Constitution which says that anybody that goes to Massachusetts and gets a marriage and is married must be recognized in every other State of the Union.

And then DOMA comes along and says a State has a right to not do that, and then we recognize the reality that the U.S. Supreme Court may pass upon the constitutionality of DOMA, and they may turn it down. We don't know. That's where this place, the Congress of the United States, under the Constitution, can come forward and

affirm the values that God created for mankind that have controlled civilizations from the beginning of time. Marriage exists of a man and a woman who form a family, and that's how we provide for the next generation.

In addition, our laws should provide that we will teach in the public schools of this Nation that God exists who created rules for man to live by. This body, Congress, can use article III, section 2 of the Constitution to acxcept these areas of the jurisdiction of the Federal court system. I would urge it to do so.

The other alternative, of course, that the professor has talked about is that this would leave judicial inquiry to State legislature—State judicial courts. I acknowledge that. Well, the answer to that is a constitutional amendment. But do we have two-thirds of the votes in the House and in the Senate to get a constitutional amendment? I don't think so.

So the move at this time, at this—in this Congress is to use article III, section 2, and then if the Supreme Court turns that down, what other recourse do we then have to achieve the goal of affirming that marriage exists and we'll have God in the Pledge of Allegiance is a constitutional amendment? I hope it doesn't come to that. But I think Congress at this time should take that step.

For example, I just—if I have time left here, Members, the use of article III, section 2 by Congress is not something with which they are unfamiliar. In the last Congress it was used 12 times, and I submit that if it was used 12 times in the last Congress, it can be used 1 time in this current Congress. There have been a number of articles that have been written by distinguished scholars on the use of article III, section 2, and I would hope that the Members of this Subcommittee and the full Subcommittee will give due consideration to them.

Thank you.

Mr. CHABOT. Thank you very much, Congressman.

[The prepared statement of Mr. Dannemeyer follows:]

PREPARED STATEMENT OF THE HONORABLE WILLIAM E. DANNEMEYER

Mr. Chairman and members of the Subcommittee:

Thomas Jefferson is generally recognized by most historians as the principle author of the Declaration of Independence. Our Founding Fathers created a federal system of three branches, Executive, Legislative and Judicial.

On Aug. 18, 1821, Jefferson wrote to Charles Hammond and expressed his fear that, of the three branches of government which were created, the one he feared the most was the federal judiciary in these words:

> "The federal judiciary is working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped from the States, and the government of all be consolidated into one (i.e., federalization)."

Decisions of the federal judiciary over the last half century have resulted in the theft of our Judeo-Christian heritage, a brief sampling is as follows:

- Enacting "a wall of separation between church and state"
- Banning nondenominational prayer from public schools
- Removing the Ten Commandments from public school walls
- Removing God from the Pledge of Allegiance

Congress should use Article III, Section 2, clause 2 of the U.S. Constitution to recover what has been stolen. Under the heading "Jurisdiction of Supreme and Appellate Courts," the clause says:

> "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."

Over the last 200 years, Congress has exercised this authority to except certain areas from the jurisdiction of the federal court system. In Turner vs. Bank of North America 4 Dall. (4 U.S.,8(1799)), the Supreme Court concluded that the federal courts derive their judicial power from Congress, not the Constitution.

In Cary vs. Curtis 3 How, (44 U.S.), 236 (1845), a statute made final the decision of the secretary of the Treasury in certain tax deductions. The statute was challenged as an unconstitutional deprivation of the judicial power of the courts. The Supreme Court concluded that the jurisdiction of the federal courts (inferior to the Supreme Court) was in the sole power of Congress.

In Sheldon vs. Sill 8 How (49 U.S. 441(1850)), involved the validity of the assignee clause of the Judicial Act of 1789 restricting such action to establish federal court jurisdictions. The Supreme Court sustained the power of Congress to limit the jurisdiction of the inferior federal courts.

In Ex Parte McCardle 6 Wall. (73 U.S.) 318 (1 868), the Supreme Court accepted review on certiorari of a denial of a petition for a writ of habeas corpus by the circuit court. Congress, fearful the Supreme Court would honor the writ, passed a law repealing the act which authorized the appeal. The Supreme Court dismissed the case for lack of jurisdiction.

In Lauf vs. E.G. Shinner & Co. 303 U.S. 323, 330 (1938), the Supreme Court upheld the power of Congress to define and limit the jurisdiction of the inferior courts of the United States in the form restrictions on the issuance of injunctions in labor disputes under the Norris-La Guardia Act of 1932.

In Lockerty v. Phillips 319 U.S. 182 (1943), Congress provided for a special court to appeal price control decisions under the Emergency Price Control Act of 1942. The Supreme Court sustained this restriction.

One of the outstanding Constitutional scholars in the Senate is Robert Byrd, West Virginia Democrat. In 1979, in order to once again allow voluntary prayer in public schools, he introduced a law to except this subject from the federal court system under Article III, 2.2. Unfortunately, it was not enacted into law.

In the 107th Congress (2001–2002), Congress used the authority of Article III, Section 2, clause 2 on 12 occasions to limit the jurisdiction of the federal courts.

Sen. Thomas A. Daschle, South Dakota Democrat, used the exception authority of Article III, 2.2 in order to cut some timber in South Dakota.

## ATTACHMENTS

*Congressman William E. Dannemeyer*
*1979-1992*
*1105 E. Commonwealth, Box 13*
*Fullerton, CA 92831*
*Tel: 714-871-4318 Fax: 714-871-4221*

June 17, 2004

House Judiciary Subcommittee on the Constitution
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Members:

Thank you for allowing me to testify at a hearing of your subcommittee on Thursday, June 24, 2004, at 10:00 A.M., concerning the right of Congress to utilize Article 3 2.2. of the U.S. Constitution to protect marriage for the States as well as correct an erroneous interpretation of the First Amendment by decisions of the Supreme Court which have stolen our Judeo-Christian heritage.

These documents are being submitted as a part of my testimony:

1. Letter dated January 15, 2004, entitled "Coalition to Acknowledge That God Exists and to Allow Expression of Faith" signed by leaders of 26 organizations.

    a. Op Ed piece in the Washington Times, October 7, 2003, on the use of Article 3 2.2.
    b. Op Ed piece in the Orange County Register of September 21, 2003, Judges are stealing our Judeo-Christian heritage.

2. Analysis by Congressional Research Service dated June 29, 1992, describing the history of Congressional use of Article 3 2.2 of the U.S. Constitution from 1789 to 1992.

3. List of 12 times that Article 3 2.2. was used by Congress in the 107th Congress (2001-2002) to limit Federal Court jurisdiction

4. Page 20-21 of Booklet by David Barton showing polling data supporting voluntary prayer in Public Schools

5. Letter dated February 7, 2003, indicating White House support for this legislative effort.

6. Article dated January 12, 2004, by Professor John Eidsmoe describing the need to end Judicial Tyranny.

7. Copy of S1558 by Senator Allard of Colorado

8. Copy of HR 3190 by Congressman Pickering - identical to S1558.

9. S 2323 by Senator Shelby

10. HR 3799 by Congressman Aderholt - identical to S 2323

11. Article in the Orange County Register of June 15, 2004 on the ruling by the U.S. Supreme Court.

Very truly yours,

William E. Dannemeyer

William E. Dannemeyer

# COALITION TO ACKNOWLEDGE THAT GOD EXISTS AND TO ALLOW EXPRESSIONS OF FAITH

**January 15, 2004**

**SUBJECT: REQUESTING CONGRESS TO ENACT LEGISLATION NOW PENDING IN THE HOUSE AND SENATE**

**ADDRESSED TO CONGRESSIONAL LEADERS**

**HOUSE**
- **Speaker Dennis Hastert**
- **Majority Leader Tom DeLay**
- **Majority Whip Roy Blunt**
- **Judiciary Committee Chairman James Sensenbrenner, Jr.**
- **Judiciary Committee Constitution Subcommittee Chairman Steve Chabot**
- **Value Action Team Chairman Joseph R. Pitts**

**SENATE**
- **Majority Leader Bill Frist**
- **Majority Whip Mitch McConnell**
- **Policy Committee Chairman Jon Kyl**
- **Judiciary Committee Chairman Orrin G. Hatch**
- **Judiciary Committee Constitution, Civil Rights and Priority Rights Subcommittee Chairman John Cornyn**
- **Value Action Team Chairman Sam Brownback**

The current Congress has a unique and historic opportunity to correct a wrong interpretation of the First Amendment by decisions of the U.S. Supreme Court which in the past half century have stolen our Judeo Christian heritage. Unique and historic because this is the first time since 1955 that both Houses of Congress and the White House are supportive of a political philosophy which is willing to acknowledge that God exists who created rules which all persons are to observe.

A brief sampling of some of these decisions is as follows:

*Enacting "a wall of separation between church and state"*
*(Everson v. Board of Education, 1947)*
*Banning nondenominational prayer from public schools*
*(Engel v. Vitale, 1962)*
*Removing the Ten Commandments from public school walls*
*(Stone v. Graham, 1980)*
*Striking down a "period of silence not to exceed one minute...for mediation or voluntary prayer"*
*(Wallace v. Jaffree, 1985)*
*Censoring creationist viewpoints when evolutionist viewpoints are taught*
*(Edwards v. Aguillard, 1987)*
*Barring prayers at public school graduations*
*(Lee v. Weisman, 1992)*

We believe that the principle problem facing America is a spiritual one. Since 9-11, our political leaders have been heard to publicly ask on many occasions "God Bless America." If we are honest with ourselves, why should God Bless America? For over two generations we have been teaching children in public schools the God does not exist.

We are encouraged that in the current Congress legislation has been introduced to allow public expression of faith and to acknowledge that God exists in America. We thank and support the following authors and the legislation they have introduced and strongly urge the Congressional leadership to move this legislation expeditiously and produce a statute and/or a Constitutional Amendment which will minimally retain God in the Pledge of Allegiance; retain "In God We Trust" as our national motto; allow voluntary prayer in public schools; allow the display of the Ten Commandments in public buildings and if a statute, utilize Article 3, 2.2 of the U.S. Constitution to except these subject areas from the federal court system.

Senator Allard of Colorado – S1558, 10 co-sponsors
Statute to allow display of Ten Commandments and to retain God in pledge and "In God We Trust" as national motto. Uses Article 3, 2.2 to except these subjects from Federal Courts

Congressman Aderholt of Alabama, HR 2045 - Ten Commandments Defense Act of 2003, 110 co-sponsors
Allows displaying of Ten Commandments, Allows expressions of faith in public

Congressman Akin of Missouri – H. Res. 153 IH, 22 co-sponsors
Resolution for President to issue proclamation for fasting & prayer

Congresswoman Emerson from Missouri – HJ Res. 7, 1 co-sponsor
Constitutional Amendment to allow voluntary prayer in public schools

Congressman Istook of Oklahoma – HJ Res. 46, 100 co-sponsors
Constitutional Amendment to allow voluntary prayer in public schools

Congressman Paul of Texas – HR 1547, 3 co-sponsors
Statute to except religious freedom from jurisdiction of federal courts

Congressman Pickering of Mississippi – HJ Res. 40, 11 co-sponsors
Constitutional Amendment to retain God in pledge and "In God We Trust" as national motto

Congressman Pickering of Mississippi – H R 3190, 35 co-sponsors
Statute to allow display of Ten Commandments and to retain "God" in pledge and "In God We Trust" as national motto. Uses Article 3, 2.2 to except these subjects from Federal Courts.

Polling data overwhelmingly supports this legislation:

"For example, in 1985, 69 percent of Americans supported school prayer; by 1991, that number had increased to 78 percent. Similarly, in 1988, 68 percent of Americans supported a constitutional amendment to reinstate school prayer; by 1994, that number had risen to 73 percent.

Furthermore, the public is strongly unified on the subject of spoken – not silent – prayer. In 1995, the support for spoken prayers by students of all faiths was at 75 percent and by 2001 (before the terrorist attacks) it was at 77 percent. Additionally, 80 percent believe that students should be able to recite a spoken prayer at graduations, and support for other types of visible religious expressions at schools remains equally high."

Signed,

Mr. David Barton
Wallbuilders, Inc.
Aledo, TX

Congressman Bill Dannemeyer (1979-1992)
Americans For Voluntary School Prayer

Mr. Gary Bauer
Campaign For Working Families

Dr. James Dobson
Focus on the Family
Colorado Springs, CO

Mr. Joel Belz
World Magazine

Rev. Jerry Falwell
Liberty Alliance
Lynchburg, VA

Mr. Phil Burress
Citizens For Community Values
Cincinnati, OH

Mr. Mike Farris
Home School Legal Defense Association

Mr. Jack Clayton
Christian Legal Defense and Education Foundation

Rev. Ted Haggard
National Association of Evangelicals
Washington, D.C.

Mr. Chuck Colson
Prison Fellowship
Washington, D.C.

Mr. David Keene
American Conservative Union

Mrs. Roberta Combs
Christian Coalition
Washington, D.C.

Dr. D. James Kennedy
Coral Ridge Ministries
Ft. Lauderdale, FL

Mr. Martin Mawyer
Christian Action Network

Mr. William Murray
Religious Freedom Coalition
Washington, D.C.

Mr. Tony Perkins
Family Research Council
Washington, D.C.

Rev. Jesse Lee Peterson
Bond, Los Angeles, CA

Mrs. Frances Rath
Committee For Biblical Principles in Government
Aloha, OR

Ms. Sandy Rios
Concerned Women For America
Washington, D.C.

Rev. Pat Robertson
CBN, Virginia Beach, VA

Dr. Rick Scarborough
Vision America, Houston, TX

Mrs. Nancy Schaefer
Family Concerns, Inc.
Turnerville, GA

Mrs. Phyllis Schlafly
Eagle Forum

Rev. Lou Sheldon
Traditional Values Coalition
Washington, DC

Mr. Paul Weyrich
Free Congress Foundation

Mr. Don Wildmon
The American Family Association
Tupelo, MS

# The Washington Times

## Article III, Section 2

### Uphold America's Judeo-Christian heritage

By William E. Dannemeyer
THE WASHINGTON TIMES
Published October 7, 2003

Thomas Jefferson is generally recognized by most historians as the principle author of the Declaration of Independence. Our Founding Fathers created a federal system of three branches, Executive, Legislative and Judicial.

On Aug. 18, 1821, Jefferson wrote to Charles Hammond and expressed his fear that, of the three branches of government which were created, the one he feared the most was the federal judiciary in these words:

"The federal judiciary is working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped from the States, and the government of all be consolidated into one (i.e., federalization)."

Decisions of the federal judiciary over the last half century have resulted in the theft of our Judeo-Christian heritage, a brief sampling is as follows:

- Enacting "a wall of separation between church and state"
- Banning nondenominational prayer from public schools
- Removing the Ten Commandments from public school walls
- Removing God from the Pledge of Allegiance

Congress should use Article III, Section 2, clause 2 of the U.S. Constitution to recover what has been stolen. Under the heading "Jurisdiction of Supreme and Appellate Courts," the clause says:

> "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."

Over the last 200 years, Congress has exercised this authority to except certain areas from the jurisdiction of the federal court system. In Turner vs. Bank of North America 4 Dall. (4 U.S.,8(1799)), the Supreme Court concluded that the federal courts derive their judicial power from Congress, not the Constitution.

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One of the outstanding Constitutional scholars in the Senate is Robert Byrd, West Virginia Democrat. In 1979, in order to once again allow voluntary prayer in public schools, he introduced a law to except this subject from the federal court system under Article III, 2.2. Unfortunately, it was not enacted into law.

In the 107th Congress (2001-2002), Congress used the authority of Article III, Section 2, clause 2 on 12 occasions to limit the jurisdiction of the federal courts.

Sen. Thomas A. Daschle, South Dakota Democrat, used the exception authority of Article III, 2.2 in order to cut some timber in South Dakota.

Congress responds to pressure from the public. Call, write, e-mail or fax your senator or member of the House to enact 51 558 by Sen. Allard, Colorado Republican, and HR 3190 by Rep. Pickering Mississippi Republican. These bills allow the Ten Commandments to be displayed and retain God in the Pledge of Allegiance and use Article III, Sec. 2.2.

*Former Rep. William E. Dannemeyer is co-chairman of Americans For Voluntary School Prayer.*

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**READER REBUTTAL: RELIGION AND GOVERNMENT**

Commentary 4 | Sunday, Sept. 21, 2003 The Orange County Register

# Judges are stealing our Judeo-Christian heritage

WILLIAM E. DANNEMEYER
THE FULLERTON RESIDENT IS CO-CHAIRMAN OF AMERICANS FOR VOLUNTARY SCHOOL PRAYER AND WAS AN ORANGE COUNTY CONGRESSMAN FROM 1979-1992

In response to Tibor R. Machan's Sept. 15 column, "Faith and its place": Thomas Jefferson is generally recognized by most historians as the principal author of the Declaration of Independence and James Madison as the father of the U.S. Constitution. Our founding fathers created a federal system of three branches - executive, legislative and judicial. The system was not designed to be efficient; on the contrary, the checks and balances of these branches of government, as they struggled for power, were designed to provide the best chance of preserving freedom for the people of America.

On Aug. 18, 1821, Jefferson wrote to Charles Hammond and expressed that of the three branches of government, the one he feared the most was the federal judiciary: "The federal judiciary is …working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped from the states, and the government of all be consolidated into one (i.e., federalization)."

Decisions of the federal judiciary over the last half-century have resulted in the theft of our Judeo-Christian heritage. Here's a brief sampling:

- Enacting "a wall of separation between church and state"; Everson vs. Board of Education, 1947.
- Banning nondenominational prayer from public schools; Engel vs. Vitale, 1962.
- Removing the Ten Commandments from public school walls; Stone vs. Graham, 1980.
- Striking down a "period of silence not to exceed one minute…for mediation or voluntary prayer"; Wallace vs. Jaffree, 1985.
- Censoring creationist viewpoints when evolutionist viewpoints are taught; Edwards vs. Aguillard, 1987.
- Barring prayers at public school graduations; Lee vs. Weisman, 1992.

On Jan. 12, Supreme Court Justice Antonin Scalia gave a speech at Fredericksburg, Va., in which he did a rare thing for a sitting justice: He publicly criticized decisions of the U.S. Supreme Court and lower federal courts. The sense of his comments was that the courts have gone overboard in keeping God out of government. He cited the recent decision of Judge Alfred Goodwin of the 9th Circuit Court of Appeals barring students in a public school from using the word "God" in the Pledge of Allegiance.

Polling data shows overwhelmingly support for legislation that would prevent such prohibitions.

For example, in 1985, 69 percent of Americans supported school prayer; by 1991, that number had increased to 78 percent. Similarly, in 1988, 68 percent of Americans supported a constitutional amendment to reinstate school prayer; by 1994, that number had risen to 73 percent.

Furthermore, the public is strongly unified on the subject of spoken – not silent – prayer. In 1995, support for spoken prayers by students of all faiths was at 75 percent; by 2001, before the terrorist attacks, it was at 77 percent.

Congress can correct the wrong interpretation of the 1st Amendment by decisions of the federal judiciary in two different ways.

One method is a constitutional amendment which would apply to the federal judiciary and to the supreme courts of the states. This, of course, requires a two-thirds vote in the House and the Senate and the approval of three-fourths of the states. It is a very daunting hurdle, to say the least.

The other alternative is a statutory approach. It would require a majority vote in the House and the Senate and the signature of the president. It would utilize Article III, Section 2.2 of the U.S. Constitution, which authorizes Congress to except certain subject matter from jurisdiction of the federal courts. This authority was used by the last Congress, the 107th, 12 different times.

Legislation using this approach has been introduced in Congress.

Sen. Wayne Allard, R-Colo., has introduced Senate Bill 1558 to allow display of Ten Commandments and to retain "God" in the pledge and "In God We Trust" as national motto. It uses Article III exception.

Rep. Ernest Istook, R-Okla., has introduced House Joint Resolution 46 with 95 co-sponsors for a constitutional amendment to allow voluntary prayer in public schools

Rep. Robert Aderholt, R-Ala., has introduced House Resolution 2045 with 61 co-sponsors to allow displays of the Ten Commandments on public property.

Congress responds to pressure from the public. Contact your House member and senators to support these measures.

103d Congress
*1st Session*

SENATE

DOCUMENT
No. 103–6

# THE CONSTITUTION

of the

# UNITED STATES OF AMERICA

## ANALYSIS AND INTERPRETATION

ANNOTATIONS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JUNE 29, 1992

PREPARED BY THE
CONGRESSIONAL RESEARCH SERVICE
LIBRARY OF CONGRESS

JOHNNY H. KILLIAN
GEORGE A. COSTELLO
CO-EDITORS

U.S. GOVERNMENT PRINTING OFFICE

of the opinion specify the elements essential of a foreign state for purposes of jurisdiction, such as sovereignty and independence.

***Narrow Construction of the Jurisdiction.***—As in cases of diversity jurisdiction, suits brought to the federal courts under this category must clearly state in the record the nature of the parties. As early as 1809, the Supreme Court ruled that a federal court could not take jurisdiction of a cause where the defendants were described in the record as "late of the district of Maryland," but were not designated as citizens of Maryland, and plaintiffs were described as aliens and subjects of the United Kingdom.[1037] The meticulous care manifested in this case appeared twenty years later when the Court narrowly construed § 11 of the Judiciary Act of 1789, vesting the federal courts with jurisdiction when an alien was a party, in order to keep it within the limits of this clause. The judicial power was further held not to extend to private suits in which an alien is a party, unless a citizen is the adverse party.[1038] This interpretation was extended in 1870 by a holding that if there is more than one plaintiff or defendant, each plaintiff or defendant must be competent to sue or liable to suit.[1039] These rules, however, do not preclude a suit between citizens of the same State if the plaintiffs are merely nominal parties and are suing on behalf of an alien.[1040]

Clause 2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all 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.

## THE ORIGINAL JURISDICTION OF THE SUPREME COURT

From the beginning, the Supreme Court has assumed that its original jurisdiction flows directly from the Constitution and is

[1037] Hodgson & Thompson v. Bowerbank, 5 Cr. (9 U.S.) 303 (1809).

[1038] Jackson v. Twentyman, 2 Pet. (27 U.S.) 136 (1829); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

[1039] Coal Co. v. Blatchford, 11 Wall. (78 U.S.) 172 (1871). See, however, Lacassagne v. Chapuis, 144 U.S. 119 (1892), which held that a lower federal court had jurisdiction over a proceeding to impeach its former decree, although the parties were new and were both aliens.

[1040] Browne v. Strode, 5 Cr. (9 U.S.) 303 (1809).

therefore self-executing without further action by Congress.[1041] In *Chisholm v. Georgia*,[1042] the Court entertained an action of assumpsit against Georgia by a citizen of another State. Congress in § 3 of the Judiciary Act of 1789[1043] purported to invest the Court with original jurisdiction in suits between a State and citizens of another State, but it did not authorize actions of assumpsit in such cases nor did it prescribe forms of process for the exercise of original jurisdiction. Over the dissent of Justice Iredell, the Court, in opinions by Chief Justice Jay and Justices Blair, Wilson, and Cushing, sustained its jurisdiction and its power to provide forms of process and rules of procedure in the absence of congressional enactments. The backlash of state sovereignty sentiment resulted in the proposal and ratification of the Eleventh Amendment, which did not, however, affect the direct flow of original jurisdiction to the Court, although those cases to which States were parties were now limited to States as party plaintiffs, to two or more States disputing, or to United States suits against States.[1044]

By 1861, Chief Justice Taney could confidently enunciate, after review of the precedents, that in all cases where original jusrisdiction is given by the Constitution, the Supreme Court has authority "to exercise it without further act of Congress to regulate its powers or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice."[1045]

Although Chief Justice Marshall apparently assumed the Court had exclusive jurisdiction of cases within its original jurisdiction,[1046] Congress from 1789 on gave the inferior federal courts concurrent jurisdiction in some classes of such cases.[1047] Sustained in the early years on circuit,[1048] this concurrent jurisdiction was finally approved by the Court itself.[1049] The Court has also relied on the first Congress' interpretation of the meaning of Article III

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[1041] But in § 13 of the Judiciary Act of 1789, 1 Stat. 80, Congress did so purport to convey the jurisdiction and the statutory conveyance exists today. 28 U.S.C. § 1251. It does not, however, exhaust the listing of the Constitution.

[1042] Dall. (2 U.S.) 419 (1793). In an earlier case, the point of jurisdiction was not raised. Georgia v. Brailsford, 2 Dall. (2 U.S.) 402 (1792).

[1043] 1 Stat. 80.

[1044] On the Eleventh Amendment, see *infra*. On suits involving States as parties, see *supra*.

[1045] Kentucky v. Dennison, 24 How. (65 U.S.) 66, 98 (1861).

[1046] Marbury v. Madison, 1 Cr. (5 U.S.) 137, 174 (1803).

[1047] In § 3 of the 1789 Act. The present division is in 28 U.S.C. § 1251.

[1048] United States v. Ravara, 2 Dall. (2 U.S.) 297 (C.C.Pa. 1793).

[1049] Rhode Island v. Massachusetts, 12 Pet. (37 U.S.) 657 (1838); Bors v. Preston, 111 U.S. 252 (1884); Ames v. Kansas ex rel. Johnson, 111 U.S. 449 (1884). Such suits could be brought and maintained in state courts as well, the parties willing. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898); Ohio ex rel. Poporici v. Alger, 280 U.S. 379 (1930).

in declining original jurisdiction of an action by a State to enforce a judgment for a precuniary penalty awarded by one of its own courts.[1050] Noting that § 13 of the Judiciary Act had referred to "controversies of a civil nature," Justice Gray declared that it "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."[1051]

However, another clause of § 13 of the Judiciary Act of 1789 was not accorded the same presumption by Chief Justice Marshall, who, interpreting it as giving the Court power to issue a writ of mandamus on an original proceeding, declared that as Congress could not restrict the original jurisdiction neither could it enlarge it and pronounced the clause void.[1052] While the Chief Justice's interpretation of the meaning of the clause may be questioned, no one has questioned the constitutional principle thereby proclaimed. Although the rule deprives Congress of power to expand or contract the jurisdiction, it allows a considerable latitude of interpretation to the Court itself. In some cases, as in *Missouri v. Holland*,[1053] the Court has manifested a tendency toward a liberal construction of its original jurisdiction, but the more usual view is that "our original jurisdiction should be invoked sparingly."[1054] Original jurisdiction "is limited and manifestly to be sparingly exercised, and should not be expanded by construction."[1055] Exercise of its original jurisdiction is not obligatory on the Court but discretionary, to be determined on a case-by-case basis on grounds of practical necessity.[1056] It is to be honored "only in appropriate cases. And the

[1050] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[1051] Id., 297. See also the dictum in Cohens v. Virginia, 6 Wheat. (19 U.S.) 264, 398–399 (1821); Chisholm v. Georgia, 2 Dall. (2 U.S.) 419, 431–432 (1793).

[1052] Marbury v. Madison, 1 Cr. (5 U.S.) 137 (1803). The Chief Justice declared that "a negative or exclusive sense" had to be given to the affirmative enunciation of the cases to which original jurisdiction extends. Id., 174. This exclusive interpretation has been since followed. Ex parte Bollman, 4 Cr. (8 U.S.) 75 (1807); New Jersey v. New York, 5 Pet. (30 U.S.) 284 (1831); Ex parte Barry, 2 How. (43 U.S.) 65 (1844); Ex parte Vallandigham, 1 Wall. (68 U.S.) 243, 252 (1864); Ex parte Yerger, 8 Wall. (75 U.S.) 85, 98 (1869). In the curious case of Ex parte Levitt, 302 U.S. 633 (1937), the Court was asked to unseat Justice Black on the ground that his appointment violated Article I, § 6, cl.2. Although it rejected petitioner's application, the Court did not point out that it was being asked to assume original jurisdiction in violation of *Marbury v. Madison*.

[1053] 252 U.S. 416 (1920). See also South Carolina v. Katzenbach, 383 U.S. 301 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970).

[1054] Utah v. United States, 394 U.S. 89, 95 (1968).

[1055] California v. Southern Pacific Co., 157 U.S. 229, 261 (1895). Indeed, the use of the word "sparingly" in this context is all but ubiquitous. E.g., Wyoming v. Oklahoma, 112 S.Ct. 789, 798–800 (1992); Maryland v. Louisiana, 451 U.S. 725, 739 (1981); United States v. Nevada, 412 U.S. 534, 538 (1973).

[1056] Texas v. New Mexico, 462 U.S. 554, 570 (1983).

question of what is appropriate concerns of course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."[1057] But where claims are of sufficient "seriousness and dignity," in which resolution by the judiciary is of substantial concern, the Court will hear them.[1058]

## POWER OF CONGRESS TO CONTROL THE FEDERAL COURTS

### The Theory of Plenary Congressional Control

Unlike its original jurisdiction, the appellate jurisdiction of the Supreme Court is subject to "exceptions and regulations" prescribed by Congress, and the jurisdiction of the inferior federal courts is subject to congressional prescription. Additionally, Congress has power to regulate modes and practices of proceeding on the part of the inferior federal courts. Whether there are limitations to the exercise of these congressional powers, and what the limitations may be, are matters that have vexed scholarly and judicial interpretation over the years, inasmuch as congressional displeasure with judicial decisions has sometimes led to successful efforts to "curb" the courts and more frequently to proposed but unsuccessful curbs.[1059] Supreme Court holdings establish clearly the

[1057] Illinois v. City of Milwaukee, 406 U.S. 91, 93–94 (1972). In this case, and in Washington v. General Motors Corp., 406 U.S. 109 (1972), and Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), the Court declined to permit adjudication of environmental pollution cases manifestly within its original jurisdiction because the nature of the cases required the resolution of complex, novel, and technical factual questions not suitable for resolution at the Court's level as a matter of initial decision but which could be brought in the lower federal courts. Not all such cases, however, were barred. Vermont v. New York 406 U.S. 186 (1972) (granting leave to file complaint). In other instances, notably involving "political questions," cf. Massachusetts v. Mellon, 262 U.S. 447 (1923), the Court has simply refused permission for parties to file bills of complaint without hearing them on the issue or producing an opinion. E.g., Massachusetts v. Laird, 400 U.S. 886 (1970) (constitutionality of United States action in Indochina); Delaware v. New York, 385 U.S. 895 (1966) (constitutionality of electoral college under one man, one vote rule).

[1058] Wyoming v. Oklahoma, 112 S.Ct. 789, 798–799 (1982). The principles are the same whether the Court's jurisdiction is exclusive or concurrent. Texas v. New Mexico, 462 U.S. 554 (1983); California v. West Virginia, 454 U.S. 1027 (1981); Arizona v. New Mexico, 425 U.S. 794 (1976).

[1059] A classic but now dated study is Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1, 161 (1913). The most comprehensive consideration of the constitutional issue is Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953), reprinted in HART & WECHSLER, op. cit., n. 250, 393.

breadth of congressional power, and numerous dicta assert an even broader power, but that Congress may through the exercise of its powers vitiate and overturn constitutional decisions and restrain the exercise of constitutional rights is an assertion often made but not sustained by any decision of the Court.

***Appellate Jurisdiction.***—In *Wiscart v. D'Auchy*,[1060] the issue was whether the statutory authorization for the Supreme Court to review on writ of error circuit court decisions in "civil actions" gave it power to review admiralty cases.[1061] A majority of the Court decided that admiralty cases were "civil actions" and thus reviewable; in the course of decision, it was said that "[i]f Congress had provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[1062] Much the same thought was soon to be expressed by Chief Justice Marshall, although he seems to have felt that in the absence of congressional authorization, the Court's appellate jurisdiction would have been measured by the constitutional grant. "Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court, as ordained by the constitution; and in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished.

"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."[1063] Later Justices viewed the matter differently than had Marshall. "By the constitution of the United States," it was said in one opinion, "the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress."[1064] In order for a case to come within its appellate jurisdiction, the Court has said, "two things must concur: the Con-

[1060] 3 Dall. (3 U.S) 321 (1796).

[1061] Judiciary Act of 1789, § 22, 1 Stat. 84.

[1062] Wiscart v. D'Auchy, 3 Dall. (3 U.S.) 321, 327 (1796). The dissent thought that admiralty cases were not "civil actions" and thus that there was no appellate review. Id., 326–327. See also Clarke v. Bazadone, 1 Cr. (5 U.S.) 212 (1803); Turner v. Bank of North America, 4 Dall. (4 U.S.) 8 (1799).

[1063] Durousseau v. United States, 6 Cr. (10 U.S.) 307, 313–314 (1810). "Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." Ex parte Bollman, 4 Cr. (4 U.S.) 75, 93 (1807) (Chief Justice Marshall). Marshall had earlier expressed his *Durousseau* thoughts in United States v. More, 3 Cr. (7 U.S.) 159 (1805).

[1064] Barry v. Mercein, 5 How. (46 U.S.) 103, 119 (1847) (case held nonreviewable because minimum jurisdictional amount not alleged).

stitution must give the capacity to take it, and an act of Congress must supply the requisite authority." Moreover, "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation."[1065]

This congressional power, conferred by the language of Article III, § 2, cl. 2, which provides that all jurisdiction not original is to be appellate, "with such Exceptions, and under such Regulations as the Congress shall make," has been utilized to forestall a decision which the congressional majority assumed would be adverse to its course of action. In *Ex parte McCardle*,[1066] the Court accepted review on *certiorari* of a denial of a petition for a writ of *habeas corpus* by the circuit court; the petition was by a civilian convicted by a military commission of acts obstructing Reconstruction. Anticipating that the Court might void, or at least undermine, congressional reconstruction of the Confederate States, Congress enacted over the President's veto a provision repealing the act which authorized the appeal McCardle had taken.[1067] Although the Court had already heard argument on the merits, it then dismissed for want of jurisdiction.[1068] "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

"What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the

[1065] Daniels v. Railroad Co., 3 Wall. (70 U.S.) 250, 254 (1865) (case held nonreviewable because certificate of division in circuit did not set forth questions in dispute as provided by statute.)

[1066] 6 Wall. (73 U.S.) 318 (1868). That Congress' apprehensions might have had a basis in fact, see C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. VI, PT. I—RECONSTRUCTION AND REUNION 1864–88 (New York: 1971), 493–495. *McCardle* is fully reviewed in id., 433–514.

[1067] By the Act of February 5, 1867, § 1, 14 Stat. 386, Congress had authorized appeals to the Supreme Court from circuit court decisions denying *habeas corpus*. Previous to this statute, the Court's jurisdiction to review *habeas corpus* decisions, based in § 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat fuzzily conceived. Compare United States v. Hamilton, 3 Dall. (3 U.S.) 17 (1795), and Ex parte Burford, 3 Cr. (7 U.S.) 448 (1806), with Ex parte Bollman, 4 Cr. (8 U.S.) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885, 23 Stat. 437.

[1068] Ex parte McCardle, 7 Wall. (74 U.S.) 506 (1869). In the course of the opinion, Chief Justice Chase speculated about the Court's power in the absence of any legislation in tones reminiscent of Marshall's comments. Id., 513.

cause."[1069] Although *McCardle* grew out of the stresses of Reconstruction, the principle there applied has been similarly affirmed and applied in later cases.[1070]

***Jurisdiction of the Inferior Federal Courts.***—The Framers, as we have seen,[1071] divided with regard to the necessity of courts inferior to the Supreme Court, simply authorized Congress to create such courts, in which, then, judicial power "shall be vested" and to which nine classes of cases and controversies "shall extend."[1072] While Justice Story deemed it imperative of Congress to create inferior federal courts and, when they had been created, to vest them with all the jurisdiction they were capable of receiving,[1073] the First Congress acted upon a wholly different theory. Inferior courts were created, but jurisdiction generally over cases involving the Constitution, laws, and treaties of the United States was not given them, diversity jurisdiction was limited by a minimal jurisdictional

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[1069] Id., 514.

[1070] Thus, see Justice Frankfurter's remarks in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1948) (dissenting): "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*." In The Francis Wright, 105 U.S. 381, 385 386 (1882), upholding Congress' power to confine Supreme Court review in admiralty cases to questions of law, the Court said: "[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to reexamination and review, while others are not." See also Luckenbuch S. S. Co. v. United States, 272 U.S. 533, 537 (1926); American Construction Co. v. Jacksonville, T. & K.W. RY., 148 U.S. 372, 378 (1893); United States v. Bitty, 208 U.S. 393 (1908); United States v. Young, 94 U.S. 258 (1876). Numerous restrictions on the exercise of appellate jurisdiction have been upheld. E.g., Congress for a hundred years did not provide for a right of appeal to the Supreme Court in criminal cases, except upon a certification of division by the circuit court: at first appeal was provided in capital cases and then in others. F. FRANKFURTER & J. LANDIS, op. cit., n. 12, 79, 109–120. Other limitations noted heretofore include minimum jurisdictional amounts, restrictions of review to questions of law and to questions certified from the circuits, and the scope of review of state court decisions of federal constitutional questions. See Walker v. Taylor, 5 How. (46 U.S.) 64 (1847). Though *McCardle* is the only case in which Congress successfully forestalled an expected decision by shutting off jurisdiction, other cases have been cut off while pending on appeal, either inadvertently, Insurance Co. v. Ritchie, 5 Wall. (72 U.S.) 541 (1866), or intentionally, Railroad Co. v. Grant, 98 U.S. 398 (1878), by raising the requirements for jurisdiction without a reservation for pending cases. See also Bruner v. United States, 343 U.S. 112 (1952); District of Columbia v. Eslin, 183 U.S. 62 (1901).

[1071] *Supra*, pp. 597–598, 599–600.

[1072] Article III, § 1, 2.

[1073] Martin v. Hunter's Lessee. 1 Wheat. (14 U.S.) 304, 374 (1816). For an effort to reframe Justice Story's position in modern analytical terms, see the writings of Professors Amar and Clinton, *supra*, n. 134; *infra*, n. 1098.

amount requirement and by a prohibition on creation of diversity through assignments, equity jurisdiction was limited to those cases where a "plain, adequate, and complete remedy" could not be had at law.[1074] This care for detail in conferring jurisdiction upon the inferior federal courts bespoke a conviction by Members of Congress that it was within their power to confer or to withhold jurisdiction at their discretion. The cases have generally sustained this view.

Thus, in *Turner v. Bank of North America,*[1075] the issue was the jurisdiction of the federal courts in a suit to recover on a promissory note between two citizens of the same State but in which the note had been assigned to a citizen of a second State so that suit could be brought in federal court under its diversity jurisdiction, a course of action prohibited by § 11 of the Judiciary Act of 1789.[1076] Counsel for the bank argued that the grant of judicial power by the Constitution was a direct grant of jurisdiction, provoking from Chief Justice Ellsworth a considered doubt[1077] and from Justice Chase a firm rejection. "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution: but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant."[1078] Applying § 11, the Court held that the circuit court had lacked jurisdiction.

Chief Justice Marshall himself soon made similar assertions,[1079] and the early decisions of the Court continued to be

[1074] Judiciary Act of 1789, 1 Stat. 73. See Warren, *New Light on the History of the Judiciary Act of 1789,* 37 Harv. L. Rev. 49 (1923). A modern study of the first Judiciary Act that demonstrates the congressional belief in discretion to structure jurisdiction is Casto, *The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction,* 26 B. C. L. Rev. 1101 (1985).

[1075] 4 Dall. (4 U.S.) 8 (1799).

[1076] "'N]or shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 79.

[1077] Turner v. Bank of North America, 4 Dall. (4 U.S.) 8, 10 (1799).

[1078] Ibid.

[1079] In Ex parte Bollman, 4 Cr. (8 U.S.) 75, 93 (1807), Marshall observed that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

sprinkled with assumptions that the power of Congress to create inferior federal courts necessarily implied "the power to limit jurisdiction of those Courts to particular objects."[1080] In *Cary v. Curtis,*[1081] a statute making final the decision of the Secretary of the Treasury in certain tax disputes was challenged as an unconstitutional deprivation of the judicial power of the courts. The Court decided otherwise. "[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."[1082] Five years later, the validity of the assignee clause of the Judiciary Act of 1789[1083] was placed in issue in *Sheldon v. Sill,*[1084] in which diversity of citizenship had been created by assignment of a negotiable instrument. It was argued that inasmuch as the right of a citizen of any State to sue citizens of another flowed directly from Article III, Congress could not restrict that right. Unanimously, the Court rejected these contentions and held that because the Constitution did not create inferior federal courts but rather authorized Congress to create them, Congress was also empowered to define their jurisdiction and to withhold jurisdiction of any of the enumerated cases and controversies in Article III. The case and the principle has been cited and reaffirmed numerous times,[1085] and has been quite recently applied.[1086]

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[1080] United States v. Hudson & Goodwin, 7 Cr. (11 U.S.) 32, 33 (1812). Justice Johnson continued: "All other Courts [beside the Supreme Court] created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer." See also Rhode Island v. Massachusetts, 12 Pet. (37 U.S.) 657, 721–722 (1838).

[1081] 3 How. (44 U.S.) 236 (1845).

[1082] Id., 244–245. Justices McLean and Story dissented, arguing that the right to construe the law in all matters of controversy is of the essence of judicial power, Id., 264.

[1083] *Supra,* n. 1076.

[1084] 8 How. (49 U.S.) 441 (1850).

[1085] E.g., Kline v. Burke Construction Co., 260 U.S. 226, 233–234 (1922); Ladew v. Tennessee Copper Co., 218 U.S. 357, 358 (1910); Venner v. Great Northern R. Co., 209 U.S. 24, 35 (1908); Kentucky v. Powers, 201 U.S. 1, 24 (1906); Stevenson v. Fain, 195 U.S. 165, 167 (1904); Plaquemines Fruit Co. v. Henderson, 170 U.S. 511, 513–521 (1898); The Mayor v. Cooper, 6 Wall. (73 U.S.) 247, 251–252 (1868).

[1086] By the Voting Rights Act of 1965, Congress required covered States that wished to be relieved of coverage to bring actions to this effect in the District Court

***Congressional Control Over Writs and Processes.***—The Judiciary Act of 1789 contained numerous provisions relating to the times and places for holding court, even of the Supreme Court, to times of adjournment, appointment of officers, issuance of writs, citations for contempt, and many other matters which it might be supposed courts had some authority of their own to regulate.[1087] The power to enjoin governmental and private action has frequently been curbed by Congress, especially as the action has involved the power of taxation at either the federal or state level.[1088] Though the courts have variously interpreted these restrictions,[1089] they have not denied the power to impose them.

Reacting to judicial abuse of injunctions in labor disputes,[1090] Congress in 1932 enacted the Norris-La Guardia Act which forbade the issuance of injunctions in labor disputes except through compliance with a lengthy hearing and fact-finding process which required the district judge to determine that only through the injunctive process could irremediable harm through illegal conduct be prevented.[1091] The Court seemingly experienced no difficulty upholding the Act,[1092] and it has liberally applied it through the years.[1093]

Congress' power to confer, withhold, and restrict jurisdiction is clearly revealed in the Emergency Price Control Act of 1942[1094] and in the cases arising from it. Fearful that the price control pro-

of the District of Columbia. In South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966), Chief Justice Warren for the Court said: "Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals." See also Palmore v. United States, 411 U.S. 389, 400–402 (1973); Swain v. Pressley, 430 U.S. 372 (1977). And see Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973), *aff'd.*, 523 F.2d 75 (9th Cir.), CERT. DEN., 424 U.S. 948 (1976).

[1087] 1 Stat. 73. For a comprehensive discussion with itemization, see Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers,* 37 Harv. L. Rev. 1010 (1924).

[1088] The Act of March 2, 1867, 10, 14 Stat. 475, as amended, now 26 U.S.C. § 7421 (federal taxes): Act of August 21, 1937, 50 Stat. 738, 28 U.S.C. § 1341 (state taxes). See also Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. § 1342 (state rate making).

[1089] Compare Snyder v. Marks, 109 U.S. 189 (1883), with Dodge v. Brady, 240 U.S. 122 (1916); with Allen v. Regents, 304 U.S. 439 (1938).

[1090] F. FRANKFURTER & I. GREENE, THE LABOR INJUNCTION (New York: 1930).

[1091] 47 Stat. 70 (1932), 29 U.S.C. §§ 101–115.

[1092] In Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938), the Court simply declared: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."

[1093] E.g., New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938); Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co., 353 U.S. 30 (1957); Boys Market v. Retail Clerks Union, 398 U.S. 235 (1970).

[1094] 56 Stat. 23 (1942).

gram might be nullified by injunctions, Congress provided for a special court in which persons could challenge the validity of price regulations issued by the Government with appeal from the Emergency Court of Appeals to the Supreme Court. The basic consitutionality of the Act was sustained in *Lockerty v. Phillips.*[1095] In *Yakus v. United States,*[1096] the Court upheld the provision of the Act which conferred exclusive jurisdiction on the special court to hear challenges to any order or regulation and foreclosed a plea of invalidity of any such regulation or order as a defense to a criminal proceeding under the Act in the regular district courts. Although Justice Rutledge protested in dissent that this provision conferred jurisdiction on district courts from which essential elements of the judicial power had been abstracted,[1097] Chief Justice Stone for the Court declared that the provision presented no novel constitutional issue.

**The Theory Reconsidered**

Contra

Despite the breadth of the language of many of the previously cited cases, the actual holdings constitute something less than an affirmance of plenary congressional power to do anything desired by manipulation of jurisdiction and indeed the cases reflect certain limitations. Setting to one side various formulations, such as mandatory vesting of jurisdiction,[1098] inherent judicial power,[1099] and

[1095] 319 U.S. 182 (1943).

[1096] 321 U.S. 414 (1944).

[1097] Id., 468. In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), purportedly in reliance on *Yakus* and other cases, the Court held that a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order had been denied. A statutory scheme similar to that in *Yakus* was before the Court in Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978), but statutory construction enabled the Court to pass by constitutional issues that were not perceived to be insignificant. See esp. id., 289 (Justice Powell concurring). See also Harrison v. PPG Industries, 446 U.S. 578 (1980), and id., 594 (Justice Powell concurring).

[1098] This was Justice Story's theory propounded in Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304, 329–336 (1816). Nevertheless, Story apparently did not believe that the constitutional bestowal of jurisdiction was self executing and accepted the necessity of statutory conferral. White v. Fenner, 29 Fed. Cas. 1015 (No. 17,547) (C.C.D.R.I. 1818) (Justice Story). In the present day, it has been argued that the presence in the jurisdictional grant provisions of Article III of the word "all" before the subject-matter grants - federal question, admiralty, public ambassadors - mandates federal court review at some level of these cases, whereas congressional discretion exists with respect to party-defined jurisdiction - such as diversity. Amar, *A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction,* 65 B. U. L. Rev. 205 (1985); Amar, *The Two-Tiered Structure of the Judiciary Act of 1789,* 138 U. Pa. L. Rev. 1499 (1990). Rebuttal articles include Meltzer, *The History and Structure of Article III,* id., 1569; Redish, *Text, Structure, and Common Sense in the Interpretation of Article III,* id., 1633; and a response by Amar, id., 1651. An approach similar to Professor Amar's is Clinton, *A Mandatory View of Federal Jurisdiction: A Guided Quest for the Original Understanding of Article III,* 132

a theory, variously expressed, that the Supreme Court has "essential constitutional functions" of judicial review that Congress may not impair through jurisdictional limitations,[1100] which lack textual and subsequent judicial support, one can see nonetheless the possibilities of restrictions on congressional power flowing from such basic constitutional underpinnings as express prohibitions, separation of powers, and the nature of the judicial function.[1101] Whether because of the plethora of scholarly writing contesting the existence of unlimited congressional power or because of another reason, the Court of late has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues and construing statutes so as not to deny jurisdiction.[1102]

*Ex parte McCardle*[1103] marks the furtherest advance of congressional imposition of its will on the federal courts, and it is significant because the curb related to the availability of the writ of *habeas corpus,* which is marked out with special recognition by the Constitution.[1104]

But how far did *McCardle* actually reach? In concluding its opinion, the Court carefully observed: "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus,* is de-

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U. Pa. L. Rev. 741 (1984); Clinton, *Early Implementation and Departures from the Constitutional Plan,* 86 Colum. L. Rev. 1515 (1986). Though perhaps persuasive as an original interpretation, both theories confront a large number of holdings and dicta as well as the understandings of the early Congresses revealed in their actions. See Casto, *supra,* n. 1074.

[1099] Justice Brewer in his opinion for the Court in United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), came close to asserting an independent, inherent power of the federal courts, at least in equity. See also Paine Lumber Co. v. Neal, 244 U.S. 459, 473, 475–476 (1917) (Justice Pitney dissenting). The acceptance by the Court of the limitations of the Norris-LaGuardia Act, among other decisions, contradicts these assertions.

[1100] The theory was apparently first developed in Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court,* 109 U. Pa. L. rev. 157 (1960). See also Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction,* 27 Vill. L. Rev. 929 (1981–82). The theory was endorsed by Attorney General William French Smith as the view of the Department of Justice. 128 CONG. REC. 9093–9097 (1982) (Letter to Hon. Strom Thurmond).

[1101] An extraordinary amount of writing has been addressed to the issue, only a fraction of which is touched on here. See HART & WECHSLER, op. cit., n. 250, 362–424.

[1102] Johnson v. Robison, 415 U.S. 361, 366–367 (1974); Weinberger v. Salfi, 422 U.S. 749, 762 (1975); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n. 12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988). In the last cited case, Justice Scalia attacked the reservation and argued for nearly complete congressional discretion. Id., 611–615 (concurring).

[1103] 7 Wall (74 U.S.) 506 (1869). For the definitive analysis of the case, see Van Alstyne, *A Critical Guide to Ex Parte McCardle,* 15 Ariz. L. Rev. 229 (1973).

[1104] Article I, § 9, cl. 2.

nied. But this is an error. The act of 1868 does not exempt from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."[1105] A year later, in *Ex parte Yerger,*[1106] the Court held that it did have authority under the Judiciary Act of 1789 to review on *certiorari* a denial by a circuit court of a petition for writ of *habeas corpus* on behalf of one held by the military in the South. It thus remains unclear whether the Court would have followed its language suggesting plenary congressional control if the effect had been to deny absolutely an appeal from a denial of a writ of *habeas corpus.*[1107]

Another Reconstruction Congress attempt to curb the judiciary failed in *United States v. Klein,*[1108] in which a statute, couched in jurisdictional terms, which attempted to set aside both the effect of a presidential pardon and the judicial effectuation of such a pardon was voided.[1109] The statute declared that no pardon was to be admissible in evidence in support of any claim against the United States in the Court of Claims for the return of confiscated property of Confederates nor, if already put in evidence in a pending case, should it be considered on behalf of the claimant by the Court of

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[1105] Ex parte McCardle, 7 Wall. (74 U.S.) 506, 515 (1869).

[1106] 8 Wall. (75 U.S.) 85 (1869). *Yerger* is fully reviewed in C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. VI, PT. I—RECONSTRUCTION AND REUNION, 1864–88 (New York: 1971), 558–618.

[1107] Cf. Eisentrager v. Forrestal, 174 F. 2d 961, 966 (D.C.Cir. 1949), *revd. on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950). Justice Douglas, with whom Justice Black joined, said in Glidden Co. v. Zdanok, 370 U.S. 530, 605 n. 11 (1962) (dissenting opinion): "There is a serious question whether the *McCardle* case could command a majority view today." Justice Harlan, however, cited *McCardle* with apparent approval of its holding, id., 567–568, while noting that Congress' "authority is not, of course, unlimited." Id., 568. *McCardle* was cited approvingly in Bruner v. United States, 343 U.S. 112, 117 n. 8 (1952), as illustrating the rule "that when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law. . . ."

[1108] 13 Wall. (80 U.S.) 128 (1872). See C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. VI, PT. I—RECONSTRUCTION AND REUNION 1864 88 (New York: 1971), 558 618. The seminal discussion of *Klein* may be found in Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited,* 1981 Wisc. L. Rev. 1189. While he granted that *Klein* is limited insofar as its bearing on jurisdictional limitation *per se* is concerned, he cited an ambiguous holding in Armstron v. United States, 13 Wall. (80 U.S.) 154 (1872), as in fact a judicial invalidation of a jurisdictional limitation. Young, id., 1222–1223 n. 179.

[1109] Congress by the Act of July 17, 1862, §§5, 13, authorized the confiscation of property of those persons in rebellion and authorized the President to issue pardons on such conditions as he deemed expedient, the latter provision being unnecessary in light of Article II, §2, cl. 1. The President's pardons all provided for restoration of property, except slaves, and in United States v. Padelford, 9 Wall. (76 U.S.) 531 (1870), the Court held the claimant entitled to the return of his property on the basis of his pardon. Congress thereupon enacted the legislation in question. 16 Stat. 235 (1870).

Claims or by the Supreme Court on appeal. Proof of loyalty was required to be made according to provisions of certain congressional enactments and when judgment had already been rendered on other proof of loyalty the Supreme Court on appeal should have no further jurisdiction and should dismiss for want of jurisdiction. Moreover, it was provided that the recitation in any pardon which had been received that the claimant had taken part in the rebellion was to be taken as conclusive evidence that the claimant had been disloyal and was not entitled to regain his property.

The Court began by reaffirming that Congress controlled the existence of the inferior federal courts and the jurisdiction vested in them and the appellate jurisdiction of the Supreme Court. "But the language of this provision shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. . . . It is evident . . . that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The Court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[1110] The statute was void for two reasons; it "infring[ed] the constitutional power of the Executive,"[1111] and it "prescrib[ed] a rule for the decision of a cause in a particular way."[1112] *Klein* thus stands for the proposition that Congress may not violate the principle of separation of powers[1113] and that it may not accomplish certain forbidden substantive acts by casting them in jurisdictional terms.[1114]

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Other restraints on congressional power over the federal courts may be gleaned from the opinion in the much-disputed *Crowell v.*

[1110] United States v. Klein, 13 Wall. (80 U.S.) 128, 145 146 (1872).

[1111] Id., 147.

[1112] Id., 146.

[1113] Id., 147. For an extensive discussion of *Klein,* see United States v. Sioux Nation, 448 U.S. 371, 391–405 (1980), and id., 424, 427–434 (Justice Rehnquist dissenting). See also Pope v. United States, 323 U.S. 1, 8–9 (1944); Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962) (Justice Harlan). In Robertson v. Seattle Audubon Society, 112 S.Ct. 1407 (1992), the 9th Circuit had held unconstitutional under *Klein* a statute that it construed to deny the federal courts power to construe the law, but the Supreme Court held that Congress had *changed* the law that the courts were to apply. The Court declined to consider whether *Klein* was properly to be read as voiding a law "because it directed decisions in pending cases without amending any law." Id., 1414.

[1114] United States v. Klein, 13 Wall. (80 U.S.) 128, 147 (1872).

*Benson.*[1115] In an 1856 case, the Court distinguished between matters of private right which from their nature were the subject of a suit at the common law, equity, or admiralty and which cannot be withdrawn from judicial cognizance and those matters of public right which, though susceptible of judicial determination, did not require it and which might or might not be brought within judicial cognizance.[1116] What this might mean was elaborated in *Crowell v. Benson,*[1117] involving the finality to be accorded administrative findings of jurisdictional facts in compensation cases. In holding that an employer was entitled to a trial *de novo* of the constitutional jurisdictional facts of the matter of the employer-employee relationship and of the occurrence of the injury in interstate commerce, Chief Justice Hughes fused the due process clause of the Fifth Amendment and Article III but emphasized that the issue ultimately was "rather a question of the appropriate maintenance of the Federal judicial power" and "whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." The answer was stated broadly. "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of law and fact, necessary to the performance of that supreme function. . . . We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."[1118]

It is not at all clear that, in this respect, *Crowell v. Benson* remains good law. It has never been overruled, and it has been cited

[1115] 285 U.S. 22 (1932). See also Ng Fung Ho v. White, 259 U.S. 276 (1922); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); St. Joseph Stock Yard Co. v. United States, 298 U.S. 38 (1936).

[1116] Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. (59 U.S.) 272 (1856).

[1117] 285 U.S. 22 (1932). Justices Brandeis, Stone, and Roberts dissented.

[1118] Id., 56, 60, 64.

by several Justices approvingly,[1119] but the Court has never applied the principle to control another case.[1120]

***Express Constitutional Restrictions on Congress.***—"[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas;" Justice Black said in a different context, "these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution."[1121] The Supreme Court has had no occasion to deal with this principle in the context of Congress' power over its jurisdiction and the jurisdiction of the inferior federal courts, but the passage of the Portal-to-Portal Act[1122] presented the lower courts such an opportunity. The Act extinguished back-pay claims growing out of several Supreme Court interpretations of the Fair Labor Standards Act; it also provided that no court should have jurisdiction to enforce any claim arising from these decisions. While some district courts sustained the Act on the basis of the withdrawal of jurisdiction, this action was disapproved by the Courts of Appeals which indicated that the withdrawal of jurisdiction would be ineffective if the extinguishment of the claims as a substantive matter was invalid. "We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due

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[1119] See Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76–87 (1982) (plurality opinion), and id., 100–103, 109–111 (Justice White dissenting) (discussing the due process/Article III basis of *Crowell*). Both the plurality and the dissent agreed that later cases had "undermined" the constitutional/jurisdictional fact analysis. Id., 82, n. 34; 110 n. 12. For other discussions, see Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (Justice Brennan announcing judgment of the Court, joined by Justice Goldberg); Pickering v. Board of Education, 391 U.S. 563, 578–579 (1968); Agosto v. INS, 436 U.S. 748, 753 (1978); United States v. Raddatz, 447 U.S. 667, 682–684 (1980), and id., 707–712 (Justice Marshall dissenting).

[1120] Compare Permian Basin Area Rate Cases, 390 U.S. 747, 767, 792 (1968); Cordillo v. Liberty Mutual Ins. Co., 330 U.S. 469 (1947); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). Justice Frankfurter was extremely critical of *Crowell*. Estep v. United States, 327 U.S. 114, 142 (1946); City of Yonkers v. United States, 320 U.S. 685 (1944).

[1121] Williams v. Rhodes, 393 U.S. 23, 29 (1968) (opinion of the Court.) The elder Justice Harlan perhaps had the same thought in mind when he said that, with regard to Congress' power over jurisdiction, "what such exceptions and regulations should be it is for Congress, in its wisdom to establish, having of course due regard to all the Constitution." United States v. Bitty, 208 U.S. 393, 399–400 (1908).

[1122] 52 Stat. 1060, 29 U.S.C. § 201.

process of law or to take private property without just compensation."[1123]

***Conclusion.***—There thus remains a measure of doubt that Congress' power over the federal courts is as plenary as some of the Court's language suggests it is. Congress has a vast amount of discretion in conferring and withdrawing and structuring the original and appellate jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court; so much is clear from the practice since 1789 and the holdings of many Court decisions. That its power extends to accomplishing by means of its control over jurisdiction actions which it could not do directly by substantive enactment is by no means clear from the text of the Constitution nor from the cases.

## FEDERAL-STATE COURT RELATIONS

### Problems Raised by Concurrency

The Constitution established a system of government in which total power, sovereignty, was not unequivocally lodged in one level of government. In Chief Justice Marshall's words, "our complex system [presents] the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union. . . ." Naturally, in such a system, "contests respecting power must arise."[1124] Contests respecting power may frequently arise in a federal system with dual structures of courts exercising concurrent jurisdiction in a number of classes of cases. Too, the possibilities of frictions grow out of the facts that one set of courts may interfere directly or indirectly with the other through injunctive and declaratory processes, through the use of *habeas corpus* and removal to release persons from the custody of the other set, and through the refusal by state courts to be bound by decisions of the United States Supreme Court. The relations between federal and state courts are governed in part by constitutional law, with respect, say, to state court interference with federal courts and

[1123] Battaglia v. General Motors Corp., 169 F. 2d 254, 257 (2d Cir.), *cert. den.* 335 U.S. 887 (1948) (Judge Chase). See also Seese v. Bethlehem Steel Co., 168 F. 2d 58, 65 (4th Cir. 1948) (Chief Judge Parker). For recent dicta, see Johnson v. Robison, 415 U.S. 361, 366–367 (1974); Weinberger v. Salfi, 422 U.S. 749, 761–762 (1975); Territory of Guam v. Olsen, 431 U.S. 195, 201–202, 204 (1977); Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n. 12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988); but see id., 611–615 (Justice Scalia dissenting). Note the relevance of United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[1124] Gibbons v. Ogden. 9 Wheat. (22 U.S.) 1.204–205 (1824).

## MAJOR LEGISLATION USING ARTICLE III, SEC. 2 POWER IN 107TH CONGRESS (SPECIFIC LANGUAGE EXAMPLES):

- 2002 SUPPLEMENTAL APPROPRIATIONS ACT FOR FURTHER RECOVERY FROM AND RESPONSE TO TERRORIST ATTACKS ON THE UNITED STATES (PL 107-206)

  **Daschle Language** protecting Black Hills Forest from NEPA and other environmental laws:

  **"**Due to the extraordinary circumstances present here, actions authorized by this section shall proceed immediately… Any actions authorized by this section **shall not be subject to judicial review by any court of the United States."**

- INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2003 (PL 107-306)

  Sec 502; '(B)

  "**Judicial review shall not be available** in the manner provided for under subparagraph (A) as follows:"

- TERRORISM RISK INSURANCE ACT OF 2002 (PL 107-297)

  Sec 102; Sub Sec. C

  "Any certification of, or determination not to certify, an act as an act of terrorism under this paragraph shall be final, and shall **not be subject to judicial review."**

## FURTHER EXAMPLES OF 107TH CONGRESS LEGISLATION (PASSED) USING ARTICLE III, SEC. 2 POWERS:

- SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT (PL 107-118)
- USA PATRIOT ACT (PL 107-056)
- 21ST CENTURY DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT (PL 107-273)
- ANDEAN TRADE PROMOTION AND DRUG ERADICATION ACT (PL 107-210)
- AMERICAN SERVICEMEMBERS' PROTECTION ACT OF 2002 (Pl 107-206)
- PUBLIC HEALTH SECURITY AND BIOTERRORISM RESPONSE ACT OF 2001 (PL 107-188)
- AVIATION SECURITY ACT (PL 107-071)
- TO EXPEDITE THE CONSTRUCTION OF THE WORLD WAR II MEMORIAL IN THE DISTRICT OF COLUMBIA (PL 107-011)
- SMALL BUSINESS INVESTMENT COMPANY AMENDMENTS ACT OF 2001 (PL 107-100)

> When the Congress first met, Mr. Cushing made a motion that it should be opened with prayer. It was opposed by Mr. Jay of New York and Mr. Rutledge of South Carolina because we were so divided in religious sentiments, some Episcopalians, some Quakers, some Anabaptists, some Presbyterians, and some Congregationalists, that we could not join in the same act of worship. [78]

In theory, it appeared that public prayer would be divisive; yet, as confirmed by the remainder of John Adams' letter, the theory was disproved when the practice became reality:

> Mr. Samuel Adams arose and said he was no bigot, and could hear a prayer from a gentleman of piety and virtue. . . . Accordingly, next morning. . . . Mr. Duché . . . struck out into an extemporary prayer, which filled the bosom of every man present. I must confess I never heard a better prayer, or one so well pronounced. . . . It has had an excellent effect upon everybody here. [79]

Daniel Webster, in arguments before the U. S. Supreme Court, described that same event and reminded the Court of the unifying power of prayer. [80] This issue was also addressed in *Lee* v. *Weisman* (1992) by Justices Scalia, Rehnquist, White, and Thomas, who declared:

> The founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration — no, an affection — for one another than voluntarily joining in prayer together, to God whom they all worship and seek. . . . The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that can not be replicated. To deprive our society of that important unifying mechanism . . . is as senseless in policy as it is unsupported in law. [81]

Significantly, the support for prayer has been growing over recent years as the public has become even more unified on this issue. In fact, as borne out by numerous public polls, prayer is a unifying, not a divisive, force.

For example, in 1985, 69 percent of Americans supported school prayer; [82] by 1991, that number had increased to 78 percent. [83] Similarly, in 1988, 68 percent of Americans supported a constitutional amendment to reinstate school prayer; [84] by 1994, that number had risen to 73 percent, [85] and by 2001 (*before* the terrorist attacks) it had climbed to 78 percent. [86]



Furthermore, the public is strongly unified on the subject of spoken — not silent — prayer. In 1995, the support for *spoken* prayers by students of all faiths was at 73 percent and by 2001 (*before* the terrorist attacks) it was at 77 percent. [87] Additionally, 80 percent believe that students should be able to recite a spoken prayer at graduations, [88] and support for other types of visible religious expressions at schools remains equally high. [89]

Despite such high numbers, these activities continue to be impermissible — and unreasonably so, for on the issue of school prayer, there are only two possibilities: either there will be voluntary prayer in school or there will not; there is no middle ground; the supporters of only one position will prevail. Which position should prevail? The theoretical answer is obvious, but the actual answer is quite different.

In fact, after a review of the Supreme Court's decisions on prayer, the federal judge who originally presided over the *Lee* v. *Weisman* decision that restricted prayer at graduation ceremonies reluctantly concluded:

> [T]he Constitution, ***as the Supreme Court views it***, does not permit it [prayer]. . . . Unfortunately, in this instance there is no satisfactory middle ground. . . . Those who are anti-prayer have thus been deemed the victors. [90] (emphasis added)

This is a clear case of the minority prevailing over the wishes of the majority, and until recent years, courts had long rejected the concept of dissident individuals or groups setting aside the rights of the majority. (See, for example, *Updegraph* v. *Commonwealth*, [91] *People* v. *Ruggles*, [92] *Commonwealth* v. *Wolf*, [93] etc.). In fact, in 1952, the Court declared:

> We are a religious people whose institutions presuppose a Supreme Being. . . . When the State encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not. . . . would be ***preferring those who believe in no religion over those who do believe***. . . . We find no constitutional requirement which makes it necessary for government to be hostile

THE WHITE HOUSE
WASHINGTON

February 7, 2003

The Honorable William E. Dannemeyer
Congressman
1105 E. Commonwealth, Box 13
Fullerton, CA 92831

Dear Bill,

Great to meet you. I have forwarded everything to White House legislative affairs with a positive recommendation. Let's be in touch. Blessings on you and yours.

Warmly,

Tim Goeglein
Special Assistant to the President &
Deputy Director of Public Liaison

# Time to End Judicial Tyranny

The judicial despotism the Founders warned against is happening today. It is time for an informed electorate to spur Congress to defend and restore our constitutional republic.

*by John Eidsmoe*

"Should the constitutional republic our forefathers designed be replaced with a government by the majority vote of a nine-person committee of lawyers who shall be appointed rather than elected and shall hold office for life?"

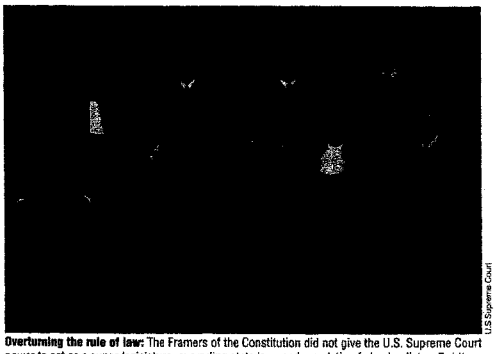
If a pollster were to ask this question, probably 99 percent of the public would answer with an emphatic "No!"

And yet, without an abundance of exaggeration, that is a fair description of the power now wielded by the U.S. Supreme Court — a court that claims the power to strike down and invalidate almost any action by almost any other branch or level of government.

It didn't begin that way. The Framers established a constitutional republic in which the powers delegated to the federal government were, in James Madison's words, "few and defined," while those reserved to the states were many. And the powers delegated to the federal government were carefully separated into legislative, executive and judicial branches.

In *The Federalist*, No. 78, Alexander Hamilton wrote that of the three branches of government, the judiciary "will always be the least dangerous to the political rights of the constitution, because it will be least in a capacity to annoy or injure them." The legislative branch exercises "will," that is, it determines the policy of the nation; the executive branch exercises "force," that is, it implements and enforces the will of the legislature. But the judiciary exercises only "judgment," interpreting the will of the legislature and the actions of the executive. Hamilton wrote that the judiciary is "beyond comparison the weakest of the three departments of government; that it can never attack with success either of the other two...."

*John Eidsmoe, a retired Air Force lieutenant colonel, is a professor of constitutional law at the Thomas Goode Jones School of Law, Faulkner University, Montgomery, Alabama.*



U.S. Supreme Court

**Overturning the rule of law:** The Framers of the Constitution did not give the U.S. Supreme Court power to act as a super-legislature, overruling state laws and mandating federal policies. But the court has arrogated these powers unto itself by judicial usurpation.

The Constitution nowhere expressly states that the federal courts have the power to strike down laws as unconstitutional. But in the famous 1803 case of *Marbury vs. Madison*, Chief Justice John Marshall claimed that power for the Supreme Court. Since Article III, Section 2 of the Constitution gives the court power over cases arising under the Constitution and laws of the United States, the Constitution therefore gives the court the authority to interpret the Constitution and statutes, argued Marshall. And if the court determines that a statute is inconsistent with the Constitution, then the court must rule that the Constitution stands and the statute falls. As Marshall declared:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

President Thomas Jefferson emphatically disagreed with Marshall's decision. Jefferson had not been a delegate to the Constitutional Convention; during the Convention and the ratification process, he was in France. He had mixed feelings about the Constitution. He admired some features of it, but he was deeply concerned about the power of the judiciary. In 1804 he wrote to

**The Framers wisely gave Congress [illegible] on the Court: Congress can limit the [illegible] appellate jurisdiction. The [illegible] used, for instance, to allow states to [illegible] abortion or local school boards to reinstitute school prayer, plus [illegible] courts being able to rule against [illegible]**

Abigail Adams: "[T]he opinion which gives to the judges the right to decide what laws are Constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and executive also in their spheres, would make the judiciary a despotic branch."

### Steady Usurpation

Jefferson and his supporters called themselves the Democratic Republicans, the ancestor of the Democratic Party. They generally favored individual liberty, states' rights, and a narrow view of the powers delegated to the federal government. Alexander Hamilton and his supporters called themselves the Federalists, and they believed the constitutional powers delegated to the federal government should be interpreted more broadly. When Jefferson was elected president in 1800, the defeated Federalist president, John Adams, in the closing days of his administration appointed Federalist John Marshall chief justice of the Supreme Court. President Jefferson and Chief Justice Marshall were distant cousins, but they clashed bitterly on issues of constitutional interpretation, and this clash intensified Jefferson's distrust of the federal judiciary.

In 1821 Jefferson warned that "the germ of dissolution of our federal government is in the constitution of the federal judiciary, an irresponsible body ... working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction, until all shall be usurped from the states, and the government of all be consolidated into one."

And in 1823 he seemed to suggest that Hamilton's view of the judiciary as the "least dangerous" branch had proven to be incorrect: "At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions nevertheless become law by precedent, sapping by little and little the foundations of the Constitution, and working its change by construction, before anyone has perceived that the invisible and helpless worm has been busily employed in consuming its substance."

Jefferson was not alone in his fear of judicial usurpation. When President Andrew Jackson vetoed the rechartering of the national bank, he argued that the national bank was unconstitutional even though the Supreme Court had held it constitutional in *McCulloch vs. Maryland* in 1819. Jackson declared in his veto message: "It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point, the President is independent of both."

In a similar vein President Lincoln wrote: "[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties to personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

And President Theodore Roosevelt expressed a similar view: "It is the people, and not the judges, who are entitled to say what their constitution means, for the constitution is theirs, it belongs to them and not to their servants in office — any other theory is incompatible with the foundation principles of our government."

### The Devious Dialectic

Several factors have led to the expansion of judicial power. One is the changing view of truth. The Framers believed that truth is fixed, absolute and ordained by God Himself. The Christian majority believed this, and the Deist minority just as strongly believed in a universe that ran according to the absolute laws of the clockmaker God.

But in the 1800s this view began to change. Hegel taught that truth is not fixed but rather changes according to a dialectical process of thesis, antithesis and synthesis. Darwinism led to the belief that truth evolves and changes. And the postmodern view is that truth is subjective — that is, truth is whatever you perceive it to be.

Along with postmodernism came the movement known as language deconstruction, which holds that words have no intrinsic meaning, and what really matters is not the author's intent or the dictionary definition, but rather the meaning drawn by the reader or viewer. A deconstructionist theater producer obviously feels much greater freedom to put her own message into Shakespeare's plays than a producer who believes she must be faithful to Shakespeare's intent. Likewise, a judge who holds this view of truth, law and language feels much more free to read his own views into the Constitution, than the judge who believes in jurisprudence of original intent.

Understood thus, Charles Evans Hughes' statement that "We are under a Constitution, but the Constitution is what the judges say it is" takes on a new and ominous meaning. And as Chancellor James Kent said, if judges are not bound by the plain meaning of the Constitution, they are free to roam at large in the trackless fields of their own imaginations.

Another contributing factor is the incorporation doctrine. Originally, as the Supreme Court recognized in *Barron vs. Baltimore* (1833), the Bill of Rights applied only to the federal government; people looked to state constitutions and state courts for protection if state officials abused their rights. But this began to change.

Ratified in 1868, the 14th Amendment provides in part that no state shall "deprive any person of life, liberty or property without due process of law." For about half a century thereafter, the courts interpreted the Due Process Clause to mean that no one may be deprived of life (executed), liberty (jailed) or property (fined) without due process of law (a fair trial). But in the early 1900s the view developed that the Due Process Clause means that states may not deprive people of free speech, press, religious liberty, or other basic rights. In other words, according to this view, the Bill of Rights, or at least some of the rights in the Bill of Rights, are incorporated into the Due Process Clause and are therefore applied to state and local governments.

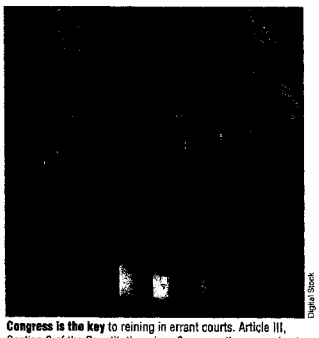
Protecting people's constitutional rights against state and local abuses seems laudable. But the practical effect of the incorporation doctrine is to give the federal courts a virtual monopoly on the business of rights protection. This greatly expands the authority of federal courts, and raises a perplexing question: In the long run, are rights really more secure in the hands of unelected federal judges, than with those who are more directly responsible to the people?

Put these concepts together — the incorporation doctrine and the postmodern concept of truth and law — and we have a recipe for judicial absolutism.

In *Roe vs. Wade* (1973), the Supreme Court struck down the abortion laws of Texas and most other states on the ground that they violated the purported constitutional right to abort a child. But where is that right found in the Constitution? As Justice Blackmun claimed, quoting from previous decisions: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."

Included in those zones of privacy, Blackmun insisted, is the right to make decisions about oneself, including whether to have children, and the right to make that decision retroactively after conception by means of abortion. More recently in the 2003 *Lawrence vs. Texas* decision, the Supreme Court found that this penumbral right of privacy also includes the right to engage in homosexual sodomy.

But consider the consequences of this type of decision making. Jurisprudence based upon "penumbras" and "emanations" removes the constitutional interpretation from any kind of objective scholarship and leaves us with a Constitution that can mean anything any judge wants it to mean.



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**Congress is the key** to reining in errant courts. Article III, Section 2 of the Constitution gives Congress the power (and duty) to proscribe the jurisdiction of the federal courts to keep them from doing harm.

## Reining in the Courts

What can be done to combat judicial tyranny? Many remedies have been suggested: constitutional amendments, limited terms for judges, defunding the courts, impeachment. But the Constitution itself provides a remedy that is worthy of consideration.

Article III, Section 2 of the Constitution, provides that the Supreme Court shall have original jurisdiction over a narrow range of cases, mostly involving foreign ambassadors. It then provides: "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." The Framers wisely gave Congress a check on the court: Congress can limit the court's appellate jurisdiction.

Predictably, the courts have not exactly been enamored with this provision. But they have generally, if reluctantly, upheld the power of Congress to limit the court's appellate jurisdiction, in such cases as *Ex Parte McCardle* (1869), *Ex Parte Yerger* (1869), *Robertson vs. Seattle Audubon Society* (1992), and *Felker vs. Turpin* (1996).

In two cases, the Supreme Court has struck down statutes that limit its appellate jurisdiction: *United States vs. Klein* (1872) because Congress was trying to affect the outcome of a pending case; and *Plaut vs. Spendthrift Farm, Inc.* (1995), because Congress was trying to overturn a court decision.

And what about limiting the jurisdiction of lower federal district courts and circuit courts of appeals? Many are unaware that the only court expressly created by the Constitution is the U.S. Supreme Court; all other federal courts were created by Congress under Article I, Section 1 and can be abolished by Congress. It seems self-evident that since Congress can create or abolish federal courts inferior to the Supreme Court, Congress can define, expand or limit their jurisdiction. Supreme Court cases so holding include *Sheldon vs. Sill* (1850), *Lockerty vs. Phillips* (1943), and *Yakus vs. United States* (1944).

Several bills are pending in Congress that would limit the appellate jurisdiction of the federal courts over cases involving the public display of the Ten Commandments. But the basic concept of limiting the federal courts' jurisdiction could be applied to many other cases as well. The concept could be used, for instance, to allow states to outlaw abortion or local school boards to reinstitute school prayer without the federal courts being able to rule against them.

The judicial despotism Jefferson and others warned against can indeed happen here, and what might have seemed fanciful prophecy in 1800 is rapidly becoming established fact. It is time to take action to defend and restore our constitutional republic. ■

S 1558 IS

108th CONGRESS
1st Session
**S. 1558**

To restore religious freedoms.

**IN THE SENATE OF THE UNITED STATES**

**August 1 (legislative day, JULY 21), 2003**

Mr. ALLARD introduced the following bill; which was read twice and referred to the Committee on the Judiciary

**A BILL**

To restore religious freedoms.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the `Religious Liberties Restoration Act'.

**SEC. 2. FINDINGS.**

Congress finds the following:

(1) The Declaration of Independence declares that governments are instituted to secure certain unalienable rights, including life, liberty, and the pursuit of happiness, with which all human beings are endowed by their Creator and to which they are entitled by the laws of nature and of nature's God.

(2) The organic laws of the United States Code and the constitutions of every State, using various expressions, recognize God as the source of the blessings of liberty.

(3) The first amendment to the Constitution secures rights against laws respecting an establishment of religion or prohibiting the free exercise thereof made by the Federal Government.

(4) The rights secured under the first amendment have been interpreted by the Federal courts to be included among the provisions of the 14th amendment.

(5) The 10th amendment reserves to the States, respectively, the powers not delegated to the Federal Government nor prohibited to the States.

(6) Disputes and doubts have arisen with respect to public displays of the Ten Commandments and to other public expression of religious faith.

(7) Section 5 of the 14th amendment grants Congress the power to enforce the provisions of the 14th amendment.

(8) Article III, section 2 of the Constitution grants Congress the authority to except certain matters from the jurisdiction of the Federal courts inferior to the Supreme Court.

**SEC. 3. RELIGIOUS LIBERTY RIGHTS DECLARED.**

(a) DISPLAY OF TEN COMMANDMENTS- The power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively.

(b) WORD `GOD' IN PLEDGE OF ALLEGIANCE- The power to recite the Pledge of Allegiance on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively. The Pledge of Allegiance shall be, `I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with Liberty and justice for all.'.

(c) MOTTO `IN GOD WE TRUST'- The power to recite the national motto on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively. The national motto shall be, `In God we trust'.

(d) EXERCISE OF CONGRESSIONAL POWER TO EXCEPT- The subject matter of subsections (a), (b), and (c) are excepted from the jurisdiction of Federal courts inferior to the Supreme Court.

*END*

S 1558 IS

108th CONGRESS
1st Session
**S. 1558**

To restore religious freedoms.

**IN THE SENATE OF THE UNITED STATES**

August 1 (legislative day, JULY 21), 2003

**COSPONSORS(10), ALPHABETICAL**:

Sen Brownback, Sam - 9/23/2003 [KS]
Sen Burns, Conrad R. - 9/29/2003 [MT]
Sen Craig, Larry E. - 10/21/2003 [ID]
Sen Graham, Lindsey O. - 9/26/2003 [SC]
Sen Lott, Trent - 9/30/2003 [MS]
Sen Bunning, Jim - 10/20/2003 [KY]
Sen Cochran, Thad - 9/30/2003 [MS]
Sen Enzi, Michael B. - 10/2/2003 [WY]
Sen Inhofe, Jim - 9/30/2003 [OK]
Sen Shelby, Richard C. - 9/25/2003 [AL]

108th CONGRESS
1st Session
**H. R. 3190**

To safeguard our religious liberties.

**IN THE HOUSE OF REPRESENTATIVES**

**September 25, 2003**

Mr. PICKERING introduced the following bill; which was referred to the Committee on the Judiciary

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**A BILL**

To safeguard our religious liberties.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the `Safeguarding Our Religious Liberties Act'.

**SEC. 2. FINDINGS.**

Congress finds the following:

(1) The Declaration of Independence declares that governments are instituted to secure certain unalienable rights, including life, liberty, and the pursuit of happiness, with which all human beings are endowed by their Creator and to which they are entitled by the laws of nature and of nature's God.

(2) The organic laws of the United States Code and the constitutions of every State, using various expressions, recognize God as the source of the blessings of liberty.

(3) The first amendment to the Constitution secures rights against laws respecting an establishment of religion or prohibiting the free exercise thereof made by the Federal Government.

(4) The rights secured under the first amendment have been interpreted by the Federal courts to be included among the provisions of the 14th amendment.

(5) The 10th amendment reserves to the States, respectively, the powers not delegated to the Federal Government nor prohibited to the States.

(6) Disputes and doubts have arisen with respect to public displays of the Ten Commandments and to other public expression of religious faith.

(7) Section 5 of the 14th amendment grants Congress the power to enforce the provisions of the 14th amendment.

(8) Article III, section 2 of the Constitution grants Congress the authority to except certain matters from the jurisdiction of the Federal courts inferior to the Supreme Court.

**SEC. 3. RELIGIOUS LIBERTY RIGHTS DECLARED.**

(a) DISPLAY OF TEN COMMANDMENTS- The power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively.

(b) WORD `GOD' IN PLEDGE OF ALLEGIANCE- The power to recite the Pledge of Allegiance on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively. The Pledge of Allegiance shall be, `I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with Liberty and justice for all.'.

(c) MOTTO `IN GOD WE TRUST'- The power to recite the national motto on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively. The national motto shall be, `In God we trust'.

(d) EXERCISE OF CONGRESSIONAL POWER TO EXCEPT- The subject matter of subsections (a), (b), and (c) are excepted from the jurisdiction of Federal courts inferior to the Supreme Court.

*END*

**H. R. 3190**
**COSPONSORS(34), ALPHABETICAL** :

Rep Akin, W. Todd - 11/20/2003 [MO-2]
Rep Barrett, J. Gresham - 11/6/2003 [SC-3]
Rep Barton, Joe - 11/21/2003 [TX-6]
Rep Bishop, Rob - 11/19/2003 [UT-1]
Rep Davis, Jo Ann - 10/29/2003 [VA-1]
Rep Everett, Terry - 11/20/2003 [AL-2]
Rep Goode, Virgil H., Jr. - 10/16/2003 [VA-5]
Rep Herger, Wally - 11/20/2003 [CA-2]
Rep Hostettler, John N. - 10/20/2003 [IN-8]
Rep King, Steve - 10/29/2003 [IA-5]
Rep Latham, Tom - 11/20/2003 [IA-4]
Rep McHugh, John M. - 10/30/2003 [NY-23]
Rep Musgrave, Marilyn N. - 10/29/2003 [CO-4]
Rep Osborne, Tom - 11/21/2003 [NE-3]
Rep Shimkus, John - 10/28/2003 [IL-19]
Rep Terry, Lee - 10/1/2003 [NE-2]
Rep Wamp, Zach - 10/8/2003 [TN-3]
Rep Bachus, Spencer - 10/17/2003 [AL-6]
Rep Bartlett, Roscoe G. - 10/28/2003 [MD-6]
Rep Beauprez, Bob - 10/21/2003 [CO-7]
Rep Brady, Kevin - 11/20/2003 [TX-8]
Rep Doolittle, John T. - 10/28/2003 [CA-4]
Rep Franks, Trent - 10/30/2003 [AZ-2]
Rep Graves, Sam - 10/28/2003 [MO-6]
Rep Hoekstra, Peter - 11/21/2003 [MI-2]
Rep Keller, Ric - 11/21/2003 [FL-8]
Rep Kingston, Jack - 10/29/2003 [GA-1]
Rep McCotter, Thaddeus G. - 11/19/2003 [MI-11]
Rep Miller, Jeff - 10/7/2003 [FL-1]
Rep Norwood, Charlie - 11/20/2003 [GA-9]
Rep Rogers, Mike D. - 10/28/2003 [AL-3]
Rep Souder, Mark E. - 10/30/2003 [IN-3]
Rep Turner, Jim - 11/20/2003 [TX-2]
Rep Wicker, Roger F. - 11/19/2003 [MS-1]

108th CONGRESS
2d Session

# S. 2323

To limit the jurisdiction of Federal courts in certain cases and promote federalism.

**IN THE SENATE OF THE UNITED STATES**

## April 20, 2004

Mr. SHELBY (for himself, Mr. MILLER, Mr. BROWNBACK, Mr. GRAHAM of South Carolina, Mr. ALLARD, Mr. INHOFE, and Mr. LOTT) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

**A BILL**

To limit the jurisdiction of Federal courts in certain cases and promote federalism.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SECTION 1. SHORT TITLE.

This Act may be cited as the `Constitution Restoration Act of 2004'.

**TITLE I--JURISDICTION**

## SEC. 101. APPELLATE JURISDICTION.

(a) AMENDMENT TO TITLE 28- Chapter 81 of title 28, United States Code, is amended by adding at the end the following:

### `Sec. 1260. Matters not reviewable

`Notwithstanding any other provision of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter to the extent that relief is sought against an entity of Federal, State, or local government, or against an officer or agent of Federal, State, or local government (whether or not acting in official or personal capacity), by reason of that entity's, officer's, or agent's acknowledgement of God as the sovereign source of law, liberty, or government.'.

(b) TABLE OF SECTIONS- The table of sections at the beginning of chapter 81 of title 28, United States Code, is amended by adding at the end the following:

`1260. Matters not reviewable.'.

## SEC. 102. LIMITATIONS ON JURISDICTION.

(a) AMENDMENT TO TITLE 28- Chapter 85 of title 28, United States Code, is amended by adding at the end of the following:

### `Sec. 1370. Matters that the Supreme Court lacks jurisdiction to review

`Notwithstanding any other provision of law, the district court shall not have jurisdiction of a matter if the Supreme Court does not have jurisdiction to review that matter by reason of section 1260 of this title.'.

(b) TABLE OF SECTIONS- The table of sections at the beginning of chapter 85 of title 28, United States Code, is amended by adding at the end the following:

`1370. Matters that the Supreme Court lacks jurisdiction to review.'.

**TITLE II--INTERPRETATION**

## SEC. 201. INTERPRETATION OF THE CONSTITUTION.

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law.

**TITLE III--ENFORCEMENT**

## SEC. 301. EXTRAJURISDICTIONAL CASES NOT BINDING ON STATES.

Any decision of a Federal court which has been made prior to or after the effective date of this Act, to the extent that the decision relates to an issue removed from Federal jurisdiction under section 1260 or 1370 of title 28, United States Code, as added by this Act, is not binding precedent on any State court.

## SEC. 302. IMPEACHMENT, CONVICTION, AND REMOVAL OF JUDGES FOR CERTAIN EXTRAJURISDICTIONAL ACTIVITIES.

To the extent that a justice of the Supreme Court of the United States or any judge of any Federal court engages in any activity that exceeds the jurisdiction of the court of that justice or judge, as the case may be, by reason of section 1260 or 1370 of title 28, United States Code, as added by this Act, engaging in that activity shall be deemed to constitute the commission of--

(1) an offense for which the judge may be removed upon impeachment and conviction; and

(2) a breach of the standard of good behavior required by article III, section 1 of the Constitution.

*END*

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**COSPONSORS(6), ALPHABETICAL:**

Sen Allard, A. Wayne - 4/20/2004 [CO]
Sen Graham, Lindsey O. - 4/20/2004 [SC]
Sen Lott, Trent - 4/20/2004 [MS]
Sen Brownback, Sam - 4/20/2004 [KS]
Sen Inhofe, Jim - 4/20/2004 [OK]
Sen Miller, Zell - 4/20/2004 [GA]

108th CONGRESS
2d Session

# H. R. 3799

To limit the jurisdiction of Federal courts in certain cases and promote federalism.

**IN THE HOUSE OF REPRESENTATIVES**

**February 11, 2004**

Mr. ADERHOLT (for himself and Mr. PENCE) introduced the following bill; which was referred to the Committee on the Judiciary.

**A BILL**

To limit the jurisdiction of Federal courts in certain cases and promote federalism.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SECTION 1. SHORT TITLE.

This Act may be cited as the `Constitution Restoration Act of 2004'.

**TITLE I--JURISDICTION**

## SEC. 101. APPELLATE JURISDICTION.

(a) IN GENERAL-

(1) AMENDMENT TO TITLE 28- Chapter 81 of title 28, United States Code, is amended by adding at the end the following:

### `Sec. 1260. Matters not reviewable

`Notwithstanding any other provision of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter to the extent that relief is sought against an element of Federal, State, or local government, or against an officer of Federal, State, or local government (whether or not acting in official personal capacity), by reason of that element's or officer's acknowledgement of God as the sovereign source of law, liberty, or government.'.

(2) TABLE OF SECTIONS- The table of sections at the beginning of chapter 81 of title 28, United States Code, is amended by adding at the end the following:

`1260. Matters not reviewable.'.

(b) APPLICABILITY- Section 1260 of title 28, United States Code, as added by subsection (a), shall not apply to an action pending on the date of enactment of this Act, except to the extent that a party or claim is sought to be included in that action after the date of enactment of this Act.

## SEC. 102. LIMITATIONS ON JURISDICTION.

(a) IN GENERAL-

(1) AMENDMENT TO TITLE 28- Chapter 85 of title 28, United States Code, is amended by adding at the end of the following:

### `Sec. 1370. Matters that the Supreme Court lacks jurisdiction to review

`Notwithstanding any other provision of law, the district court shall not have jurisdiction of a matter if the Supreme Court does not have jurisdiction to review that matter by reason of section 1260 of this title.'.

(2) TABLE OF SECTIONS- The table of sections at the beginning of chapter 85 of title 28, United States Code, is amended by adding at the end the following:

`1370. Matters that the Supreme Court lacks jurisdiction to review.'.

(b) APPLICABILITY- Section 1370 of title 28, United States Code, as added by subsection (a), shall not apply to an action pending on the date of enactment of this Act, except to the extent that a party or claim is sought to be included in that action after the date of enactment of this Act.

**TITLE II--INTERPRETATION**

## SEC. 201. INTERPRETATION OF THE CONSTITUTION.

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.

**TITLE III--ENFORCEMENT**

## SEC. 301. EXTRAJURISDICTIONAL CASES NOT BINDING ON STATES.

Any decision of a Federal court which has been made prior to or after the effective date of this Act, to the extent that the decision relates to an issue removed from Federal jurisdiction under section 1260 or 1370 of title 28, United States Code, as added by this Act, is not binding precedent on any State court.

## SEC. 302. IMPEACHMENT, CONVICTION, AND REMOVAL OF JUDGES FOR CERTAIN EXTRAJURISDICTIONAL ACTIVITIES.

To the extent that a justice of the Supreme Court of the United States or any judge of any Federal court engages in any activity that exceeds the jurisdiction of the court of that justice or judge, as the case may be, by reason of section 1260 or 1370 of title 28, United States Code, as added by this Act, engaging in that activity shall be deemed to constitute the commission of--

(1) an offense for which the judge may be removed upon impeachment and conviction; and

(2) a breach of the standard of good behavior required by article III, section 1 of the Constitution.

*END*

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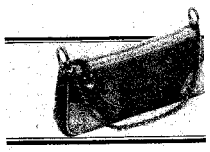
**COSPONSORS(20), ALPHABETICAL:**

Rep Bachus, Spencer - 2/24/2004 [AL-6]
Rep Cramer, Robert E. (Bud), Jr. - 2/24/2004 [AL-5]
Rep Deal, Nathan - 3/18/2004 [GA-10]
Rep Everett, Terry - 2/24/2004 [AL-2]
Rep Jones, Walter B., Jr. - 4/27/2004 [NC-3]
Rep Lewis, Ron - 4/27/2004 [KY-2]
Rep Miller, Jeff - 3/10/2004 [FL-1]
Rep Pence, Mike - 2/11/2004 [IN-6]
Rep Rogers, Mike D. - 2/24/2004 [AL-3]
Rep Souder, Mark E. - 3/25/2004 [IN-3]
Rep Bishop, Rob - 4/27/2004 [UT-1]
Rep Davis, Jo Ann - 3/10/2004 [VA-1]
Rep DeMint, Jim - 4/1/2004 [SC-4]
Rep Hall, Ralph M. - 4/27/2004 [TX-4]
Rep Kingston, Jack - 2/24/2004 [GA-1]
Rep McCotter, Thaddeus G. - 4/27/2004 [MI-11]
Rep Pearce, Stevan - 3/18/2004 [NM-2]
Rep Pitts, Joseph R. - 2/24/2004 [PA-16]
Rep Ryun, Jim - 3/11/2004 [KS-2]
Rep Wamp, Zach - 3/10/2004 [TN-3]

TUESDAY
June 15, 2004



# 'Under God' in pledge – for now

Supreme Court ruling doesn't touch on merits; fight over phrase to continue.

By ANNE GEARAN
THE ASSOCIATED PRESS

WASHINGTON • The Supreme Court on Monday allowed millions of schoolchildren to keep affirming loyalty to one nation "under God," but dodged the underlying question of whether the Pledge of Allegiance is an unconstitutional blending of church and state.

The ruling overturned a lower-court decision that the religious reference made the pledge unconstitutional in public schools. But Monday's decision did so on technical grounds, ruling that Michael Newdow, the man who brought the case on behalf of his 10-year-old daughter, could not legally represent her.

Michael Newdow

It was an anticlimactic end to an emotional high court showdown over God in public schools and in public life. It also neutralizes what might have been an election-year political issue.

The outcome does not prevent a future court challenge over the same issue, however, and both defenders and opponents of the current wording predicted that fight will come quickly.

The Supreme Court already has said schoolchildren cannot be required to recite the oath that begins, "I pledge allegiance to the flag of the United States of America." The court also has repeatedly barred school-sponsored prayer from classrooms, playing fields and school ceremonies.

MORE ON THE RULING
COURT: Effect on parental rights debated. News 4

# Pledge ruling touches parental-rights debate

Father shares custody, but justices say only mother could act for child in court.

ON PAGE 1
RULING: 'Under God' phrase stays in Pledge of Allegiance.

FROM REGISTER NEWS SERVICES

WASHINGTON • The atheist father who challenged the constitutionality of the Pledge of Allegiance says the Supreme Court's dismissal of the case "is a blow for parental rights."

But the decision was so narrowly crafted that it was not likely to alter the rights of parents in custody disputes, legal experts said. Some scholars suggested the decision bolstered parental rights by upholding a Sacramento County family-court order granting the daughter's mother absolute control of her upbringing.

The decision was issued on Flag Day and the 50th anniversary of the addition of the words "under God" to the previous version.

The high court ruled 8-0 that California atheist Michael Newdow, who was successful in lower courts with his challenge to the pledge, has no right to speak on legal matters on behalf of his daughter. Newdow had objected to the pledge because she recited the words in public school.

Newdow shares custody of his daughter with her Christian mother, but the mother is her sole legal representative, the court said, so he never had the right to sue.

The girl's mother, Sandra Banning, had alerted the court that she and her daughter, who is not named in court papers, do not object to the pledge.

The girl's parents never have married.

The legal decision allowed the justices to avoid ruling on whether the tradition of reciting the pledge in public schools amounts to the government promoting a particular faith in violation of the First Amendment.

It also defused a potential election-year issue. The Bush administration argued to keep the reference to God, and lawmakers of both parties responded to lower court rulings by rushing before the news cameras and reciting the oath and singing "God Bless America."

Justice John Paul Stevens, who wrote the decision, said the court didn't need to reach the constitutional issue because Newdow never should have been allowed to sue in the first place.

"When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law," Stevens wrote.

Chief Justice William Rehnquist and Justices Sandra Day O'Connor and Clarence Thomas agreed with the outcome but wrote separately to say they would have decided it on its merits and found the pledge constitutional.

"Reciting the pledge, or listening to others recite it, is a patriotic exercise, not a religious one," Rehnquist wrote. "Participants promise fidelity to our flag and our nation, not to any particular God, faith or church."

Justice Antonin Scalia did not participate; he removed himself from the case after Newdow complained that Scalia had publicly expressed his view that the issue should be decided by the legislative branch, not the courts.

Newdow, a physician with a law degree who argued his own case before the high court, called the decision a "blow for parental rights."

"She spends 10 days a month with me," he said. "The suggestion that I don't have sufficient custody is just incredible."

The New York Times and The Associated Press contributed to this report.

Mr. CHABOT. At this time the Committee Members have 5 minutes each to ask questions of the panel, and I recognize myself for that purpose for 5 minutes.

Professor Redish, let me begin with you. You've written that, quote, "the States' courts have, since the Nation's beginning, been deemed both fully capable of and obligated under the supremacy clause to enforce Federal law. I am quoting the Constitution. Congress has complete authority to have constitutional rights enforced exclusively in the State courts," unquote. And I think you basically reiterated that here this morning.

In your opinion, why did the Founders leave open the possibility that State courts could be the ultimate arbiters of constitutional questions, or at least some constitutional questions?

Mr. REDISH. Mr. Chairman, the history is surprisingly well documented on that part of the Constitution. There was a struggle between the States' righters who wanted no lower Federal courts created and only State courts having power to interpret and enforce Federal law with Supreme Court review, and then the pro-Federal wing wanted to dictate the requirement that lower Federal courts be created. And Madison came up with what is now appropriately referred to as the Madisonian Compromise, which was basically to punt to the first Congress. Congress had the power to create them, but was not compelled to create them. It was really the outgrowth of a political deadlock at the convention.

Mr. CHABOT. Thank you.

Let me follow up. How does the Judiciary Act of 1789 then form an understanding of the original meaning of Congress' authority over Federal court jurisdiction?

Mr. REDISH. Well, it shows that the original Congress recognized that it had this so-called greater includes the lesser power. They did create lower Federal courts immediately. That's certainly true. But they excluded from their jurisdiction numerous issues. So it was clearly the understanding of the initial Congress postframing that they had authority to limit Federal court jurisdiction.

At the time, for purposes of context, I should indicate the power to interpret Federal law was not really an important issue, because there was so little substantive Federal legislation. Most things were left to the States anyway, but at least in theory it clearly underscores my—the interpretation that I'm giving you of article III.

Mr. CHABOT. Thank you.

Professor Gerhardt, let me turn to you. Do you agree that under the Constitution State courts have full and coequal authority with Federal courts to decide Federal constitutional questions? And if not, why not?

Mr. GERHARDT. Well, if I understand the question, I think clearly State courts can adjudicate constitutional claims. I don't think there's any doubt about that. I don't know that that's what we're really concerned with here today though. I think that if you leave the State courts alone, without any possible review in the United States Supreme Court, the constitutional claim, then I think you do have a constitutional problem.

I think there's no question that State courts, as I said, and as Professor Redish has said, can adjudicate these claims. But you move into a much different realm if you're withdrawing Federal ju-

risdiction in retaliation against their judicial decisions or aimed at a particular class of citizens. I think those present constitutional difficulties.

Mr. CHABOT. Thank you.

Now, Mrs. Schlafly, let me turn to you at this point. Is H.R. 3313, the Marriage Protection Act, consistent with a traditional understanding of congressional authority over Federal court jurisdiction?

Mrs. SCHLAFLY. Oh, absolutely. It is consistent with it. And I think everything we've heard here today shows that Congress does have the power to limit and regulate the authority of the Federal courts on this issue.

I think that the bill that you referred to is somewhat limited. I think, as I said in my testimony, that we should also remove jurisdiction from Federal courts to hear a challenge to State DOMAs because we already have a case filed on that. And it's very important that the Federal courts not have the opportunity to override the legislatures and the Congress on this issue of marriage.

We heard a lot of talk about the separation of powers here today, but under the separation of powers, we expect these decisions to be made by our elected representatives, not by some activist judge.

Mr. CHABOT. Thank you very much.

And unfortunately, my time is going to run out in 5 seconds, so I'll terminate my time at this time.

The gentleman from New York is recognized for 5 minutes.

Mr. NADLER. Thank you.

Mrs. Schlafly, you stated in your testimony, you quoted approvingly Professor—excuse me—President Bush in which he said, quote, "we will not stand for judges who undermine democracy by legislating from the bench and trying to remake the culture of America by court order," close quote. You go on to say "he's right, we won't stand for such judicial arrogance." *Brown* v. *Board of Education of Topeka*, 1954, which outlawed Jim Crow, the segregation of public schools, changed the culture of a third of the United States, said that what they had been doing for 100 years was unconstitutional. Do you have the same disapproval? Was that remaking the culture of America by court order? And was that illegitimate, in your opinion?

Mrs. SCHLAFLY. No, it was not.

Mr. NADLER. Because? How do you distinguish it?

Mrs. SCHLAFLY. I would distinguish it because what *Brown* did was to overrule *Plessy*. And if you take the position that the Constitution is whatever the Supreme Court says it is, then you have to accept *Dred Scott* and *Plessy* v. *Ferguson*. And *Brown* came along and overturned that, and that was the right thing to do.

Mr. NADLER. And that may have been the right thing to do, but that wasn't remaking the culture of America by court order?

Mrs. SCHLAFLY. No. It was correcting a previous bad mistake.

Mr. NADLER. And how about *Loving* v. *Virginia* that outlawed—that allowed interracial—that said States couldn't outlaw interracial marriages, which is probably more to the point here?

Mrs. SCHLAFLY. Yes. Well——

Mr. NADLER. Was that remaking the culture of America by court order?

Mrs. SCHLAFLY. No, it wasn't. I think it was——

Mr. NADLER. Okay. Professor Redish, Judge McDougal of the Southern District of Slobovia has just come down with a decision that I find outrageous and has promised to come down with more such decisions. So I am introducing a bill to eliminate the Southern District of Slobovia. Do we—under our plenary power to create or abolish Federal courts, can we abolish a particular Federal court because we don't like that judge? And if we can, how does that square with the constitutional power, with the constitutional prohibition about limiting tenure of judges?

Mr. REDISH. I assume you don't intend to eliminate the judge in any way other than——

Mr. NADLER. He can still be there. He just won't—he'll be a judge in a nonexistent court.

Mr. REDISH. I think it's well established. I don't think it would be controversial at all that you have power to rearrange the Federal courts. This Congress created the 11th circuit out of the fifth circuit.

Mr. NADLER. No, I'm not talking about that.

Mr. REDISH. Oh, you're saying based on that action.

Mr. NADLER. I don't like—in South Dakota they only have one district. They've only got three judges, let's say. I don't know if that's true. But, for example—and I'm going to abolish the district of South Dakota. They won't have any Federal judges in South Dakota because I don't like the three judges.

Mr. REDISH. Well, the citizens of South Dakota would have to have access to some independent judicial forum. Either you have to put them into Federal courts in North Dakota or assign the jurisdiction to the State courts. But if what you're suggesting is does the fact that you're doing it out of an animosity toward a particular——

Mr. NADLER. No, no, no. I'm saying—forget the motive. I am saying do we have the power to abolish a court and abolish, in effect, the judge as a judge by abolishing the court?

Mr. REDISH. Sure. They have life tenure under article III.

Mr. NADLER. So they would have life tenure in a nonexistent court.

Mr. REDISH. I've seen baseball managers have long-term contracts after they've been fired.

Mr. NADLER. Okay. Let me change the subject. You've—I'm trying—you disagreed with Professor Gerhardt about the power of Congress, about the phantom constitutional restriction on our power to limit jurisdiction. Do you disagree that if we were to say that the Federal courts have no jurisdiction to hear claims of religious discrimination against Jews or Quakers, could we do that?

Mr. REDISH. I certainly agree that the equal protection component of the fifth amendment limits this Congress' power. You could not say Jews do not have access to Federal courts, African Americans do not have access to Federal courts.

Mr. NADLER. And we could not say that the Federal courts have no jurisdiction to judge the constitutionality of the law that you said couldn't have intermarriage between two different religious groups.

Mr. REDISH. No, I don't agree with that. I see a big distinction there. There was a Supreme Court decision in the 1970's named *Geduldig* v. *Aiello*, which suggested that it is quite a different thing to discriminate directly as opposed to discriminating indirectly. As long as individuals who wanted to challenge whatever laws are involved to protect their rights have access to an independent forum, I see——

Mr. NADLER. So you think we could do that.

Mr. REDISH. It would depend on exactly how it's phrased, but, yeah, I think you certainly would have the power.

Mr. NADLER. Mr. Gerhardt, could you comment to that?

Mr. GERHARDT. Well, I guess a couple of comments. I mean, the first is I think clearly if you, this body, Congress, passes a law, it gets evaluated under the Equal Protection Clause and relatively—I should say equal protection component of the fifth amendment—in a relatively straightforward manner. You ask whether there was a suspect classification. You ask whether or not it impedes a fundamental right. You also might ask whether or not it passes, in the absence of either of those things, the rational basis test. It's conceivable you may have a law that's passed that the Supreme Court evaluates under the rational basis test and strikes down. That's exactly *Evans* v. *Roemer*.

Mr. CHABOT. The gentleman's time has expired, but you can continue your answer.

Mr. GERHARDT. The only other comment I would then make is that I think if Congress abolishes an article III court in which there is a sitting judge, that's plainly violation of separation of powers. If this body were to eviscerate the Presidency, subpoena the President to testify, for example, that might well be unconstitutional. So I think that the invasion, the exercise of a power to undermine the effectiveness of another branch, violates separation of powers.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. And I thank the Chairman for holding these hearings, and I thank the witnesses for their testimony, and apologize for not being here to absorb it all. I will read the text of this subsequent to that.

I'm very interested in this issue, and interested in the response of Professor Gerhardt. As I read the Constitution, and it establishes clearly that the inferior courts are established by Congress. So I won't be a response to the position that if Congress establishes all inferior courts, then constitutionally, what Congress gives, Congress can take away. If there is a branch of—or not a branch of Government, but if there's a department that's established by Congress, and we decide to abolish that department—an example a decade ago would be the Department of Education—constitutionally we could abolish that, then why could not Congress abolish the inferior courts that are established by Congress?

Mr. GERHARDT. Well, I think there are a few limitations on—that will arise. And we have mentioned them today. The first one is separation of powers. If you abolish a court in which there is a sitting judge, I think that that does raise very serious separation of powers concerns. Moreover, I think you are going to raise concerns

under article III because that judge's life tenure may be put in jeopardy as well.

Beyond that, I think that you may have other concerns depending on what—whether or not that withdrawal has been in retaliation against a judicial decision. Say that the lower court has—say the Supreme Court has not reached the question on flag burning, whether or not that is something that is a first amendment right, but the Circuit Court has done that. You then withdraw, try to withdraw jurisdiction in that case, that's effectively trying to overrule that court. I think that's not a permissible exercise of power.

Mr. KING. But, Professor, if Congress grants power to a court, a court that is defined as an inferior court in the Constitution, then why could they not withdraw that power constitutionally?

Mr. GERHARDT. Because there are limits on exercise of power.

Mr. KING. And the basis of those limits would be what?

Mr. GERHARDT. The Constitution.

Mr. KING. And if the Constitution grants us power to establish that—let's say, for example, then Congress—this definition, this line of the separation of powers between these two branches of Government that are in question here, Congress established the courts, and by precedent we allow the judicial branch to take jurisdiction over any number of subject matter and law. And as that jurisdiction grows, and the influence of the courts grow, and we're very well aware the expansiveness of that interest and the activeness of the courts, then as that grows, then, would you then prescribe for us at what point Congress might intervene, under what circumstances legally, and also with public opinion in mind?

Mr. GERHARDT. Well, as I suggest in my statement, I think one would analyze that would be that Congress has got to have a neutral reason to contract jurisdiction. It's one thing to expand it, but once you get into the business of contracting, withdrawing jurisdiction, you need a neutral justification, such as national security, judicial efficiency. But I don't think distrust of Federal judges qualifies as a neutral justification. I don't think hostility to the fundamental right that may be adjudicated in a particular case also constitutes neutral justification.

Mr. KING. Who will define neutral justification?

Mr. GERHARDT. Ultimately the courts.

Mr. KING. Correct. So eventually we're around that tautological logic that brings us back to where we began; that is, that if Congress can't make definitions, if they can't define the subject matter, eventually the courts can then be linked—they can link the logic back together and do whatever they will, without congressional intervention.

Mr. GERHARDT. Congressman, we just may have a respectful disagreement here, but I think that you've characterized it as do whatever they say. They will, of course, I believe in good faith, construe the Constitution, and I believe they would likely construe the Constitution in the way that would protect the vitality of the Federal court system. But how—but I don't think—I don't view their activity as an unlicensed one.

Mr. KING. And I'm not willing myself to concede the good faith argument, because I think that's been breached many times in the past. And probably the most obvious one would be Dred Scott, and

there's a series of those and the linkage of those cases that get us to this point. I mean, I would go back then to say, for example, *Griswold* v. *Connecticut* and the establishment of the right to privacy that wasn't conceived by our Founders, and how that was built upon to get us to this point where we have a constitutional right to partial-birth abortion. I mean, the Founders didn't envision this, and the logic of the courts support this. The logic of the Congress does not. And so at some point we must find a way to intervene.

And I'd turn to Mrs. Schlafly on, again, a final recommendation on how we might do that definitively.

Mrs. SCHLAFLY. Well, I would urge that you pass legislation that takes away from the Federal courts the power to hear challenges to the traditional definition of marriage. And I'm very fascinated by Professor Gerhardt's continual references to separation of powers. The clearest thing about the separation of powers is that all legislative power is in the hands of Congress. And what we're confronted with here is that judges are trying to override the specific definition about the definition of marriage that has to be decided by our elected Representatives, and that is what the separation of powers means.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Virginia Mr. Scott is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. And I'd like to kind of follow up on that, because if we're talking about legislative powers and the abuse of the judiciary and the havoc raised by these unelected judges, Mrs. Schlafly, I'd like you to comment on the havoc created when these unelected judges required Virginia to recognize marriages of people of different races.

[11 a.m.]

Mrs. SCHLAFLY. Well, we all know that race is in a particular category in our country, and the courts have done some helpful things on that. As I pointed out, the main case that people talk about, *Brown*, was simply correction of a previous mistake, and it was one of the greatest examples of judicial supremacy when they started the whole bad line of cases with *Dred Scott*.

Mr. SCOTT. You agree with that list of cases, but these are unelected judges, not the legislative branch. If we waited for the legislative branch to allow mixed marriages, it would still be prohibited in Virginia.

Mrs. SCHLAFLY. Well, most of the other States did allow mixed marriages so it was not—it was just some States.

Mr. SCOTT. But in that, the unelected judges imposing their will did not wreak havoc because—you agree?

Mrs. SCHLAFLY. I am not saying all courts' decisions are bad, just lots of them. I think it is a perfectly valid, neutral argument to say we do not trust the judges in the issue of marriage.

Mr. SCOTT. And if we set a policy that we did not trust the judges, then that ruling could not have been made; is that right?

Mrs. SCHLAFLY. Yes, but we did not do that. The American people were perfectly acceptable of that. But it is clear we do not trust the judges on the issue of marriage.

Mr. SCOTT. That was an issue of marriage.

Let me ask Professor Gerhardt, you are talking about a neutral justification for court stripping. Does motive make a difference if it has the effect of eliminating the jurisdiction on a constitutional issue?

Mr. GERHARDT. Well, it sometimes might. The critical thing is the purpose and effect of a law, and sometimes the court will infer that from just looking at the law itself, and sometimes it looks at the context in which the law is passed. But looking at either context or effect might well bring you to an illegitimate purpose or motivation, at which point I think courts strike laws down.

Mr. SCOTT. Professor Redish, you have indicated if something unconstitutional is going on, you have to have access to some court. Would you have an appeal to the Supreme Court at some point even though Congress has stripped it of, or tried to strip it of jurisdiction?

Mr. REDISH. That is actually a fascinating question. My answer I think is no, because the right to an adequate judicial forum derives from the Due Process Clause. The Supreme Court itself has made clear that due process requires no right of appeal. There is no constitutionally dictated right of appellate review. So as long as you had an adequate and independent trial forum, who possessed sufficient power to enforce its decrees, there would be no due process violation from excluding Supreme Court review power.

Mr. SCOTT. The Supreme Court has jurisdiction over consideration of constitutional issues. That is part of article III.

Mr. REDISH. Absolutely. But all of its appellate power under article III and its power over most constitutional issues which comes within its appellate power, is qualified by the Exceptions Clause. And I see no way to read that other than this Congress may make plenary exceptions to that jurisdiction.

Mr. SCOTT. So if something unconstitutional is going on in Virginia, and Congress allowed it to happen, as long as Virginia courts approved it there would be no access to fix it?

Mr. REDISH. That is right. I should emphasize that nothing in the Exceptions Clause empowers, allows this Congress to overrule a preexisting Supreme Court decision. Ironically, to the contrary, it locks it in because the only court that can change a Supreme Court decision is the Supreme Court. But the whole notion of the Exceptions Clause and the power over lower Federal courts is premised on the notion that the State courts are going to be good-faith protectors of Federal rights. Whether that is empirically true one could debate, but it certainly was the assumption of the framers.

Mr. SCOTT. Mr. Gerhardt, would you like to comment on that? If something is unconstitutional in Virginia, you would have no Federal remedy as long as Congress just allowed it to happen?

Mr. GERHARDT. I would read the Supreme Court doctrine differently and read constitutional law differently. I think that there certainly are circumstances in which the Supreme Court of the United States will not trust the State courts as final adjudicators of certain Federal or constitutional claims. You might go as far as *Martin* v. *Hunters Lessee* as one example of that. I don't think the Constitution generally sets up the State courts in a position to be the final adjudicators of Federal law. I don't think that situation

would be consistent with how constitutional law has grown over time.

It just bears repeating: I don't believe there is any unlimited power that is granted in the Constitution to any branch. The Supreme Court and other Federal courts, might well make mistakes. The Constitution prescribes the methods for overruling those mistakes if they happen to pertain to constitutional law, and those are limited.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Indiana, Mr. Hostettler, is recognized for 5 minutes.

Mr. HOSTETTLER. I thank the Chairman.

As we contemplate the issue of same-sex marriage and the notion of an independent judiciary, I think it is important to look at the Supreme Court case which has brought us to this point to be very concerned about the future of traditional marriage in America.

In *Lawrence* v. *Texas*, the Supreme Court determined that for a variety of reasons a Texas sodomy law was unconstitutional. But what is intriguing in the opinion of the majority, as written by Justice Kennedy and the concurring opinion by Justice O'Connor, is the idea of speaking to the issue of marriage. Now, the case of *Lawrence* v. *Texas* did not have anything to do with marriage. It is my understanding of the facts of the case with regard to the arrest that was made, that the individuals involved in the case were not involved in a wedding ceremony at the time of the arrest. But rather, the case, *Lawrence* v. *Texas*, does speak to the issue of same-sex marriage, and that is intriguing to me in that Justice Kennedy implicitly speaks to the issue when he says, "The present case does not involve whether the Government must give formal recognition to any relationship that homosexual persons seek to enter." obviously what other type of relationship is he talking about but the issue, in my opinion, of same-sex marriage, because it is more explicitly brought out in Justice O'Connor's concurring opinion when she says that "Texas cannot assert any legitimate State interest here, such as preserving the traditional institution of marriage."

Once again, the case was not about marriage but the court seems, for whatever reason, to want to talk about the issue of marriage. She goes on to say, "Unlike the moral disapproval of same-sex relations, other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."

So the Court both implicitly and explicitly speaks to the fact that they are not talking about same-sex marriage, and by the wording of their opinions, at least Kennedy and O'Connor seem to tell us that they would not be in favor of expanding these rights to include same-sex marriage.

I wanted to clarify that and ask Professor Gerhardt some questions. I find, like Mrs. Schlafly, your discussion of separation of powers intriguing.

Do you believe that the power to impeach and remove from office of Congress is a violation of separation of powers?

Mr. GERHARDT. You are asking whether the impeachment and removal of a Senator or Member of Congress is a violation of separation of powers? I want to make sure I understand the question.

You are asking if Congress sets out to impeach and remove a Member of Congress——

Mr. HOSTETTLER. No. Impeachment is done in the House, removal is done in the Senate. And we impeach and remove from office officers of the Government: President, Vice President, judges, justices, anyone. I am asking if that is a violation of separation of powers, in your opinion.

Mr. GERHARDT. The impeachment of whom, is what I am trying to find out.

Mr. HOSTETTLER. The Constitution says the House shall have sole power of impeachment. Let us say the impeachment of, say, a Federal judge and the removal of that Federal judge by the Senate. Do you believe that is a violation of separation of powers?

Mr. GERHARDT. The way you phrase it, I would probably have to say no; but I would have to know what the Federal judge had done to give you a fuller answer.

Mr. HOSTETTLER. Are you saying that the House cannot impeach——

Mr. GERHARDT. Yes, the House can impeach Federal judges. It has done that.

Mr. HOSTETTLER. But you are saying except for something else?

Mr. GERHARDT. If you are asking if the power of impeachment can ever exceed its limitations, I suppose the answer is yes. If the House impeached a private citizen——

Mr. HOSTETTLER. I understand what you are saying. I don't know how we would do that. That is intriguing.

Mr. GERHARDT. I would hope you wouldn't.

Mr. HOSTETTLER. Do you think the power to pardon after a Supreme Court has upheld a lower court's ruling with regard to an individual, do you think the power to pardon by the President is a violation of separation of powers? When the courts have determined that an individual has violated a Federal law and the Supreme Court has upheld the conviction, do you believe that the pardon is——

Mr. GERHARDT. Given what you have suggested, no, I would not think that would be a problem. If it is a Federal offense, obviously the pardon power does not pertain to State offenses but it pertains to Federal offenses. The President has been given that authority, so if the President exercises that authority, as Presidents have done, I am not sure there is a problem there.

Mr. HOSTETTLER. I ask unanimous consent for one additional minute.

Mr. CHABOT. Without objection.

Mr. HOSTETTLER. Do you believe the power of Congress to repeal a previously enacted statute is a violation of separation of powers?

Mr. GERHARDT. I can answer that question generally as probably yes. But again, we have to understand that the particulars may make a great deal of difference to the answer.

Mr. HOSTETTLER. You are saying it is a violation of separation?

Mr. GERHARDT. No, I said generally it would not be; but obviously I would need to know the particulars. There may be withdrawals of jurisdiction and other statutory entitlements and how that is done may make a great deal of difference to the answer.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from California, Mr. Schiff, is recognized for 5 minutes.

Mr. SCHIFF. Thank you, Mr. Chairman. This is now the fourth of five hearings on the subject, and I think on this side of the aisle we do not wish to be outdone. We would like to propose five more hearings on this subject, because Lord knows there is nothing else to have a hearing on in the Congress.

I have been trying now for 2½ years to get a hearing on whether the Constitution permits the President to detain American citizens without access to counsel, without access to judicial review, based on its sole determination that an American is an unlawful enemy combatant. I have not been able to get a hearing on that in almost 3 years, and we now have had five hearings on this subject. We have not been able to get a hearing on whether we should have a constitutional amendment to continue the Government if we were obliterated in a terrorist attack, but we do have time for five hearings on this subject, and I would like to propose that we have five more hearings.

I would like to ask some of the witnesses where their theory of the Constitution leads them. Mrs. Schlafly, you say that you do not trust the Federal courts to decide some of these questions, and you have greater trust in the State courts, so you would like to remove some of the Federal courts' jurisdiction and give it to the State courts?

Mrs. SCHLAFLY. Well, the Congress cannot legislate about the State courts. We are only considering here today the limiting of the Federal courts.

Mr. SCHIFF. Mrs. Schlafly, you would remove the Federal courts' jurisdiction over the marriage issue and allow the State courts to decide that?

Mrs. SCHLAFLY. Yes, I would. Marriage has always been a State matter.

Mr. SCHIFF. So you would be content with the Massachusetts Supreme Court deciding that issue rather than the U.S. Supreme Court?

Mrs. SCHLAFLY. I am not content with Massachusetts, no; but I would not be encouraged to think that the Supreme Court would do the right thing, and I don't think they should be handling it. Personally, I think the people of Massachusetts should take care of their problem, just like the people of Hawaii and Alaska took care of their courts.

Mr. SCHIFF. If the people of Massachusetts decided to amend their constitution to make it abundantly clear that they supported gay marriage, and—are you a citizen of Florida?

Mrs. SCHLAFLY. Missouri.

Mr. SCHIFF. I'm sorry; Missouri. Do you think the people of Massachusetts have that right, and would you find that has a place in the federalist system?

Mrs. SCHLAFLY. I think they have the right but I don't think it would possibly happen.

Mr. SCHIFF. But you are willing to allow the people of Massachusetts to make that decision for themselves?

Mrs. SCHLAFLY. Yes. There are a lot of people who are not apparently willing to let the people of Massachusetts, because the legis-

lature did everything that they could to keep that from going to the people. I think it is clear that the American people do not want to legislate same-sex marriage.

Mr. SCHIFF. Mrs. Schlafly, then you probably would not be comfortable with the current proposed constitutional amendment because that precludes a State constitution from allowing any marriage other than that between a man and a woman; you would not want to prohibit a State from writing that in their constitution or writing the converse, correct?

Mrs. SCHLAFLY. I would not object to that, if the American people want to have an amendment on that, providing we know exactly what it does. I mean, I believe in the legislative process.

Mr. SCHIFF. If you believe that the people of Missouri should not decide for the people of Massachusetts what kind of constitutional laws they should have, then I would think that you would not want a constitutional amendment that precludes the people of Massachusetts from doing that, would you?

Mrs. SCHLAFLY. There are a number of instances where States had made certain determinations but we decided we wanted to make it a national rule. If the American people want to have a marriage amendment, I would support that.

Mr. SCHIFF. But at the moment, I am asking what you want. Do you want the people of Missouri to be able to determine what the people of Massachusetts have for their own marriage laws?

Mrs. SCHLAFLY. At the moment, I want you to fix it so the Federal courts cannot overturn the laws of the State of Missouri, because we have a good State DOMA law, and we do not want Federal judges interfering with it.

Mr. SCHIFF. Mr. Dannemeyer, you would have us remove Federal court jurisdiction over marriage and over the Pledge of Allegiance as well; is that correct?

Mr. DANNEMEYER. Yes.

Mr. SCHIFF. Would you have us remove Federal court jurisdiction over legal tender so they could not remove "In God We Trust" from legal tender?

Mr. DANNEMEYER. Well, I think if the issue is we acknowledge keeping the motto "In God We Trust," I think we should keep that motto.

Mr. SCHIFF. I think we should keep that motto, too, and I think we should keep "under God" in the Pledge of Allegiance. But my question is: Should we remove jurisdiction from the Federal courts in case they might decide otherwise?

Mr. DANNEMEYER. Well, yes, I do. I think Congress has the authority.

Mr. SCHIFF. I am not asking whether we have the authority, I am asking whether you think we should do this; assuming we have the authority, should we remove the Federal court jurisdiction over abortion?

Mr. DANNEMEYER. I think that article III, section 2 presents a good opportunity for reaching that very issue. In fact *Roe* v. *Wade* of 1973 was based on a premise that was created out of thin air for justification of the Constitution.

Mr. SCHIFF. I ask unanimous consent for an additional minute.

Mr. CHABOT. Without objection.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. Dannemeyer, would you propose, then, since many of these issues that we have talked about, the Pledge, "In God We Trust" on legal tender, are issues regarding separation of church and State, shall we remove the Federal court jurisdiction over the first amendment of the Bill of Rights that provides, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," and in my view, that amendment does not preclude having "under God" in the Pledge, which I support, but just in case some court may find otherwise, shall we remove the jurisdiction of the Federal courts over the first amendment just to be safe?

Mr. DANNEMEYER. No, I don't think that we should give a broad reach of that nature. I think in this instance we are dealing with correcting. For example, we should make clear that people have the ability to express faith in public, which is what voluntary prayer in public schools is all about. We should be able to post the Ten Commandments on the walls of public buildings, and on that issue it is just as important as having the Ten Commandments on walls of public buildings.

Mr. CHABOT. The gentleman's time has expired. Does the gentleman wish an additional 30 seconds?

Mr. SCHIFF. Yes, thank you.

So rather than completely removing the jurisdiction of Federal courts over the first amendment, you would merely enumerate all of the first amendment issues involving the Pledge of Allegiance or abortion or—well, that involves a different amendment, I suppose—really, any separation of church and State issues within the first amendment, you simply enumerate those and remove those from the Federal Government?

Mr. DANNEMEYER. I would say to the gentleman from California that H.R. 3799 by Congressman Aderholt from Alabama is now pending before this Committee and should be adopted. It speaks to the specific issues that you described. It would allow retaining God in the Pledge of Allegiance, God in the national motto. It would allow expressions of faith, voluntary prayer in school, it would allow displaying the Ten Commandments on the walls of public buildings, and I hope you would support it.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman.

Professor Gerhardt, as I understand it your position is that Congress, having the article I and article III power to create lower courts, we do not necessarily have the automatic plenary authority, as Professor Redish suggests, to abolish those Federal courts; is that right?

Mr. GERHARDT. It depends on the circumstances. With respect to abolition, I think it depends on whether or not the court itself is vacant. If it is not vacant, I think there is a constitutional problem.

Mr. FEENEY. Would you agree that in *Lockerty* v. *Phillips* and *Sheldon* v. *Sill*, the U.S. Supreme Court has, on several occasions, suggested that having created the lower courts, that Congress has the implied power to repeal or abolish those courts?

Mr. GERHARDT. I would respectfully read those decisions differently, but the bottom line for me is if you are talking—I think the withdrawal of the jurisdiction is itself subject to various constitutional limitations.

Mr. FEENEY. My question is about abolishing what we have created. You are basically saying there may be restraints on abolishing things that we had the power to create under certain circumstances?

Mr. GERHARDT. We created a lower court.

Mr. FEENEY. But we do not necessarily have the automatic right to repeal or abolish that court, is what your position is. And would that be true with respect to creating an executive agency? If we created a Cabinet officer, the nanny State baby-sitter Cabinet officer, if we decided that did not work out, would we be limited in our ability to abolish what we created in the legislative branch just like in the judicial branch?

Mr. GERHARDT. I think in that particular circumstance it is likely to be different. I think you could have something like the Department of Homeland Security where you reorganize things.

Mr. FEENEY. Having created an executive agency, would we potentially be limited if we decided to abolish what we created?

Mr. GERHARDT. I am not sure you would be limited in doing that.

Mr. FEENEY. So when we create a Federal or an executive agency to repeal what we have done we are not limited, but with respect to the judicial branch they may be depending on the circumstances?

Mr. GERHARDT. I assume you have a neutral justification with regard to the executive agency. But if you have a neutral justification, you can reorganize jurisdiction. But if you do not have a neutral jurisdiction, in my opinion——

Mr. FEENEY. I would ask you in writing to tell us where in the text of the Constitution our powers are limited with respect to abolishing a judicial agency or entity we created, whereas it is different from the article II power, agencies that we have created.

Look, the fundamental issue is here, who creates constitutional rights. Some of us believe deeply when the 13 States ratified the Constitution, the people of those States spoke through their republican forms of Government. That is how constitutional rights were established and guaranteed to the people of the country. When new States adopted the Constitution as they became part of our Constitution, when constitutional amendments pursuant to article V were adopted pursuant to the provisions of the Constitution, that is how constitutional rights are created.

But I would like the professors to follow with me, because the problem here is when the Massachusetts Supreme Court, out of thin air, after 250 years of interpretation and history and tradition, its own constitution decides there is suddenly some new inherent right to marriage—I want to ask the professors to follow with me because I think this hypothetical gets to the text. This gets to the fundamental issue here: How are these rights created, and what do we do about run-away courts?

Supposing sometime in the future, five or more justices on the United States Supreme Court—maybe they decide to import foreign laws, as the *Lawrence* case did; maybe they cite a European

human rights decision; supposing they decided the 14th amendment Equal Protection Clause guarantees pedophiles the right to have relations with minor children at all times in all places, that they are constitutionally protected in this behavior and it is a fundamental right. Notwithstanding the fact that 50 States may have antipedophilia laws, the Constitution may have antipedophilia law, what is the remedy, Professor Gerhardt, and then Professor Redish, what is the remedy of the people? And I would ask you to cite in light of article IV, section 4, the Constitution, guaranteeing that we live under a republican form of Government—meaning we get to select the people that make and establish our laws—what would be the remedy if five justices decided to create a new right to pedophilia-type behavior tomorrow?

Mr. GERHARDT. Frankly, I think it would not be unlike *Dred Scott*. The remedy there was the 14th amendment. That is how *Dred Scott* got overruled. That is one of the ways prescribed under the Constitution.

A second way is you try, once people leave the Court, you might try to appoint people with different views.

A third way is you go back to the Court itself and try to convince them they are wrong. That is some of the ways that the Constitution allows.

Mr. CHABOT. The gentleman's time has expired.

Mr. FEENEY. Mr. Speaker, I ask unanimous consent for 30 seconds for Professor Redish to answer.

Mr. CHABOT. Without objection.

Mr. REDISH. I believe the *Dred Scott* case is one illustration. The other illustration is a case called *Chisolm* v. *Georgia*, where the very early Supreme Court construed article III to revoke State sovereign immunity; and very rapidly an amendment, the 11th amendment, was adopted overruling *Chisolm* v. *Georgia*. And I am sure in the example you give, there would be outrage throughout the Nation when we are dealing with a decision of that kind of unpopularity, a constitutional amendment would follow at least as rapidly as the 11th amendment did.

Mr. CHABOT. The gentleman's time has expired. The gentlewoman from Wisconsin is recognized for 5 minutes.

Ms. BALDWIN. Thank you, Mr. Chairman.

Before turning to questions, I wanted to ask, Mr. Chairman, unanimous consent to submit for the record a report received earlier this week addressed to you from the Congressional Budget Office entitled the "Potential Budgetary Impact of Recognizing Same Sex Marriages."

Mr. CHABOT. Without objection.

Ms. BALDWIN. Thank you. I offer that for the record, based in part on two of our prior hearings. I know there was a lot of questioning back and forth about the potential cost to the Federal Government, were the States and the Federal Government to someday recognize same-sex marriages. This report goes through some estimating and looks at effects on Federal revenues, income tax revenues, estate tax revenues. It further looks at effects on outlays and concludes, while the numbers are very negligible, a slight boon to the U.S. economy or the Federal Government were those relationships to be recognized sometime in the future. I am glad to have

their thinking on the topic added to the record of this Committee as we look at the issue.

Turning to today's topic, I had occasion to review the Congressional Research Service report on court stripping, and one of the things that they note is that there are all sorts of legislative proposals that could be characterized as court stripping: abolishing courts, limiting remedies in certain cases. But here today we are looking at a particular type of what is known as court stripping: proposals that have been made to limit the jurisdiction of Federal courts to hear cases in particular areas of constitutional law. Oftentimes the proposals that are brought forward in Congress, or most of the times they are brought forward in response to what can be characterized as a controversial court ruling. Issues that have resulted in court stripping proposals in Congress include rulings on busing, abortion, prayer in school and, recently, the reciting of the Pledge of Allegiance, and clearly the issue that brings us here today.

Because most of these proposals historically have not passed through Congress and been signed into law, an analysis of the constitutionality of these really relies predominantly on very, very old case law, a textual analysis of the Constitution and sort of scholarly discussion about what might happen given the lack of clear and recent precedent.

I wanted to direct my questions to our two law professors, and sort of expanding on Congressman Nadler's questions about the equal protection limits to this court stripping practice. I know our two professors draw that line in a different place.

Professor Redish, I was pleased to hear your commentary about whether this is constitutional or not, a lot of these court stripping bills would be unwise because they would have an impact on the legitimacy and public confidence in the Congress and the Federal courts. But your analysis in your testimony clearly says that the constitutional directive of equal protection restricts congressional power to employ its power to reject or restrict jurisdiction in an unconstitutionally discriminatory manner. And later on you elaborate that you could not, for example, exclude Federal judicial power in cases brought by African Americans, Jews or women.

I am wondering how much further, since there is a corollary—and you had that question a little bit before, of combining or revoking Federal jurisdiction in substantive matters which disproportionately affect those same protected classes. And I would also like to hear Professor Gerhardt's comments on where that line is in his analysis.

Mr. REDISH. My understanding of the equal protection law is that outside the area of race, the disproportionate impact for facially neutral aspects of the law do not render it a violation of equal protection. That was the *Goodridge* case I referred to earlier, where the Supreme Court said a law not including pregnancy in certain health benefits, although obviously it could only have an impact on women, was not a violation of equal protection.

So I believe under existing constitutional doctrine as I read it, that a law that said women or African Americans or Jews would not have access to the Federal courts would be unconstitutional. A law that restricted jurisdiction over a particular issue that hap-

pened to indirectly impact only women or Jews, African Americans, I believe is a different issue, I would say would not violate equal protection.

Mr. CHABOT. The gentlewoman's time has expired.

Ms. BALDWIN. If Professor Gerhardt could also be allowed to respond?

Mr. CHABOT. Without objection.

Mr. GERHARDT. I think if the law were directed plainly at women, then it gets heightened scrutiny in Federal court and it is only going to be upheld if it has substantial justification.

Even if the law does not mention plainly that it is directed against women, the court has held in other context, for example, a race-specific provision—and this is out of *Washington*, *Washington* v. *Seattle*, the court subjected that law to strict scrutiny because it could only have been African Americans who would have been disadvantaged by that law. If you have a law that is directed at burdening gays and lesbians and it is inevitable that they would be the plaintiffs in challenging DOMAs, then it is the natural inference that is what the law is directed against. The court would have to at least subject that to a rational-basis test, and in *Evans* v. *Romer*, for example, has struck it down for lacking a legitimate or neutral justification.

Mr. CHABOT. The gentlewoman's time has expired. The gentleman from Virginia, Mr. Forbes, is recognized for 5 minutes.

Mr. FORBES. Mr. Chairman, I thank the panel for their comments today. Mr. Nadler and Mr. Schiff have suggested that we have spent too much time on dealing with the marriage issue. In all due respect, there are some of us on this Subcommittee who believe, rightly or wrongly, that this is a major issue impacting families as we know them in America. Likewise, there are some of us on this Committee who feel that the American family unit is so crucial to the success of America, and America so crucial to the concept of freedom throughout the world, that it merits a significant amount of time to be spent on it.

I know none of my colleagues would make recommendations that they did not believe in, so if we need to have five more hearings, let us have five more hearings on this issue until we flesh it out and make sure that we make the right decisions.

I have heard many of you on the panel today being asked all kinds of questions other than the questions that you came prepared to answer. I could probably ask you about how you feel about the New York Yankees or the Washington Redskins, but we are here to look at the issue of marriage in this particular legislation. It may be simple, but it comes down to two basic issues: Can we as Congress limit this jurisdiction? And the second question is, should we?

Mrs. Schlafly, you have indicated that you feel, one, we can; and two, we should; is that a fair statement?

Mrs. SCHLAFLY. That is absolutely correct. I think it is clear from this panel and the historical record that you can do it. The issue is you have a wonderful law. DOMA is a well written, elegantly written law, that says what the American people want. We are faced with the possibility, through various litigation, that some ac-

tivist judges may throw it out, and you have had predictions that judges will do that.

I would suggest that it is up to Congress to prevent that from happening by using the power that we know you have. We do believe that these major decisions should be made by elected representatives, and the whole idea of unelected, lifetime judges to be able to overrule the fine law that Congress passed, and similar laws in all of the other States, is simply not tolerable in a democratic system of self-government.

Mr. FORBES. Mr. Gerhardt, thank you for your thoughts today. If you can help me today or submit your answer later in writing, my question is the concept that Mr. Feeney was talking about a little bit, that even though Congress has no mandate to create courts or jurisdiction or give them jurisdiction, that somehow once we have done that, whether in this area or the bankruptcy court or whatever, that we cannot withdraw that jurisdiction subsequently, if we decide to do that, without a motive or basis that the court approves. I am just wondering if you can at some point in time tell me not other court cases but just the constitutional principle upon which you base that statement?

Mr. GERHARDT. Well, I think it is, for example, the fifth amendment, and that amendment would require, among other things, that if you undertake a legislative action, it has to comply with the equal protection standard. That would then lead us down a particular path, depending on what the classification is, that this withdrawal of jurisdiction seeks to effectuate. So I think that is one limitation. I think every congressional power is subject to some limitation, just like Presidential powers are, and even judicial powers are subject to limitations.

I think it would be incorrect, at least in my judgment, to believe that there is such a thing as an unlimited congressional power.

Mr. FORBES. Mr. Redish, as I understand your comments today, you believe that we have the authority to do what is in this legislation, but that we should not exercise that authority in this way at this time?

Mr. REDISH. Yes. And I should emphasize once again, that has nothing to do with my views on the substantive merits of this particular law. It is my belief, just as a matter of the American political and judicial process, this is a very powerful authority this Congress has with some very negative consequences that can flow from its exercise, and great caution should be used before it is employed in any substantive area of law.

Mr. FORBES. Mr. Dannemeyer, you believe that we have the authority and that we should exercise the authority; is that a fair summation? I am out of time.

Mr. DANNEMEYER. Yes. Yes, I do.

Mr. CHABOT. Thank you. The gentleman's time has expired.

I would ask unanimous consent that the Ranking Member be granted the time to ask one final question.

Without objection.

Mr. NADLER. Thank you, Mr. Chairman.

This is a factual question for Professor Redish, I suppose. Have we ever adopted a constitutional amendment or has Congress ever

proposed to the States a constitutional amendment to overturn an anticipated court decision that had not yet occurred?

Mr. REDISH. Nothing occurs to me off the top of my head. That has not yet occurred?

Mr. NADLER. Has not at the time it was proposed.

Mr. HOSTETTLER. Would the gentleman yield? Such as the Bill of Rights?

Mr. REDISH. Well, I am not sure that was designed to fend off a particular court decision. It was a broad-based, categorical, normative directive as to what the rights should be; but I don't think it was grounded in any concern that otherwise courts would decide something that Congress did not like.

Mr. NADLER. I thank the gentleman.

Mr. CHABOT. I think that is a very good response. Without objection, Members will have 5 days to include additional responses.

I want to thank the panel. I thought this was excellent testimony on behalf of all four of the witnesses. I want to thank the Members for being here in such high numbers.

If there is no further business to come before the Committee, we are adjourned. Thank you.

[Whereupon, at 11:40 a.m., the Subcommittee was adjourned.]

# APPENDIX

## MATERIAL SUBMITTED FOR THE HEARING RECORD

### PREPARED STATEMENT OF CHARLES E. RICE

The subject of this hearing is the power of Congress over the jurisdiction of lower federal courts and its power over the appellate jurisdiction of the Supreme Court. This issue arises in the context of H.R. 3313, which provides:

> 'No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or determine any question pertaining to the interpretation of section 1738c of this title or of this section. Neither the Supreme Court nor any court created by Act of Congress shall have any appellate jurisdiction to hear or determine any question pertaining to the interpretation of section 7 of Title 1.' [1]

This statement, however, offers a general analysis of the power of Congress to remove classes of cases from federal court jurisdiction rather than a specific and detailed analysis of H.R. 3313.

#### THE POWER OF CONGRESS OVER THE JURISDICTION OF LOWER FEDERAL COURTS

The Constitution [Art III, Sec. 1) provides, "The juridical 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." The Constitution itself did not create the lower federal courts. Instead it left to Congress the decision whether to create such courts and, if Congress chose to create them, how much of the jurisdiction encompassed within the federal judicial power it ought to confer upon them. Congress need not have created such lower courts at all. Having created them, it need not vest in them jurisdiction to decide the full range of cases within the federal judicial power. For instance, until 1875, the lower federal courts had no general jurisdiction in cases arising under the Constitution or laws of the United States. [2] Today, the jurisdiction of the lower federal courts is limited in some respects by the requirement of jurisdictional amount and in other respects as to the classes of cases in which they are empowered to exercise jurisdiction. The Norris La Guardia Act, for example, withdrew from the lower federal courts jurisdiction to issue injunctions in labor disputes. The constitutionality of the Norris La Guardia Act was sustained by the Supreme Court in *Lauf* v. *E. G. Shinner and Co.* [3]

In an extensive dictum in *Palmore* v. *U.S.* [4] the Supreme Court summarized the status of the lower federal courts under Article III:

> Article III describes the judicial power as extending to all cases, among others, arising under the laws of the United States; but, aside from this Court, the power is vested "in such interior Courts as the Congress may from time to time ordain and establish." The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts to hear and decide cases within the juridical power of the United States, including those criminal cases arising under the laws of the United States. Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art III. "[T]he juridical power of the United States . . . is (except in enumerated instances, applicable exclu-

[1] 108th Cong., 1st Sess.; Section 1738c, of Title 28, is the Defense of Marriage Act; Section 7 of Title 1, of the Constitution is the Full Faith and Credit Clause.
[2] See Hart and Wechaler, The Federal Courts and the Federal System ()1953), 727–33.
[3] 303 U.S. 323, 330 (1938).
[4] 411 U.S. 389, 400–402 (1973).

sively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Cary* v. *Curtis,* 3 How 236, 245, 11 L.Ed. 576 (1845). [9] Congress plainly understood this, for until 1875 Congress refrained from providing the lower federal courts with general federal-question jurisdiction. Until that time, the state courts provided the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts.

9. This was the view of the Court prior to *Martin* v. *Hunter's Lessee,* 1 Wheat 304, 4 L.Ed. 97 (1816). *Turner* v. *Bank of North America,* 4 Dall 8, 1 L.Ed.718, (1799); *United States* v. *Hudson,* 7 Cranch 32, 3 L.Ed.259 (1812). And the contrary statements in *Hunter's Lessee,* supra, at 327–339, 4 L.Ed. 97, did not survive later cases. See for example, in addition to *Cary* v. *Curtis,* 3 How 236, 11 L.Ed. 576 (1845), quoted in the text, *Rhode Island* v. *Massachusetts,* 12 Pet 657, 721–722, 9 L.Ed. 1233 (1838); *Sheldon* v. *Sill,* 8 How 441, 12 L.Ed. 1147 (1850); *Case of the Sewing Machine Companies,* 18 Wall 553, 577–578, 21 L.Ed. 914 (1874); *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 233–234, 67 L.Ed. 226, 43 S.Ct. 79, 24 ALR 1077 (1922).

While various theories have been advanced to argue for restrictions on Congress' power over the jurisdiction of the lower federal courts, none of them is supported by the Supreme Court. Not only does the greater discretion to create, or not, the federal courts themselves include the lesser power to define their jurisdiction, the evident intent of the framers was to vest in the Congress the capacity to make the prudential judgment as to which courts, state or federal, should decide constitutional cases on the lower and intermediate levels.

A statute withdrawing a particular class of cases from the lower federal courts or forbidding those courts to issue specified types of order, would clearly be within the constitutional power of Congress to enact.

THE POWER OF CONGRESS OVER THE APPELLATE JURISDICTION OF THE SUPREME COURT

The Exceptions Clause of Article III, Section 2, provides that "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." This was intended, according to Alexander Hamilton, to give "the national legislature . . . ample authority to make such *exceptions,* and to prescribe such regulations as will be calculated to obviate or remove" the "inconveniences" which might arise from the powers given in the Constitution to the federal judiciary.[5] There was evidently concern in the Constitutional Convention and in some of the ratifying conventions that the Supreme Court would exercise appellate power to reverse jury verdicts on issues of fact. Nevertheless, the language of Article III, Section 2, explicitly give the Supreme Court "appellate Jurisdiction, both as to Law and Fact." And it is evident that the power of Congress to make exceptions to that appellate jurisdiction extends to the Court's power to review questions of law as well as questions of fact. As Hamilton observed in The Federalist, no. 81, "the Supreme Court will possess an appellate jurisdiction both as to law and fact, in all cases referred to [the subordinate tribunals], both subject to any *exceptions* and *regulations* which may be thought advisable."[6]

This power of Congress was so broadly interpreted that a specific authorization by Congress of appellate jurisdiction was construed by the Supreme Court to imply that such jurisdiction was excluded in all other cases. This "negative pregnant" doctrine was enunciated by Chief Justice John Marshall in *U.S.* v. *More,* in which the Court held that it had no criminal appellate jurisdiction because none had been expressly stated by Congress. Marshall, speaking for the Court, said:

[5] *The Federalist,* No. 80. Emphasis in original.
[6] Emphasis in original.

> . . . an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described.[7]

It is interesting to note that no criminal cases were appealable to the Supreme Court until 1891, simply because until then Congress had not specified that they could be so appealed. The only way a criminal case could be brought to the Supreme Court was "by certificate of division of opinion" in the Circuit Court "upon specific questions of law."[8]

In 1810, in *Durousseau* v. *U.S.,*[9] Chief Justice Marshall emphasized that the Court is bound even by implied exceptions to its appellate jurisdiction, so that, in effect, it can exercise it only where expressly granted by Congress." The "first legislature of the union," he said, "have not declared, that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative in the exercise of such appellate power as is not comprehended within it." When Chief Justice Taney spoke to the issue in *Barry* v. *Mercein,* he said, "By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes."[10]

Prior to 1868, the Supreme Court never had to decide the validity of an act of Congress making a specific exception to its appellate jurisdiction. But when William H. McCardle, a Mississippi editor, was imprisoned by the federal reconstruction authorities on account of statements he had made, he sought a writ of *habeas corpus* from the federal circuit court, asking that court to rule that his detention was invalid. When this petition was denied he appealed to the Supreme Court under a statute specifically permitting such appeals. After the Supreme Court heard arguments on the case and while the Court was deliberating, Congress enacted a statute repealing that part of the prior statute which had given the Supreme Court jurisdiction to hear such appeals from the circuit court. The Court, in confronting for the first time the issue of the positive congressional exception to the appellate jurisdiction, dismissed the petition for what of jurisdiction, even though the case had already been argued and was before the Court. "We are not at liberty to inquire into the motives of the legislature," said the Court. "We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words . . . without jurisdiction the court cannot proceed at all in any case. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case. And this is not less clear upon authority than upon principle."[11]

It is true that the statute upheld in *McCardle* did not bar the Supreme Court from reviewing all *habeas corpus* cases. Rather, it only barred review sought under the 1867 statute which had provided an avenue of review of such cases from the circuit court. The Supreme Court retained the *habeas corpus* review power which had been given it by the Judiciary Act of 1789 and which Congress had chosen not to withdraw. Later in 1868, the Court applied this distinction in *Ex parte Yerger,*[12] where the Court held that the 1868 statute left untouched the Supreme Court's power to issue its own writ of *habeas corpus* to a lower court as provided in the Judiciary Act of 1789. But neither in *McCardle* nor in *Yerger* is there any indication whatever that the Court would not have upheld an act withdrawing appellate jurisdiction in all *habeas corpus* cases from the Court.

Four years later, in *U.S.* v. *Klein,*[13] the Court had occasion to spell out one important limitation of the Exceptions Clause. Klein is the only Supreme Court decision ever to strike down a statute enacted under the Exceptions Clause. The claimant in *Klein,* who had been a Confederate, sued in the Court of Claims to recover the proceeds from the sale of his property seized and sold by the Union forces. He had received a full presidential pardon for his Confederate activities, and the Court of Claims ruled in his favor for that reason. If he had not received a pardon, the governing statute would have prevented his recovery. While the appeal of his case was

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[7] 7 U.S. (3 Cranch) 159, 172 (1805).

[8] *U.S.* v. *Sanges,* 144 U.S. 310, 319 (1892); see also *U.S.* v. *Cross,* 145 U.S. 571 (1892); *Ex parte Bigelow,* 113 U.S. 328, 329 (1885).

[9] 10 U.S. (6 Cranch) 307, 314 (1810).

[10] 46 U.S. (5 How.) 103, 119 (1847).

[11] *Ex parte McCurdle,* 74 U.S. (7 Wall.) 506, 513–14 (1868).

[12] 75 U.S. (8 Wall.) 85 (1868).

[13] 80 U.S. (13 Wall.) 128, 145–46 (1872).

pending before the Supreme Court, a state was enacted which provided that, whenever it appears that a judgment of the Court of Claims has been founded on such presidential pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case. The statute further declared that every pardon granted to a suitor in the Court of Claims which recited that he has been guilty of any act of rebellion or disloyalty, shall, if accepted by him in writing without disclaimer of those recitals, be taken as conclusive evidence of such act of rebellion or disloyalty and his suit shall be dismissed. While declaring the statute unconstitutional, the Supreme Court expressly reiterated that Congress does have the power to deny appellate jurisdiction "in a particular class of cases":

> Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right to appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient. [14]

The statute in *Klein* attempted to dictate to the Court how and by what processes it should decide the outcome of a particular class of cases under the guise of limiting it jurisdiction. The Court lost jurisdiction only when the Court of Claims judgment was founded on a particular type of evidence, that is, a pardon. And the statute further prescribed that the effect of the pardon would be such that the recitals in the pardon of acts of rebellion and disloyalty would be conclusive proof of those acts. "What is this," said the Court, "but to prescribe a rule for the decision of a cause in a particular way?" It is difficult to imagine a more flagrant intrusion upon the judicial process than this effort to dictate the rules to be used in deciding cases. Moreover, the statute in *Klein* intruded upon the President's pardoning power by attempting "to deny to pardons granted by the President the effect which this court had adjudged them to have." In these major respects the statute involved in *Klein* was wholly different from a statute simply withdrawing appellate jurisdiction over a certain class of cases.

Since the *Klein* case, the Supreme Court has not had occasion to define further any limits to the Exceptions Clause. In *The "Francis Wright,"* [15] the Court said that what the "appellate powers" of the Supreme Court "shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not." Chief Justice Waite, in his opinion for the Court in *The "Francis Wright"* referred to "the rule, which has always been acted on since, that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe." [16] Several statements of individual justices in the intervening years reinforce this conclusion. Thus Justice Frankfurter, in his dissenting opinion in *National Insurance Co.* v. *Tidewater Co.* [17] Noted that "Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice. Ex parte McCardle,* 7 Wall. 506." [18]

In summary, the holdings of the Supreme Court and the statements of various individual justices compel the conclusion that Congress clearly has power under the Exceptions Clause to withdraw appellate jurisdiction from the Supreme Court in particular classes of cases. Indeed, this power is so strong that an exception will be implied in cases where Congress has not specifically "granted" appellate jurisdiction to the Court.

It will be useful here to mention some arguments that have been advanced against the use of the exception power by Congress. It has been urged, as Professor

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[14] Emphasis added.

[15] 105 U.S. 381, 386 (1881).

[16] 105 U.S. at 385 (emphasis added).

[17] 337 U.S. 582, 655 (1949).

[18] See also the opinion of Justice Harlan in *Glidden* v. *Zdanok,* 370 U.S. 567–68 (1962); and see the concurring opinion of Justice Douglas in *Flast* v. *Cohen,* 392 U.S. 83, 109 (1968), stating that "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of Section 2, Art. III. See *Ex parte McCardle,* 7 Wall. 506."

Henry Hart put it, that the exceptions "must not be such as to destroy the essential role of the Supreme Court in the constitutional plan."[19] In addition to the difficulty of determining what is the Supreme Court's "essential role," that test would make the Court itself the final arbiter as to the extent of its powers. Despite the clear grant of power to Congress in the Exceptions Clause, no statute could deprive the Court if its "essential role;" but that role would be whatever the court said it was. It is hardly in keeping with the spirit of checks and balances to read such a virtually unlimited power into the Constitution. If the Framers intended so to permit the Supreme Court to define its own jurisdiction even against the will of Congress, it is fair to say that they would have made that intention explicit.

Furthermore, the "essential role" test was advanced by Professor Hart in response to the suggestion that Congress could satisfy the Exceptions Clause by removing all but a "residuum of jurisdiction," for example, by withdrawing appellate jurisdiction in "everything but patent cases." Whatever the cogency of Professor Hart's "essential role" test would be to a wholesale withdrawal of jurisdiction, if it were ever attempted by Congress, his test cannot properly be applied to narrowly drawn withdrawals of jurisdiction over particular types of cases. It could hardly be argued that the "essential role" of the Supreme Court depends on its exercising appellate jurisdiction in every type of case involving constitutional rights. Such a contention would be contrary to the clear language of the Exceptions Clause and to the consistent indications given by the Supreme Court itself.

A related but more substantial argument against the exercise of Congress' Exceptions Clause power is that Supreme Court review of cases involving important constitutional rights is necessary to ensure uniformity of interpretation and the supremacy of federal statutes over state laws.

The argument that fundamental rights should not be allowed to vary from state to state begs the question of whether there is a fundamental right to uniformity of interpretation by the Supreme Court on every issue involving fundamental rights. The argument overlooks the fact that the Exceptions Clause is itself part of the Constitution. As Alexander Hamilton wrote in No. 80 of the Federalist, the Exceptions Clause is a salutary means "to obviate and remove" the "inconveniences" resulting from the exercise of the federal judicial power. Judging from what the Supreme Court has said about it over the years, it is not only an important element of the system of checks and balances, but one which grants a wide discretion to Congress in its exercise. There is, in short, a fundamental right to have the system of checks and balances maintained in working order. Without that system, the more dramatic personal rights, such as speech, privacy, free exercise of religion, would quickly be reduced to nullities. This right to preservation of the system of checks and balances is itself one of our most important constitutional rights.

If it be contended that the Exceptions Clause cannot be used to deprive the Supreme Court of appellate jurisdiction in cases involving fundamental constitutional rights, it must be replied that such a limitation can be found neither in the language of the clause nor in its explications by the Supreme Court. Indeed, the Supreme Court's conclusion, prior to 1891, that there was no general right of appeal to that Court in criminal cases surely involved the denial of the right to appeal in cases involving constitutional rights. For what constitutional right is more fundamental than the Fifth Amendment right not to be deprived of life or liberty without due process of law?

A withdrawal of Supreme Court appellate jurisdiction and lower federal court jurisdiction over a subject such as same-sex marriage, school prayer or whatever, would not reverse any rulings the Supreme Court had already made on the subject. Some state courts might apply previous Supreme Court decisions but others might not. The constitutional commitment of complete discretion to Congress as to whether even to create lower federal courts, the resulting discretion of Congress to limit that jurisdiction, and the explicitly conferred control of Congress over the appellate jurisdiction, all combine to compel the conclusion that there is no constitutional right to uniformity of interpretation among the states as to constitutional rights. There would therefore be no constitutional obstacle to the effect of H.R. 3313 in permitting each state to make its own decision on the definition and legal incidents of marriage.

In his First Inaugural Address, President Abraham Lincoln warned that "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent

[19] Henry Hart, "The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic," 66 *Harv. L. Rev.* 1362, 1365 (1953).

practically resigned the government into the hands of that eminent tribunal." Supreme Court decisions in several areas are distortions of the constitutional intent in matters of substantial importance. It is within the power—and it is the duty—of Congress, to remedy this wrong. The withdrawal of jurisdiction would be a measured and appropriate response. It would be preferable to a constitutional amendment in that it would have no permanent impact on the Constitution. If experience showed it to be unwise, it could be readily repealed by a statute. But it would restore the balance of governmental powers and help to undo some of the unfortunate consequences of judicial excess.

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# THE FIRST CONGRESS'S UNDERSTANDING OF ITS AUTHORITY OVER THE FEDERAL COURTS' JURISDICTION†

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## I. INTRODUCTION

Congress's control of federal court jurisdiction has been a favorite topic of debate for many years.[1] Commentary on the extent of this legislative power typically has involved two essentially separate analyses.[2] Power over the Supreme Court's jurisdiction has involved construction of a bafflingly simple phrase in article III of the Constitution establishing the Court's appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[3] Authority over the lower courts' jurisdiction turns upon a different provision dealing with "inferior Courts."[4] Consistent with the Madisonian Compromise at the Constitutional Convention,[5] the latter provision generally has been considered an appropriate basis for recognizing plenary congressional control over the lower courts' jurisdiction.[6]

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[1] Most of the scholarly commentary is collected in a mammoth footnote in Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 742–44 n.3 (1984) [hereinafter cited as Clinton, *Mandatory View*]. *See also* Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984) [hereinafter cited as Gunther, *Guide*].

[2] *See, e.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 309–74 (2d ed. 1973) [hereinafter cited as HART & WECHSLER 2d].

[3] U.S. CONST. art. III, § 2.

[4] U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.").

[5] The details of the Madisonian Compromise have been presented elsewhere. *See, e.g.*, HART & WECHSLER 2d, *supra* note 2, at 11–12. *See also* Clinton, *Mandatory View*, *supra* note 1, at 763–64. In response to the Convention's approval of a motion that would have denied the national government authority to create lower federal courts, James Madison and James Wilson advanced and the Convention accepted a compromise plan that would postpone consideration of the issue. Instead of mandating lower courts, the Constitution would simply empower Congress to decide whether there should be lower federal courts. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 124–25 (rev. ed. 1937) [hereinafter cited as FARRAND'S RECORDS]. *See also* 2 FARRAND'S RECORDS at 45–46.

[6] *See* Gunther, *Guide*, *supra* note 1, at 912–14.

In recent years, Professor Julius Goebel[7] and Professor Robert Clinton[8] have challenged the historical accuracy of the traditional understanding of the Madisonian Compromise. The theses of these two scholars, however, are inconsistent with the enactment of the Judiciary Act of 1789.[9] This brief note will consider the system of federal courts created by the first Congress, giving special emphasis to the private and public papers of Oliver Ellsworth[10] and William Paterson,[11] the principal drafters of the Judiciary Act. These papers, together with the jurisdictional limitations contained in the Act and early interpretations by the Supreme Court and Attorney General Randolph demonstrate a general acceptance of extensive congressional control over federal court jurisdiction.

## II. The Mandatory Theses

Professor Goebel's rejection of the Madisonian Compromise is based upon what appears to be a simple editorial revision of article III. The Committee of Detail draft of the Constitution as amended and referred to by the Committee of Style required "such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States."[12] During the last few weeks of the Convention, the Committee of Style rewrote this language to require "such inferior courts as Congress may from time to time ordain and establish."[13] Professor Goebel concluded that this change was intended to rescind the Compromise and mandate the creation of a system of inferior courts vested with the complete judicial power of the United States.[14] If Professor Goebel's thesis were adopted as constitutional doctrine, Congress would have no authority to limit the jurisdiction of the lower Federal courts.[15] This conclusion has been criticized as "uncharacteristically thinly supported and unpersuasive."[16]

Professor Clinton presented a more sophisticated thesis. He concluded that the framers of the Constitution intended a definite linkage between the jurisdictions of the Supreme Court and the lower courts. Congress can limit any specific federal court's jurisdiction only so long as the aggregate combined original and appellate jurisdiction of the federal judiciary encompasses all cases within article III, section 2 of the Constitution.[17] Under this theory of mandatory aggregate vesting, Congress is free to restrict

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[7] J. Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, 240–47 (1971).

[8] Clinton, *Mandatory View*, *supra* note 1, at 750–54.

[9] The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) [hereinafter cited as Judiciary Act].

[10] *See* W. Brown, The Life of Oliver Ellsworth (1905) [hereinafter cited as Brown's Ellsworth]; R. Lettieri, Connecticut's Young Man of the Revolution: Oliver Ellsworth (1978) [hereinafter cited as Lettieri's Ellsworth].

[11] *See* J. O'Connor, William Paterson Lawyer and Statesman 1745–1806 (1979) [hereinafter cited as O'Connor's Paterson].

[12] 2 Farrand's Records, *supra* note 5, at 575, *quoted in* J. Goebel, *supra* note 7, at 246.

[13] 2 Farrand's Records, *supra* note 5, at 600, *quoted in* J. Goebel, *supra* note 7, at 246.

[14] J. Goebel, *supra* note 7, at 247.

[15] "The discretion left to Congress was the authority to settle the institutional pattern at the lower level of judicial administration and to arrange how the jurisdiction conferred by section 2 of Article III was there to be disposed." *Id.*

[16] Hart & Wechsler 2d, *supra* note 2, at 13 n.46. Most scholars concur in the rejection of Professor Goebel's analysis. *See* Clinton, *Mandatory View*, *supra* note 1, at 794 n.169; Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 61 (1975); Sager, *Constitutional Limitations On Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 34 n.47 (1981).

[17] The thesis of mandatory aggregate vesting is summarized and resummarized in Clinton,

the jurisdiction of the lower federal courts only insofar as the Supreme Court is vested with appellate jurisdiction over state court adjudications of the excluded cases. Similarly, Congress may limit the Supreme Court's appellate jurisdiction to the extent that a lower federal court is vested with power over the excluded cases.

The thesis of mandatory aggregate vesting has some anomalous policy implications,[18] but the theory is founded in history — not policy. The remainder of the present note suggests a significant weakness in Professor Clinton's — and incidentally Professor Goebel's — analysis. Although Professor Clinton has meticulously analyzed the records of the Constitutional Convention and the ratification process for material relevant to congressional control over federal court jurisdiction, the subsequent enactment of the Judiciary Act of 1789 receives comparatively cursory consideration.[19] That Act, however, deserves more attention because many of the leading participants in the Constitutional Convention and the subsequent ratification process were members of the first Congress.[20]

## III. The Judiciary Act

Oliver Ellsworth and William Paterson were influential delegates to the Philadelphia Convention, and they later served together in the first Congress and on the Supreme Court. Ellsworth was a member of the Committee of Detail that prepared the first draft of the Constitution.[21] Paterson is best known for his small states plan that resulted in the Great Compromise of the Convention: a Senate in which each state has equal representation.[22] Both men were present when the Madisonian Compromise initially was struck,[23] but they left the Convention before the Committee on Style reported a number of changes in the last two weeks of the Convention.[24] Nevertheless, they kept in touch with the political ebb and flow in Philadelphia.[25]

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*Mandatory View*, *supra* note 1, at 749–54 & 841–45. A similar theory is presented in Sager, *supra* note 16, at 61–68.

[18] For example, Professor Clinton's analysis seems to recognize a congressional power to limit the Supreme Court's power to the narrow original jurisdiction in article III as long as a system of lower federal courts is retained. But this absurd suggestion is so unlikely to be implemented that it cannot be taken as a serious criticism. Professor Clinton suggests, however, that elimination of the lower courts' diversity jurisdiction might be impermissible unless the Supreme Court is vested with appellate jurisdiction over state court diversity cases. Clinton, *Mandatory View*, *supra* note 1, at 854 n.369. Elimination of diversity jurisdiction is by no means an absurd proposition. One wonders about a constitutional theory that would require Congress to create a presumably discretionary appellate jurisdiction that the Supreme Court certainly would never use.

[19] *See id.* at 846–51.

[20] *See* Encyclopedia of American History 145 (R. Morris 6th ed. 1982); Sager, *supra* note 16, at 31 n.37.

[21] 2 Farrand's Records, *supra* note 5, at 97.

[22] *See generally* C. Rossiter, 1787: The Grand Convention ch. 10 (1966); O'Connor's Paterson, *supra* note 11, ch. 7.

[23] The Madisonian Compromise was approved initially on June 5 and finally on July 18, 1787. *See* Hart & Wechsler 2d, *supra* note 2, at 11–12. Paterson left the Convention on July 23, 1787. 3 Farrand's Records, *supra* note 5, at 589. Ellsworth left sometime between August 23 and August 27, 1787. *Id.* at 487. The Convention concluded its business on September 17, 1787. *Id.* at 641–50.

[24] The Committee on Style submitted its report on September 12, 1787. 2 Farrand's Records, *supra* note 5, 582. Paterson and Ellsworth left in late July and August. *See supra* note 23.

[25] *See, e.g.*, Letter from fellow New Jersey Delegate David Brearley to William Paterson (Aug. 21, 1787), *reprinted in* 3 Farrand's Records, *supra* note 5, at 73; Letter from William Paterson to Oliver Ellsworth (Aug. 23, 1787) (inquiring, "What are the Convention about? When will they

Although Paterson did not participate in the subsequent ratification process,[26] Ellsworth played a significant role in Connecticut. Before the Connecticut ratification convention was convened, Ellsworth began writing a series of influential essays[27] entitled, *The Letters of a Landholder*.[28] In *Landholder* VI, he responded to George Mason's complaint that the system of federal courts authorized by the Constitution would "absorb and destroy the judiciaries of the several states."[29] Ellsworth flatly rejected any notion that the complete judicial power must be vested in the federal judiciary: "nothing hinders but . . . that all the cases, except the few in which [the Supreme Court] has original and not appellate jurisdiction, may in the first instance be had in the state courts and those trials be *final* except in cases of great magnitude."[30] Ellsworth's political ally and mentor,[31] Roger Sherman, voiced this same view in more detail.[32]

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rise?"), *reprinted in* 4 FARRAND'S RECORDS, *supra* note 5, at 73. When the final version of the Constitution was complete, Paterson returned to Philadelphia and signed the document. 2 FARRAND'S RECORDS, *supra* note 5, at 664.

After the Convention was over, Ellsworth met with Roger Sherman, a fellow Connecticut delegate, to draft a formal report to Connecticut's Governor Huntington. 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 351–52 (M. Jensen ed. 1978) [hereinafter cited as JENSEN'S DOCUMENTARY HISTORY]. The next day, their report was sent to the Governor. Letter from Roger Sherman and Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), *reprinted in* 3 JENSEN'S DOCUMENTARY HISTORY, *supra*, at 352. Sherman was present throughout the Convention and signed the proposed Constitution. 3 FARRAND'S RECORDS, *supra* note 5, at 590. One may reasonably assume that Ellsworth discussed the business of the Convention on this and other occasions. For Ellsworth's and Sherman's understanding of congressional power over the lower courts' jurisdiction, see *infra* notes 27–32 and accompanying text.

[26] "There is no indication that Paterson played any role in winning support for the ratification in New Jersey, but there was no significant opposition to be worried about." O'CONNOR'S PATERSON, *supra* note 11, at 161 (footnote omitted). *Accord* 3 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 117–97 (exhaustive analysis of the ratification process in New Jersey). During this time, Paterson was successfully staving off financial ruin. His ne'er-do-well brother had listed him as guarantor on a number of obligations. O'CONNOR'S PATERSON, *supra* note 11, at 165–68.

[27] *See* 13 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 562. Rufus King declared that "'the Landholder' will do more service our way than the elaborate works of Publius [the Federalist Papers]." Letter from Rufus King to Jeremiah Wadsworth (Dec. 23, 1788), *quoted in* 13 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 562.

[28] Ellsworth, *The Letters of a Landholder* (Nov. 1787–Mar. 1788), *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 135–202 (P. Ford ed. 1892) [hereinafter cited as *Landholder*; for convenience, both the letter number and the Ford pagination are indicated]. On Ellsworth's authorship of these letters, see 13 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 561–62. *See also* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 137 (P. Ford ed. 1892).

[29] Mason, *The Objections of the Hon. George Mason, to the Proposed Federal Constitution* (1787), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 329–30 (P. Ford ed. 1888).

[30] *Landholder* VI, *supra* note 28, at 164–65 (emphasis added). James Iredell also wrote a response to Mason's objection. Iredell explained that, "it is impracticable to define everything [in respect to the federal courts' jurisdiction]. [Therefore] we must depend upon our future legislature in this case as well as others." Iredell, *Answers to Mr. Mason's Objections to the New Constitution, Recommended by the Late Convention* (1788), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 343 (P. Ford ed. 1888).

[31] *See* BROWN'S ELLSWORTH, *supra* note 10, at 47–48 (Ellsworth once stated that he had consciously modeled himself after Sherman). *See also* LETTIERI'S ELLSWORTH, *supra* note 10, at 43; F. MCDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776–1786, 178 (1965) (in the Continental Congress, Ellsworth had been "the alter ego of Roger Sherman").

[32] The wording of Sherman's analysis is remarkably similar to Ellsworth's and clearly rejects Professor Clinton's thesis:

After the Constitution was ratified, Ellsworth and Paterson were selected to represent their states in the Senate.[33] On April 7, 1789, the day after a quorum first was attained in the Senate, both men were appointed to the committee designated "to bring in a bill for organizing the Judiciary of the United States."[34] A senator from each state was appointed to the committee,[35] presumably because everyone agreed that the creation of a federal judicial system was important and controversial. Anyone who has drafted a complex document will understand that the actual drafting of the judiciary bill must — of necessity — have been accomplished by a comparatively small subgroup.[36] Most of the committee's work was done by Oliver Ellsworth, William Paterson, and Caleb Strong of Massachusetts. Ellsworth was the father of the legislation and its moving force.[37] Paterson acted as his principal lieutenant, and Strong played a comparatively minor support role.[38] Ellsworth and Paterson had been allies in the struggle at the Convention to assure small states protection in Congress,[39] and both men were ardent federalists.[40]

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> It was thought necessary in order to carry into effect the laws of the Union, to promote justice, and preserve harmony among the states, to extend the judicial powers of the United States to the enumerated cases, under such regulations and with such exceptions as shall be provided by law, *which will doubtless reduce them to cases of such magnitude and importance as cannot safely be trusted to the final decision of the courts of particular states*; and the constitution does not make it necessary that any inferior tribunals should be instituted, but it may be done if found necessary.

Sherman, *Observations on the New Federal Constitution (A Citizen of New Haven, II)* (Dec. 25, 1788) (emphasis added), *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 240–41 (P. Ford ed. 1892). *See also* Sherman, *Observations on the Alterations Proposed as Amendments to the Federal Constitution (A Citizen of New Haven, I)* (Dec. 4, 1788), *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 235 (P. Ford ed. 1892). Clinton Rossiter thought that Sherman was one of the most influential members of the Convention and was "probably the most useful and certainly the most valuable delegate from Connecticut." C. ROSSITER, *supra* note 22, at 249.

[33] Paterson was the overwhelming choice of the New Jersey legislature. O'CONNOR'S PATERSON, *supra* note 11, at 168. In Connecticut, Ellsworth was unopposed. 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 28 (G. DenBoer ed. 1984).

[34] 1 ANNALS OF CONG. 18 (J. Gales ed. 1789). The standard accounts of the legislative process leading to the creation of the federal judicial system are Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923) [hereinafter cited as Warren, *New Light*], and J. GOEBEL, *supra* note 7, ch. XI. *See also* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 4–14 (1928).

[35] There was a conscious decision to have each state represented on the committee. 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 14 (Senate Journal) (L. DePauw ed. 1972) [hereinafter cited as DEPAUW'S SENATE JOURNAL]. Half of the members of the committee also had been delegates to the Constitutional Convention: Oliver Ellsworth, William Paterson, Caleb Strong of Massachusetts, Richard Bassett of Delaware, and William Few of Georgia. *See* 3 FARRAND'S RECORDS, *supra* note 5, at 586–90.

[36] On May 11, the committee selected a subcommittee to draft a bill. W. MACLAY, THE JOURNAL OF WILLIAM MACLAY 29 (C. Beard ed. 1927) [hereinafter cited as MACLAY'S DIARY]; Letter from Caleb Strong to Robert Paine (May 24, 1789) (available at Massachusetts Historical Society, Boston, Massachusetts). Neither Maclay nor Strong give the subcommittee membership.

[37] Warren, *New Light*, *supra* note 34, at 59–60; J. GOEBEL, *supra* note 7, at 459–60. After the House passed an amended version of the Senate bill, Ellsworth, Paterson and Pierce Butler were appointed to a special committee to consider the House amendments. *See infra* note 42. Analysis of a hand written draft bill in the National Archives (*see infra* note 41) indicates that the first nine sections of the draft were written by Paterson, sections 10–23 by Ellsworth, and section 24 by Strong. Warren, *New Light*, *supra* note 34, at 50.

[38] Warren, *New Light*, *supra* note 34, at 59–60; J. GOEBEL, *supra* note 7, at 459–60. *See also supra* note 37.

[39] *See* O'CONNOR'S PATERSON, *supra* note 11, ch. 7. *See also* the very warm, informal, and chatty

On June 12, 1789, about two months after Ellsworth's drafting committee was formed, a bill was reported to the Senate.[41] After lengthy debate and numerous amendments, the legislation was approved by both houses on September 27 of that year.[42] The bill[43] reported by the Senate committee, and the legislation eventually enacted, contained

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letter from Paterson to Ellsworth (Aug. 23, 1789), *reprinted in* 4 FARRAND'S RECORDS, *supra* note 5, at 73.

[40] "From the day when every doubt of the right of the smaller states to an equal vote in the Senate was quieted, they — so I received it from the lips of Madison, and so it appears from the records — exceeded all others in zeal for granting powers to the general government. Ellsworth became one of its strongest pillars. Paterson was for the rest of his life a federalist of federalists." 2 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION 88 (1882). *Accord*, BROWN'S ELLSWORTH, *supra* note 10, ch. V–VII; O'CONNOR'S PATERSON, *supra* note 11, ch. 8, 11 & 12.

[41] 1 ANNALS OF CONG. 46 (J. Gales ed. 1789). *See also* MACLAY'S DIARY, *supra* note 36, at 72. There is a minor dispute regarding the precise wording of the bill that was reported out of committee on June 12. Professor Warren, through careful investigation, was able to locate a handwritten copy of the bill in the National Archives and concluded that this relic was the bill actually reported on June 12. Warren, *New Light*, *supra* note 34, at 49–50. *Accord*, DEPAUW'S SENATE JOURNAL, *supra* note 35, at 67 n.34. The handwritten bill is in a collection of papers entitled "A Bill to establish the Judicial Courts of the United States." National Archives, Senate Files, Sen. IA-B1. Professor Goebel compared this handwritten bill with the bill printed on June 16 by Thomas Greenleaf, the Senate printer, and found substantial differences. J. GOEBEL, *supra* note 7, at 465–66. He concluded that the handwritten draft in the National Archives actually is a mature but not final working draft and that the Greenleaf printed version reflects the language that actually was reported out of committee on June 12. *Id.* at 463–66.

Professor Goebel's analysis would seem compelling except that the back of the final page of the handwritten draft found by Professor Warren has the following endorsement:

1st Sess L. 1st Con

A Bill to establish ye judicial
Courts of the United States

Read June 12, 1789.
[ ? ] Monday June 22.
assigned for the 2d reading.
as reported

Page 12 of the handwritten bill (which is the final page in Paterson's handwriting) has a similar endorsement. Perhaps the handwritten draft was the bill actually reported, but members of the committee made a few changes between June 12 when the bill was reported and June 16 when printed copies were available. Except for the Assignee Clause (*see infra* notes 96–105 and accompanying text), none of the judiciary measures discussed in the present article are significantly different in the two bills.

[42] The Senate passed a bill on July 17, 1789. 1 ANNALS OF CONG. 50 (J. Gales ed. 1789). This Senate bill was referred to the House which passed an amended version on September 17, 1789. *Id.* at 894. The House version immediately was referred to the Senate where a three person committee (Ellsworth, Paterson, and Pierce Butler) reviewed the House amendments. *Id.* at 80. On September 19, 1789, Ellsworth recommended that the Senate agree to most of the House amendments, and the Senate passed a resolution endorsing Ellsworth's recommendation. DEPAUW'S SENATE JOURNAL, *supra* note 35, at 179. On September 21, 1789, the House agreed without debate to the Senate resolution, 1 ANNALS OF CONG. 904 (J. Gales ed. 1789), and the bill was signed by the Speaker of the House and the Vice President the next day, September 22, 1789. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 222–23 (L. DePauw ed. 1977) (House Journal); DEPAUW'S SENATE JOURNAL, *supra* note 35, at 183–84.

[43] A Bill to Establish the judicial Courts of the United States (undated) (printed by Thomas

a number of substantial limitations upon the subject matter jurisdiction of the Supreme Court and the lower federal courts.[44] Because all debates in the first Senate were secret,[45] there is some difficulty in piecing together a complete history of the act.[46] Nevertheless, the Rutgers University Library at New Brunswick has William Paterson's notes of the Senate debates (Paterson's Notes)[47] and a manuscript of a speech (Paterson's Speech)[48] he wrote for the Senate debates. The New York Public Library's Bancroft Collection contains additional notes and a working draft of Paterson's Speech.[49] Legal scholars have paid little attention to these materials. Paterson's Speech and his notes of the Senate debates are particularly important because the Judiciary Act originated in the Senate and he was one of the principal drafters.

### A. *Paterson's Speech and Notes*

The Senate debates began on June 22, 1789.[50] As the first order of business the Senate agreed that some lower courts should be established.[51] Senator Lee then moved "[t]hat the jurisdiction of the Federal courts should be confined to cases of admiralty and maritime jurisdiction."[52] Senator Lee and his allies argued that an extensive system of lower federal courts was unnecessary and an insult to the state judges.[53] Paterson jotted down his preliminary thoughts in response to Lee's motion[54] and then redrafted his thoughts into a speech to be delivered the next day.[55]

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Greenleaf) [hereinafter cited as Committee Bill], *reprinted in* EARLY AMERICAN IMPRINTS N. 45657 (published by Readex Microprint Corp.). Although two candidates have been nominated as the committee's final proposed bill (*see supra* note 41), the widely available Readex Microprint will be used in the present article. Readex lists the Committee Bill as a House document, but the bill clearly is the original Senate bill. *Compare* MACLAY'S DIARY, *supra* note 36, at 86, 87 (section in the first part of bill providing for affirmation by Quakers is broadened by striking the reference to Quakers), *with* Committee Bill, *supra*, at 4 (ninth unnumbered section: affirmation by Quakers). The microprint Committee Bill is identical to the original Senate bill now in the New York Public Library.

[44] *See, e.g.*, *infra* notes 71–95, 123–34 and accompanying text (diversity and alienage jurisdiction); *infra* notes 96–105 and accompanying text (Assignee Clause).

[45] *See* J. GOEBEL, *supra* note 7, at 444 n.163.

[46] MACLAY'S DIARY, *supra* note 36, gives some insights but generally is not very helpful. Senator Maclay was an adamant opponent of the Judiciary measure. *See* Warren, *New Light*, *supra* note 34, at 96–97, 109. Indeed, supporters of the measure consciously kept him in the dark. *See* MACLAY'S DIARY, *supra* note 36, at 97–98.

[47] *See* Paterson's Notes, *infra* Appendix C.

[48] *See* Paterson's Speech, *infra* Appendix B.

[49] *See* Paterson's Draft Speech, *infra* Appendix A.

[50] 1 ANNALS OF CONG. 47 (J. Gales ed. 1789). Apparently there had been some preliminary discussion on June 12, 1789. *See* MACLAY'S DIARY, *supra* note 36, at 72.

[51] MACLAY'S DIARY, *supra* note 36, at 83.

[52] *Id.* (quoting Lee's motion). The precise words of Senator Lee's proposed amendment apparently were:

> That no subordinate federal jurisdiction be established in any State, other than for Admiralty or Maritime causes but that federal interference shall be limited to Appeals only from the State Courts to the supreme federal Court of the U. States.

National Archives, Senate Files, Sen. IA-B1, chit number 28. Since the Supreme Court was not vested with complete appellate jurisdiction (*see infra* notes 119–34 and accompanying text), Lee's motion was inconsistent with any theory of mandatory jurisdiction. In any event, the Senate rejected the motion and proceeded to enact a judiciary system with a number of significant jurisdictional limitations.

[53] *See* Paterson's Initial Notes, *infra* Appendix A, lines 1–23.

[54] *See id.* lines 24–142.

[55] *See* Paterson's Speech, *infra* Appendix B.

Consistent with the traditional understanding of the Madisonian Compromise, Paterson did not even hint in his speech that the Constitution restricts congressional power to limit the lower courts' jurisdiction.[56] After some obligatory but uninspiring introductory rhetoric,[57] he began:

> Ever since the Adoption of the Const.n I
> have considered federal Courts of subordinate
> Jurisd.n and detached from state Tribunals as
> inevitable.
> The Necessity, the Utility, the Policy
> of them strikes my Mind in the most forcible Manner.[58]

He continued in this prudential vein by advancing cogent reasons of policy for creating lower federal courts.[59] Paterson's unifying theme was that it is unwise to entrust all federal matters to state judges dependent upon the individual states.[60]

Later on that same day, Lee's motion to limit the lower courts' jurisdiction to admiralty cases was defeated. The Senate then considered the composition of the Supreme Court.[61] On the next day, June 24, the Senate debated whether to establish the unusual system of circuit courts proposed by Ellsworth's committee.[62] The principal topic of debate was "whether there should be circuit courts or courts of *nisi prius*."[63] Paterson's

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[56] Paterson's initial notes include the isolated statement that, "The const.n, points out a number of articles, which the federal courts must take up." Paterson's Initial Notes, *infra* Appendix A, lines 165–67. The origin of this statement is unclear (*see infra* text following note 174), and there is no comparable passage in Paterson's Speech. *See* Paterson's Speech, *infra* Appendix B.

In any event, the statement is fraught with ambiguity. Perhaps the phrase, "a Number of Articles," refers to substantive provisions of the Constitution rather than the list of cases and controversies in article III, section 2. Furthermore, the verb "must take up," may be hortatory: Congress has plenary power over the courts' jurisdiction, but prudential considerations are so overwhelming that the Congress "must" exercise its discretion in favor of jurisdiction. Even if the statement represents a theory of mandatory jurisdiction, the cases that "the federal courts must take up" may be the few cases within the Supreme Court's mandatory original jurisdiction. *Cf. Landholder* VI, *supra* note 28, at 164–65, (Oliver Ellsworth notes the Supreme Court's original jurisdiction as the only mandatory jurisdiction under the Constitution) (*see supra* note 30 and accompanying text for quotation).

[57] *See* Paterson's Speech, *infra* Appendix B, lines 1–17.

[58] *Id.* lines 17–21.

[59] *See infra* note 60.

[60] *See, e.g.*, Paterson's Speech, *infra* Appendix B, lines 68–70 ("However I may value a Man, yet if he be dependent upon another, I should not like to submit to his Decision a Dispute in which that other is concerned."). *See generally id.* lines 22–97.

[61] MACLAY'S DIARY, *supra* note 36, at 86. Paterson's Notes on this portion of the Senate's consideration are obscure. *See* Paterson's Notes, *infra* Appendix C, lines 1–14. See *infra* notes 119–32 and accompanying text for a discussion of the pertinent provisions for Supreme Court appellate jurisdiction.

[62] *See generally* J. GOEBEL, *supra* note 7, at 471–80. The circuit courts were three judge courts consisting of the federal district judge of the state where the court sat and at least one Supreme Court Justice. Judiciary Act, *supra* note 9, § 4. These courts were given appellate jurisdiction over appeals from the district courts. *Id.* §§ 11, 21–22. The circuit courts also were given an important original jurisdiction. *Id.* §§ 11–12.

[63] MACLAY'S DIARY, *supra* note 36, at 86. To most twentieth century attorneys, *nisi prius* is a generic concept, but in the eighteenth century this phrase referred specifically to the manner in which the three English superior courts of common law exercised their original jurisdiction. The courts sat en banc at Westminster to decide all pretrial issues. Individual judges then would go on circuit to preside over the trial of factual issues at *nisi prius* in the appropriate venue throughout

Notes provide the gist of what was said, concentrating on the comparative advantages of a *nisi prius* system.[64] Sometime after the *nisi prius* debates, a third alternative remarkably similar to the present original jurisdiction of the federal courts was mentioned: "Why should not the Jurisd$^{n}$ of the Dist$^{t}$ Court be complete & extend to all Cases at Law and in Equity, with an Appeal, limiting the same."[65] If this third alternative had been adopted, the district courts would have been the principal federal trial courts, and presumably neither the circuit courts nor a *nisi prius* system would have been enacted for the trial of cases. There is some evidence that the drafting committee previously had also considered vesting the federal trial courts with "complete" jurisdiction.[66]

Paterson's Notes do not suggest the significance or context of the comprehensive district court proposal. Instead, the notes immediately turn to the jurisdiction of the circuit courts and begin by considering the amount in controversy limitation. Paterson recorded:

> If a small sum, it
> may involve a Question of Law
> of great Importance, and
> should be liable to be removed.
> Hambden [sic], his a Cause of 20 s/.
> — Sum of 500 D$^{s}$ small enough.
> . . .
> Def$^{t}$ but how as to the Pltf.
> Concurrent Jurisd$^{n}$.
> . . .
> The Farmers in the New England
> States not worth more than
> 1,000 D$^{s}$ on an Average.[67]

Following this consideration of the amount in controversy limitation, the Senate discussed the types of cases that would be tried by the circuit courts. The principal business of the federal trial courts would be to adjudicate commercial cases involving "Money. Merchandize. Land bought and sold. . . . Where Titles are held under different States, each State will endeavor to protect its own Grant. they should be tried in the federal Court."[68] The rest of Paterson's Notes are given over to the Senate's consideration of the procedure to be used in the lower federal courts, especially the adoption of equity procedures for law cases.[69]

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England. After a verdict, post-trial issues would be decided, and a judgment would be entered by the court, en banc, at Westminster. *See* RADCLIFFE & CROSS' THE ENGLISH LEGAL SYSTEM 182–87 (G. Hand & D. Bentley 6th ed. 1977); 3 W. BLACKSTONE, COMMENTARIES *57–59.

[64] *See* Paterson's Notes, *infra* Appendix C, lines 15–51.

[65] *See id.* lines 52–57.

[66] Professor Warren notes the existence of an anonymous letter "from a gentleman in New York to his friend in Virginia" that was written at the time of the drafting process and reports, "[t]hat . . . [the circuit] Court . . . was to have cognizance of all cases of federal jurisdiction, whether in law or equity above the value of five hundred dollars." Warren, *New Light*, *supra* note 34, at 61. The letter is reprinted in the State Gazette of North Carolina, July 30, 1789.

[67] Paterson's Notes, *infra* Appendix C, lines 58–73.

[68] *See id.* lines 74–82.

[69] *See id.* lines 83–172.

B. *Jurisdictional Limitations In The Judiciary Act*

Consistent with the traditional understanding of the Madisonian Compromise, Paterson clearly thought that Congress had legislative discretion to limit the jurisdiction of the lower federal courts. He forcefully argued against proposals to limit the District Courts' jurisdiction to admiralty matters, but his arguments were prudential — not constitutional. To Paterson, Senator Lee's admiralty proposal simply was unwise; Paterson assumed that Congress had discretionary authority over the federal courts' jurisdiction.[70] The bill he helped draft and the Act Congress passed certainly contained major limitations upon the courts' jurisdiction.

1. Amount in Controversy

From the beginning of the drafting process, Ellsworth's committee apparently agreed that the non-admiralty civil jurisdiction of the lower courts should be limited to cases in which the amount in controversy exceeded five hundred dollars.[71] This limitation was enacted by Congress.[72] Professor Clinton concedes that Congress thereby limited federal jurisdiction but dismisses the excluded litigation as "cases involving a trivial federal supremacy interest."[73]

The members of the Senate, however, clearly did not consider the five hundred dollar limitation to be trivial. During the debates and in the specific context of a jurisdictional amount limitation, the point was made, "If a small Sum, it may involve a Question of Law of great Importance . . . . Hambden [sic], his a Cause of 20 s/."[74] The reference to John Hampden's refusal to pay Charles I's Ship Money tax emphasizes that this was not a casual theoretical consideration. Although only twenty shillings were

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[70] Based solely upon remarks of William Smith in the House of Representatives, Professor Clinton asserts "it is reasonably clear that federalist supporters of the Judiciary Act believed that Congress . . . had no discretion to decide whether to invest the federal courts with the entirety of the judicial power of the United States." Clinton, *Mandatory View*, *supra* note 1, at 850. Although Senator Maclay advanced an argument similar to Smith's in the Senate debates (MACLAY'S DIARY, *supra* note 36, at 83, 85), neither legislator's analysis is entitled to significant weight. Both men espoused the notion that concurrent state court jurisdiction of causes within article III is unconstitutional. MACLAY'S DIARY, *supra* note 36, at 85; 1 ANNALS OF CONG. 801 (J. Gales ed. 1789) (Smith's speech). This is the argument that Hamilton destroyed in Federalist No. 82 and that was rejected in numerous ratification conventions. *See* Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 488 (1928). Furthermore, Congress itself gave the back of its hand to the Smith-Maclay analysis by enacting the Judiciary Act. Neither Maclay nor Smith had been delegates to the Philadelphia Convention, and Maclay did not participate in the Pennsylvania ratification convention. 3 FARRAND'S RECORDS, *supra* note 5, at 558–59; 2 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 326–27 (Pennsylvania ratification). Apparently Smith attended the South Carolina convention, but there is no indication in Elliot's Debates that he ever said anything. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 339 (J. Elliot ed. 1836) [hereinafter cited as ELLIOT'S DEBATES].

[71] *See, e.g.*, Letter from Oliver Ellsworth to Richard Law (April 30, 1789), *reprinted in* F. WHARTON, STATE TRIALS OF THE UNITED STATES 37–38 n.1 (1849). *See also* Letter From a Gentleman in New York to his Friend in Virginia (1789), *discussed in* Warren, *New Light*, *supra* note 34, at 61.

[72] Judiciary Act, *supra* note 9, § 11 (original jurisdiction); *id.* § 12 (removal jurisdiction). *See generally* Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299 (1984).

[73] Clinton, *Mandatory View*, *supra* note 1, at 850.

[74] Paterson's Notes, *infra* Appendix C, lines 58–62. *See supra* note 67 and accompanying text.

involved, the King sued Hampden to recover the amount due,[75] and the litigation became a test for the King's constitutional authority to rule England without a Parliament.[76] The common law judges barely sustained the King's position.[77] The closeness of the decision was a serious political defeat for the King and is generally considered an important antecedent to the English Civil War.[78] The reference in the Senate debates to the *Ship Money* case highlights the Senate's understanding that the five hundred dollar limitation might exclude cases of major national significance.[79]

When the Judiciary Act was passed, the rights of British creditors against American debtors was a good example of small monetary claims implicating a major issue of national concern. Payment of these debts had been an important consideration in negotiating the Definitive Peace Treaty concluding the Revolution.[80] The treaty provided, "[i]t is agreed that Creditors on either Side shall meet with no lawful Impediment to the recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted."[81] The state governments' failure to assist in implementing this treaty obligation was an open scandal.[82] Paterson's Notes contain no reference to this issue, but he,

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[75] The proceedings are reported in Rex v. Hampden, 3 Howell's State Trials 826 (Exch. 1637) (The Case of Ship Money). For a legal analysis of the *Ship Money* case, see 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 49–55 (2d ed. 1937); Keir, *The Case of Ship Money*, 52 L. Q. REV. 546 (1936).

[76] "If [Ship Money] could be established as a regular tax which the King was entitled to collect without Parliamentary consent, the fundamental constitutional issue of the century would be decided in favor of the Monarchy." C. HILL, THE CENTURY OF REVOLUTION 55 (1961). *See generally id.* at 54–56; G. AYLMER, 1603–1689: THE STRUGGLE FOR THE CONSTITUTION 82–85 (1963); C. WEDGWOOD, THE KING'S PEACE Bk 2, ch. II (1955); Keir, *supra* note 75.

[77] The vote was 7–5. Rex v. Hampden, 3 Howell's State Trials 826 (Exch. 1637).

[78] G. AYLMER, *supra* note 76, at 84–85; C. HILL, *supra* note 76, at 55–56.

[79] The Senate's concern in this regard also is reflected in its subsequent rejection of a House proposal to add a provision to the Bill of Rights restricting the Supreme Court's appellate jurisdiction to cases in which the amount in controversy is one thousand dollars or higher. *See* DEPAUW'S SENATE JOURNAL, *supra* note 35, at 154 (House proposal rejected by the Senate). Madison explained, "It will be impossible I find to prevail on the Senate to concur in the limitation on the *value* of appeals to the Supreme Court, which they say is unnecessary, and might be embarrassing in questions of national or constitutional importance in their principle, tho' of small pecuniary amount." Letter from James Madison to Edmund Pendleton (Sept. 23, 1789) (emphasis original), *reprinted in* 12 THE PAPERS OF JAMES MADISON 418–20 (R. Rutland ed. 1979) [hereinafter cited as MADISON PAPERS]. *See also* Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), *reprinted in* 12 MADISON PAPERS, *supra*, at 402–03. Madison's understanding of the Senate's objection to a constitutional amount in controversy limitation on jurisdiction probably was based upon his discussions with Ellsworth, Paterson, and Senator Carroll, the Senate managers at the committee of conference on the proposed Bill of Rights. *See* J. GOEBEL, *supra* note 7, at 454.

[80] *See, e.g.*, Letter from John Adams to John Jay (Aug. 25, 1785), *reprinted in* 8 THE WORKS OF JOHN ADAMS 302–10 (C. Adams ed. 1853). *See also* S. BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (2d ed. 1962); D. HENDERSON, COURTS FOR A NEW NATION 72–75 (1971).

[81] Definitive Treaty of Peace, Art. 4, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES 151 (H. Miller ed. 1931).

[82] *See* 1 A. DECONDE, A HISTORY OF AMERICAN FOREIGN POLICY 40–41 (3d ed. 1971); D. HENDERSON, *supra* note 80, at 74; 4 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 176–79, 190–93, 370–71 (1926) (Chief Justice Marshall's biography of Washington). During the Pennsylvania ratification debates, James Wilson lamented, "the truth is, and I am sorry to say it, that in order to prevent the payment of British debts, and from other causes, our treaties have been violated . . . ." 2 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 517. Oliver Ellsworth made the same point in the Continental Congress and in the Connecticut ratification debates. *See* Madison's Notes of Debates in the Continental Congress (Jan. 16, 1783), *reprinted in* 6 MADISON PAPERS, *supra* note 79, at 46–

Ellsworth, and the rest of the Senate surely were aware of the problem.[83] Paterson was counsel for British interests after the Revolution and had the most extensive debt collection practice in New Jersey.[84] Ellsworth had specifically referred to the problem of British debts in the Connecticut ratification debates.[85] In particular, a great part of the aggregate British debt was for individual sums of less than five hundred dollars.[86] Therefore the amount in controversy limitation effectively precluded a significant group of British creditors from having a federal court vindicate rights secured by the most important treaty in United States history.[87] Congress could not conceivably have viewed

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47; 3 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 544. *See also* the colloquy between Edmund Lee and Chief Justice Marshall in Dunlop v. Ball, 6 U.S. (2 Cranch) 180, 182–83 (1804) (both men agreed, "The fact was notorious, that [at the time the Judiciary Act was passed] it was the general opinion of the inhabitants of the state, and of the juries that a British debt could not be recovered"). Notwithstanding Wilson's concern for this problem and the pertinent jurisdictional limitations in the Judiciary Act, he approved the Act. *See* MACLAY'S DIARY, *supra* note 36, at 98, 100.

[83] There is evidence to suggest that the five hundred dollar amount in controversy limitation was placed in the Act to deprive specific British creditors of a federal forum. In 1801, there was a proposal to reduce the jurisdictional amount from $500 to $400. Representative Nicholas, in opposition to the proposal:

> stated that the estate of Lord Fairfax, with quit rents due thereon, had been confiscated during the Revolution by the State of Virginia; notwithstanding the confiscation, the heirs of Lord Fairfax had sold all their rights, which the assignees contended remained unimpaired. It might be their wish to prosecute in a Federal court, expecting to gain advantages in it which could not be had from the courts of Virginia. His object was to defeat the purpose by limiting the jurisdiction of the Circuit Courts to sums beyond the amount of quit rents alleged to be due by any individual.

10 ANNALS OF CONG. 897 (1801). Furthermore, "As most of the business of the British merchants in Virginia had been of retail nature, dispersed by local factors, a great part of the debts was composed of separate sums under $500." S. BEMIS, *supra* note 80, at 436.

The treaty obligation of the United States to British creditors was discussed in the House debates of the Judiciary Act. Representative Sedgwick forcefully argued:

> The United States, after a glorious and successful struggle, in which they displayed a valor and patriotism astonishing the Old World, secured their independence! and a single concession was the price of an honorable peace. The discharge of *bona fide* debts due from the citizens of America to the subjects of Britain was all that Britain required. Now, is it not obvious to every man, that this honorable stipulation ought by all means to be considered the supreme law of the land?

1 ANNALS OF CONG. 806 (J. Gales ed. 1789). *See also id.* at 813–14 (Rep. Jackson); *id.* at 822 (Rep. Vining).

[84] *See generally* R. Haskett, William Paterson, Counsellor at Law (1952) (Ph.D. dissertation, Princeton Univ.). During the seven year period 1783–1790, Paterson was counsel in 947 cases in his four busiest counties. At least 544 of these were debt cases, and he represented the creditor in 455. O'CONNOR'S PATERSON, *supra* note 11, at 120–21.

[85] *See supra* note 82.

[86] Based upon a study of the records of the British Foreign Office, Professor Bemis concluded that a great part of the British debts involved specific sums below $500 and that technical problems of proof were major impediments to recovery. S. BEMIS, *supra* note 80, at 436–37. *Accord*, C. RITCHESON, AFTERMATH OF REVOLUTION 66–67 (1969) (discussing debts owed to two Glasgow firms); Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia*, 19 WM. & MARY Q. 511, 518 (3d Ser. 1962).

[87] In 1802, the fourth article of the Definitive Treaty of Peace was reaffirmed in the Convention of Jan. 8, 1802. *See* Definitive Treaty of Peace, art. II, *reprinted in* 2 H. MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 488 (1931). A group of British merchants petitioned Congress to remove the five hundred dollar limitation so that the United States' obligation could be fully implemented. They complained:

this treaty obligation to Great Britain as unimportant.[88]

Even when viewed strictly in terms of dollars and cents, the five hundred dollar limitation was significant.[89] The comment in the Senate debates that, "[t]he Farmers in the New England States [are] not worth more than 1,000 D[illegible] on an Average,"[90] surely was proffered as an objection to the limitation. These farmers — and more important their out-of-state creditors — were effectively denied the protection authorized by the Constitution's diversity provision.

The five hundred dollar amount in controversy limitation also effectively barred virtually all common law tort actions from the federal trial courts.[91] During the closed Senate debates, the apparent point was made that the lower courts' jurisdiction would extend to "Money. Merchandize. Land bought and sold. . . . Where Titles are held under different States, each State will endeavor to protect its own Grant. they should be tried in the federal Court."[92] Tort actions are notably absent from this list. Oliver Ellsworth understood that the amount in controversy limitation proposed by his committee would be a significant barrier to tort claims. He had served upon the highest appellate court in Connecticut for four years and knew that tort judgments in excess of five hundred dollars were rare.[93] Nevertheless, he proposed and Congress enacted a five hundred

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> a number of small debts are due from individuals, widely dispersed throughout the State of Virginia, to British creditors . . . and that . . . they and their agents are exposed to much trouble, incur a heavy expense, and frequently with the eventual and entire loss of debts, supported by such documents and principles as have, in a number of similar cases, insured them a recovery in the federal circuit court. That . . . *these [state] courts do not in practice respect the decisions of the Circuit Court and the Supreme Court of the United States, on the construction of the said fourth article of the British treaty, in relation to British debts.*

AM. STATE PAPERS Misc. 189 (1805) (quoting the petition; emphasis added). In the penultimate paragraph of the congressional committee's report on the petition, the committee refused to consider whether the state courts were properly implementing the treaty obligation. The committee concluded that the petition should be denied on general principles. *Id.*

[88] *See, e.g., supra* note 83 (Rep. Sedgwick's reference to "the supreme law of the land"). To the chagrin of our national leaders, the British had seized upon American violations of the treaty's debt provision as an excuse for failing to comply with other provisions favorable to the United States. *See, e.g.*, Letter from George Washington to John Jay (Aug. 15, 1786) ("What a misfortune it is, that Britain should have so well founded a pretext for its palpable infractions!"), *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY (J. Johnston ed. 1891). *See generally* F. MARKS, INDEPENDENCE ON TRIAL 5–15 (1973); R. MORRIS, JOHN JAY, THE NATION AND THE COURT ch. III (1967). Oliver Ellsworth made the same point at the Connecticut ratification convention. 3 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 544.

[89] Contemporaneous with the enactment of the Judiciary Act, Congress approved the Bill of Rights, including the seventh amendment guaranteeing trial by jury in civil cases. *See* J. GOEBEL, *supra* note 7, ch. X. There was a concern, however, not to extend this constitutional right to cases involving insignificant amounts of money. *See id.* at 34–35, 450. Accordingly, the right was limited to cases involving more than twenty dollars (U.S. CONST. amend. VII) — a sum far less than five hundred dollars.

[90] Paterson's Notes, *infra* Appendix C, lines 71–73. *See supra* note 67 and accompanying text.

[91] Professor Tachau has studied the federal trial court's docket in Kentucky for the years 1789 to 1816. During that period only five actions for trespass were filed. M. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC 158–59 (1978). *See also* D. HENDERSON, *supra* note 80, at 86 (noting a similar experience in Virginia).

[92] Paterson's Notes, *infra* Appendix C lines 74–82.

[93] During the period that Oliver Ellsworth was on the Connecticut bench, there is no report of damages being awarded in excess of $500.00 in a tort case. The largest reported award was $249.75

dollar limitation. One would assume that those "local Prejudices"[94] that alienage and diversity jurisdiction were designed to remedy[95] would be particularly virulent in tort actions.

2. The Assignee Clause

In addition to a general jurisdictional amount in controversy, Ellsworth's committee proposed[96] and Congress enacted[97] a special limitation with respect to promissory notes. If a note had been assigned, there would be no jurisdiction unless the court would have had jurisdiction of a suit commenced by the payee. While this Assignee Clause served to prevent collusive assignments to create diversity jurisdiction,[98] the clause also had an undesirable impact upon interstate commerce. As a practical matter, a New York merchant might be reluctant to take a note between two Rhode Islanders because the New York merchant would have to resort to Rhode Island state courts to collect on the note.[99]

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involving assault and battery. Wilford v. Grant, 1 Kirby 114, 114 (Conn. 1786). All other judgments were for less than $100.00. *See* Barker v. Wilford, 1 Kirby 232, 232 (Conn. 1787) (mentioning $66.60 judgment in related tort action); Thomson v. Church, 1 Kirby 212, 212 (Conn. 1787) ($0.01); Kimball v. Munson, 2 Kirby 3, 5 (Conn. 1786) ($36.63); Bill v. Scott, 1 Kirby 62, 62 (Conn. 1786) ($13.32, judgment reversed). During this period, damages were awarded in pounds and shillings. A New England pound was worth $3.33 in 1789 dollars. F. McDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 83 n.3 (1972).

During the period immediately after Ellsworth left the Connecticut bench, the trend of small tort judgments continued. *See* Church v. Dewolf, 2 Root 282, 283 (Conn. 1795) ($29.64); Waters v. Waterman, 2 Root 214, 214 (Conn. 1795) ($49.95); Allen v. Dyon, 2 Root 213, 213 (Conn. 1795) ($19.98); Lambert v. Parmelee, 2 Root 181, 183 (Conn. 1795) ($66.60); Canday v. Lambert, 2 Root 173, 174 (Conn. 1795) ($19.98 judgment replaced by $1.00 judgment); Adgate v. Stores, 2 Root 160, 161 (Conn. 1794) ($0.83); Burlingham v. Wylee, 2 Root 152, 153 (Conn. 1794) ($49.95); Granger v. Hancock, 2 Root 88, 88 (Conn. 1794) ($1.67); Kelly v. Riggs, 2 Root 13, 13 (Conn. 1793) ($3.33); Webb v. Fitch, 1 Root 544, 544 (Conn. 1793) ($39.96); Davidson v. Fowler, 1 Root 358, 359 (Conn. 1792) ($33.30); Lewis v. Niles, 1 Root 346, 346 (Conn. 1791) ($29.97); Johnson v. Stanley, 1 Root 245, 246 (Conn. 1791) ($49.95); Merrils v. Goodwin, 1 Root 209, 209 (Conn. 1790) ($4.99); Dixon v. Pierce, 1 Root 138, 138 (Conn. 1789) ($2.33); Hall v. Hall, 1 Root 120, 120 (Conn. 1789) ($49.95). The only exception was Burrows v. Pixley, 1 Root 362, 362–63 (Conn. 1792), in which damages of $999.00 were awarded for the total destruction of a prosperous business.

[94] Paterson's Speech, *infra* Appendix B, line 105.

[95] *See* Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3 (1948); Friendly, *supra* note 70; Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869 (1931).

[96] Committee Bill, *supra* note 43, at 5 (eleventh unnumbered section). The Assignee Clause appears in two separate places in the handwritten draft discovered by Professor Warren. *See* National Archives File, Draft Bill at 15 (marginalia beside description of circuit courts' jurisdiction); *id.* at 29 (miscellaneous section in later part of the bill). Both are marked out. There probably was some indecision about where this clause should go, and the printer finally was directed to insert it in the section defining the circuit courts' jurisdiction.

[97] Judiciary Act, *supra* note 9, § 11. The Senate somewhat narrowed the limitation by excepting "cases of foreign bills of exchange."

[98] *See* 10 ANNALS OF CONG. 897–99 (1801) (discussing the purpose and desirability of the Assignee Clause). During the ratification of the Constitution, the anti-federalists had been concerned about the collusive creation of diversity jurisdiction. *See* 3 ELLIOT'S DEBATES, *supra* note 70, at 526 (George Mason complains specifically that debts might be assigned collusively). *See also* J. GOEBEL, *supra* note 7, at 475–76.

[99] *See* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 539 (1834); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW Pt. 2, ch. II, § 21 (1836). *See also* Pennoyer v. Neff, 95 U.S. 714 (1878).

One may assume that the first Congress fully understood this problem when the clause originally was enacted.[100] This type of case also was excluded from the Supreme Court's appellate jurisdiction.[101] Therefore, the Assignee Clause is quite inconsistent with a constitutional theory mandating the aggregate vesting of the complete judicial power of the United States.

The constitutionality of the Assignee Clause was considered during oral argument in *Turner v. Bank of North America*.[102] The bank's counsel argued that "the judicial power, is the grant of the constitution; and congress can no more limit, than enlarge the constitutional grant."[103] Oliver Ellsworth, who was then Chief Justice, replied incredulously:

> How far is it meant to carry this argument?
> Will it be affirmed, that in every case, to which
> the judicial power of the United States extends,
> the federal courts may exercise a jurisdiction,
> without the intervention of the legislature, to
> distribute, and regulate, the power?[104]

Justice Chase emphatically rejected the notion.[105]

If the original understanding of the Constitution was that the complete judicial power must be vested, the bank's counsel raised a serious issue. The Judiciary Act

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[100] As reported by the drafting committee, the Committee Bill had no exceptions. Committee Bill, *supra* note 43, at 5 (eleventh unnumbered section). During the Senate debates, however, the Assignee Clause was amended to exclude "cases of foreign bills of exchange." Judiciary Act, *supra* note 9, § 11. *See* J. GOEBEL, *supra* note 7, at 495.

In 1801, Congress vested the federal courts with jurisdiction over "all actions, or suits, matters or things cognizable by the judicial authority of the United States, under and by virtue of the Constitution thereof." Act of Feb. 13, 1801, ch. IV, § 11, 2 Stat. 89, 92. The Assignee Clause, however, was retained. *Id.* § 16. In the congressional debates, the opponents of the Assignee Clause clearly understood the provision's impact upon interstate commerce: "The effect of the amendment [to retain the Assignee Clause] would be to shut out from the Federal Courts all persons of this description, whose claims would be as much affected by local passions and prejudices, as though they had not been assigned." 10 ANNALS OF CONG. 898 (1801). Apparently someone contended during the debate that the Constitution required that the federal courts be vested with complete diversity jurisdiction. *Id.* at 899. But the record of this aspect of the debate is too scanty to draw any conclusions.

[101] *See infra* notes 119–21 and accompanying text.

[102] 4 U.S. (4 Dall.) 8 (1799).

[103] *Id.* at 10. William Paterson was present, but there is no report of any comments that he may have made. The *Turner* case was considered in August Term of 1799. "Cushing and Iredell, Justices, were prevented by indisposition from taking their seats on the bench, during the whole term." *See* New York v. Connecticut, 4 U.S. (4 Dall.) 1, 1 n.a (1799). Therefore Paterson's presence was necessary in *Turner* to achieve a quorum. *See* Judiciary Act, *supra* note 9, § 1.

[104] *Turner*, 4 U.S. (4 Dall.) at 10 n.a.

[105] *Id.* Justice Chase stated:

> [I]f congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, *or to any other court*, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.

*Id.* (emphasis added). Justice Chase's forceful language perhaps should be qualified by the fact that he had strongly opposed ratification of the Constitution. *See* Dillard, *Samuel Chase*, in 1 THE JUSTICES OF THE SUPREME COURT 1789–1969, 185–97 (L. Pollack ed. 1969). Nevertheless, his statement is quite consistent with Ellsworth's rhetorical question. *See supra* note 104 and accompanying text.

provided that neither the lower federal courts nor the Supreme Court had jurisdiction. At the very least, one would expect a casual aside to the effect that the congressionally imposed limitation did not implicate any significant federal supremacy interest. Instead the argument was met with incredulity.

3. General Federal Question Jurisdiction

In retrospect, the most remarkable limitation upon the lower courts' jurisdiction was the absence of general federal question jurisdiction over civil cases. The Senate considered granting the district courts "complete [jurisdiction] . . . extend[ing] to all Cases at Law and in Equity."[106] In addition, Professor Warren noted that an anonymous letter written at the time of the drafting process "from a gentleman in New York to his friend in Virginia" reported: "That Inferior Courts [referring to the circuit courts] . . . shall take cognizance of all cases of Federal jurisdiction, whether in law or equity above the value of 500 dollars."[107] The bill reported by the committee, however, did not vest the federal courts with general civil federal question jurisdiction.

Instead, the circuit courts were vested with jurisdiction keyed to the nature of the parties rather than the nature of the dispute:

> [T]he circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum . . . of (500) dollars and the United States are plaintiffs or petitioners; or a foreigner or citizen of another state than that in which the suit is brought, is a party.[108]

This language was enacted with a few changes not pertinent to the present discussion.[109] Thus, the Senate considered vesting the courts with "complete" jurisdiction but eventually decided against a broad grant of general power. In contrast, the federal courts were given general jurisdiction to try federal crimes.[110]

The legislative decision not to vest the lower courts with a general federal question jurisdiction barred at least three important categories of cases from the lower courts. Perhaps the most surprising aspect of the lower courts' limited jurisdiction was the

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[106] Paterson's Notes, *infra* Appendix C, lines 54–55. *See supra* note 65 and accompanying text.

[107] Letter from a Gentleman in New York to his Friend in Virginia (1789), *quoted in* Warren, *New Light*, *supra* note 34, at 61. The letter is reprinted in the *State Gazette of North Carolina*, July 30, 1789.

[108] Committee Bill, *supra* note 43 (eleventh unnumbered section). The blank after "(500) dollars" presumably was included in case the Senate desired to change the amount.

[109] Judiciary Act, *supra* note 9, § 11. The statute provided, in pertinent part:

> That the circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum . . . of five hundred dollars, and the United States are plaintiffs, or, petitioners; or an *alien* is a party, or *the suit is between a citizen of the State where the suit is brought, and a citizen of another State*.

*Id.* (emphasis added to indicate changes).

[110] The district courts' jurisdiction extended to "all crimes and offenses that shall be cognizable under the authority of the United States" with a maximum jurisdiction of thirty lashes, 100 dollars, and six months imprisonment. Judiciary Act, *supra* note 9, § 9. The circuit courts' general criminal jurisdiction did not extend the courts' original jurisdiction to the limits of the Constitution. *See, e.g.*, Act of Feb. 4, 1815, 3 Stat. 195, 198 (removal of state criminal cases against federal officers).

relegation of the United States, itself, to the state courts. If the United States had a small civil claim against a citizen, the national government was barred from its own courts.[111] The Copyright Act of 1790[112] provides another example of an action arising under federal law barred from the federal courts. Section 6 of the Act created a "special action on the case founded upon this act" to recover damages for copyright infringement.[113] Instead of vesting the federal courts with jurisdiction, the Copyright Act simply provided that the action could be initiated "in any court having cognizance thereof."[114] Finally, the Patent Act of 1790[115] similarly restricted suits for patent infringement to the state courts.[116]

All three of these restrictions on jurisdiction involved important federal interests. Litigation in which the United States is a plaintiff may implicate a significant federal supremacy interest even though the actual amount in controversy may be small.[117] Similarly, there was and is a clearly perceived federal interest in a uniform national system of patent and copyright laws.[118] Nevertheless, Congress decided not to vest the federal courts with general federal question jurisdiction and thereby relegated the bulk of this litigation to the state courts.

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[111] The circuit courts' jurisdiction over suits by the United States was subject to the five hundred dollar amount in controversy limitation. *See supra* note 108 and accompanying text. The district courts were given concurrent jurisdiction over suits at common law — but apparently not in equity — by the United States. This jurisdiction was limited to suits in which the matter in dispute was one hundred dollars. Judiciary Act, *supra* note 9, § 9. If the dispute was less than one hundred dollars, the government's case would have to be tried in state court. This strange loophole was mentioned in the House debates. 1 ANNALS OF CONG. 824 (J. Gales ed. 1789) (Rep. Stone).

[112] Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790). William Paterson was on the Senate committee appointed to study the bill that became the Copyright Act. B. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 199 n.65 (1967).

[113] Copyright Act of 1790, ch. 15, § 6, 1 Stat. 124, 125–26 (1790).

[114] *Id.*

[115] Patent Act of 1790, ch. 7, 1 Stat. 109 (1790).

[116] *See* HART & WECHSLER 2d, *supra* note 2, at 845. Section 4 of the Patent Act provided that infringers "shall *forfeit* and pay . . . damages . . . which may be recovered in an action on the case founded on this act." 1 Stat. at 111 (emphasis added). This forfeiture action arguably fell within the district courts' exclusive jurisdiction "of all suits for penalties and *forfeitures* incurred, under the laws of the United States." Judiciary Act, *supra* note 9, § 9 (emphasis added). The word "forfeiture," however, was a term of art referring to the practice of seizing a wrongdoer's property — a practice commonly used in the enforcement of eighteenth century customs laws. *See* C.J. Hendry Co. v. Moore, 318 U.S. 133, 136–53 (1943) (extensive discussion of the eighteenth century concept of forfeiture). Therefore, the provision in the Judiciary Act most likely was intended to encompass seizures of property. In contrast, the infringement action created by the Patent Act was drafted in terms that explicitly disavowed the accepted legal meaning of forfeiture. *See* Patent Act of 1790, ch. 7, § 4, 1 Stat. 104, 111 ("shall forfeit and pay . . . damages").

[117] *See supra* notes 74, 79 and accompanying text.

[118] *See generally* B. BUGBEE, *supra* note 112. The framers considered a national system of patent and copyright law sufficiently important to vest Congress with specific legislative authority in this area. U.S. CONST. art. I, § 8. *See generally* Fenning, *The Origin of the Patent and Copyright Clause in the Constitution*, 17 GEO. L.J. 109 (1929). President Washington urged Congress to enact copyright legislation, noting, "there is nothing which can better deserve your patronage than the promotion of science and literature," 1 ANNALS OF CONG. 932–34 (J. Gales ed. 1790), and a Senate committee responded, "Literature and Science are essential to the preservation of a free Constitution: the measures of Government should, therefore, be calculated to strengthen the confidence that is due to that important truth." *Id.* at 935–36.

4. The Supreme Court's Jurisdiction

Professor Clinton's thesis of mandatory aggregate vesting would permit significant limitations upon the original jurisdiction of the lower Federal courts as long as the excluded cases are cognizable in a state court with an appeal to the United States Supreme Court. This would assure that the federal courts in the aggregate are vested with the full judicial power of the United States. But the first Congress understood article III in a different way. In addition to placing substantial limitations upon the lower federal courts' original jurisdiction, the first Congress substantially limited the Supreme Court's appellate jurisdiction.

The Judiciary Act of 1789 restricts the Court's appellate jurisdiction over cases decided by the state courts to three categories:

> 1. Where the validity of a treaty, statute, or authority of the United States is drawn into question and the state court's decision is against their validity.[119]
> 2. Where the validity of a state statute or authority is challenged on the basis of federal law and the state court's decision is in favor of their validity.[120]
> 3. Where a state court construes a United States constitution, treaty, statute, or commission and decides against a title, right, privilege, or exemption under any of them.[121]

It is evident from this delineation of jurisdiction that Congress made no attempt whatsoever to mesh the Supreme Court's appellate jurisdiction with the limitations on the lower courts' original jurisdiction. Except for admiralty cases and federal crimes, the lower courts' jurisdiction was keyed to the parties involved. In contrast, the Supreme Court's appellate jurisdiction over the cases excluded from the lower courts' jurisdiction was defined in terms of three types of federal questions. If the idea of aggregate vesting is historically accurate, one would expect Congress to have made some effort to coordinate the federal courts' jurisdictions. No such effort was made.

Under the Judiciary Act of 1789, cases could arise that clearly fall within the judicial power of the United States but that were excluded from the combined appellate and original jurisdiction of the federal courts. Suppose, for example, a state court erroneously voided a state statute for violation of the federal Constitution.[122] Perhaps this could be dismissed as a situation not involving a federal supremacy interest, but surely there is at least an interest in uniformity of decision in respect to the meaning of the Constitution. Furthermore, what if a Connecticut court were to void a Rhode Island statute as contrary to the federal Constitution? There is a clear federal supremacy interest in granting the Supreme Court appellate jurisdiction to referee such a dispute between two states over the meaning of the Constitution. Nevertheless, Congress denied the Court jurisdiction in such a case.

A far more significant omission in the Court's appellate jurisdiction relates to the absence of jurisdiction on the basis of alienage — specifically, the problem of British creditors. In the Pennsylvania ratification proceedings, James Wilson[123] was adamant

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[119] Judiciary Act, *supra* note 9, § 25.

[120] *Id.*

[121] *Id.*

[122] *See, e.g.*, Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911). After the *Ives* decision, Congress expanded the Supreme Court's appellate jurisdiction to include such cases. *See* F. FRANKFURTER & J. LANDIS, *supra* note 34, at 188–98.

[123] Wilson was one of the most influential members of the Constitutional Convention and is

about the need for a federal forum to implement the nation's treaty obligations.[124] But Congress vested the Supreme Court with appellate jurisdiction specifically limited to state court decisions that either invalidated or misconstrued treaties.[125] This limitation, when coupled with the amount in controversy limitation on the lower courts' original jurisdiction, ignored the very real problem of state courts giving lip service to the treaty while denying a British creditor's claim on some unrelated legal issue or fact.[126] Furthermore, if a state court simply refused to recognize the supremacy of the treaty,[127] the cost of an appeal to the distant Supreme Court would be prohibitive in cases involving claims of five hundred dollars or less. The game would not be worth the candle. Congress could have solved the problem of local prejudice against British creditors by giving unlimited original jurisdiction to the lower courts.[128] Despite the important national interests implicated by the claims of British creditors, Congress declined to create a federal forum for either the original or appellate adjudication of these claims.

The Supreme Court also was deprived of appellate jurisdiction over diversity cases coming from the state courts. Just as British creditors with claims of five hundred dollars or less were deprived of a federal forum, so too were American creditors who sold to citizens of another state. This want of federal jurisdiction was an impediment to national development insofar as it discouraged interstate commerce. When President Jefferson announced in 1801 his plan to reduce the extent of the federal judiciary,[129] the New York City Chamber of Commerce saw a direct connection between diversity jurisdiction and interstate commerce:

> Perhaps no part of the constitution of the United States has had a more direct and salutory influence upon the trading interest of these states than the provisions which respect the judiciary department; owing to the confidence which they are calculated to inspire in commercial dealings as well between foreigners and citizens as between the Citizens of different States.[130]

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considered the chief drafter of the judicial article. *See* G. SEED, JAMES WILSON ch. 4–6 (1978); C. SMITH, JAMES WILSON, FOUNDING FATHER 1742–1798 ch. XV & XVI (1956); *see also* McCloskey, *Introduction*, in THE WORKS OF JAMES WILSON 1–48 (R. McCloskey ed. 1967).

[124] 2 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 520.

[125] *See supra* notes 119–21 and accompanying text.

[126] Wilson certainly understood this problem when he argued for ratification at the Pennsylvania convention. *See* 2 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 520–21 (discussing state abuses during the Revolution). *See also* Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 324–26 (1796) (Wilson, J., dissenting). See *infra* notes 150–59 and accompanying text for a discussion of *Wiscart*. Nevertheless, Wilson approved the Judiciary Act. *See* MACLAY'S DIARY, *supra* note 36, at 98, 100.

[127] There is evidence that the state courts did "not in practice respect the decisions of the . . . Supreme Court of the United States on the construction of the said fourth article of the British treaty, in relation to British debts." AM. STATE PAPERS Misc. No. 189 (1805).

[128] Given original federal jurisdiction, even the problem of prejudiced jurors was not insurmountable. During the early years, federal marshalls were known to empanel jurors with an eye to the jurors' political beliefs. *See* C. PRINCE, THE FEDERALISTS AND THE ORIGINS OF THE U.S. CIVIL SERVICE 263–67 (1977); M. DAURER, THE ADAMS FEDERALISTS 165 (1953). In addition, a special verdict could be used. *See, e.g.*, Ogden v. Gray, Minute Book at 254–55 (C.C. N.C. 1799) (the Minute Book for the Circuit Court for the District of North Carolina is in the Archives Branch of the Atlanta Federal Archives & Records Center), in which Oliver Ellsworth used a special verdict in a British creditor case. Judgment subsequently was entered for the British creditor on the basis of the special verdict. *Id.* at 263.

[129] 11 ANNALS OF CONG. 11–17 (1801) (Jefferson's first annual message to the Congress). *See generally* G. HASKINS & H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15, ch. V (1981).

[130] Memorial of the New York City Chamber of Commerce (Feb. 11, 1801), *reprinted in* 25 THE

Undoubtedly, the first Congress also understood the commercial implications of diversity jurisdiction.[151] Congress, however, exercised its discretion and totally deprived the federal courts of original and appellate jurisdiction over diversity cases valued at five hundred dollars or less.[152]

Finally, the plight of aliens and out-of-state citizens involved in tort actions should not be ignored. Despite the potential for xenophobia, the doors of the federal trial courts were virtually closed to this type of litigation.[153] Nor was the Supreme Court granted any appellate jurisdiction to correct state court excesses in these controversies.[154]

In summary, the first Congress's allocation of jurisdiction in the Judiciary Act is inconsistent with the thesis that the Constitution requires the entire judicial power of the United States to be vested in the aggregate in the Supreme Court and lower federal courts. No effort was made to mesh the Supreme Court's appellate jurisdiction with the legislative limitations imposed upon lower federal court jurisdiction. Furthermore, the Judiciary Act completely denied an original or appellate federal forum for the consideration of a number of cases involving important national interests.

### C. *Randolph's Report*

Shortly after the Judiciary Act became law, Congress asked Edmund Randolph, the first Attorney General of the United States, to submit a report and recommendation on

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PAPERS OF ALEXANDER HAMILTON 545–56 n.4 (H. Syrett ed. 1977) [hereinafter cited as HAMILTON PAPERS]. *Accord* Memorial of the Philadelphia Chamber of Commerce (1801), *discussed in* L. KERBER, FEDERALISTS IN DISSENT 150, 157 (Paperback ed. 1980). *See also* Hamilton, *The Examination No. V*, *reprinted in* 25 HAMILTON PAPERS, *supra*, at 476, 480. In subsequent congressional deliberations, John Rutledge forcefully argued, "[h]e must be a speculator indeed, and his purse must overflow, who would buy your Western lands and city lots, if there be no independent tribunals where the validity of your titles will be confirmed." 11 ANNALS OF CONG. 759 (1802). *See also* L. KERBER, *supra*, at 157. Over a hundred years later, Chief Justice Taft made the same point. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 23, at 136 (4th ed. 1983) (quoting Taft: "no single element in our governmental system has done so much to secure capital for . . . the West and South").

[151] This analysis is ably developed in Frank, *supra* note 95, at 22–28. In the Virginia and Pennsylvania Ratification debates, James Madison, John Marshall, and James Wilson defended diversity jurisdiction in terms of protecting interstate commerce from local prejudice. 3 ELLIOT'S DEBATES, *supra* note 70, 534–35, 538 (Madison); *id.* at 556 (Marshall); 2 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 519 (Wilson). On the related issue of whether there actually was significant intersectional prejudice in judicial proceedings, *compare* Friendly, *supra* note 70, *with* Yntema & Jaffin, *supra* note 95. These three articles collect most of the pertinent primary sources. In addition, we know that Paterson was apprehensive about intersectional prejudice. In his Senate speech defending the bill that he had helped to draft, he justified the circuit courts' diversity jurisdiction on the grounds that "State Trib' keep up local Prejudices, etc." *See* Paterson's Speech, *infra* Appendix B, line 105. The concluding "etc." in Paterson's Speech suggests that local prejudice was a familiar and commonly understood problem.

[152] Five hundred dollars was not a trivial amount in 1789. *See supra* notes 74–95 and accompanying text. Nevertheless, there were other interests involved. *See* AM. STATE PAPERS Misc. No. 189 (1805), in which a congressional committee explained that diversity litigation in federal courts is comparatively inconvenient for local defendants because of the distance they must travel to the district court. *See also* Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 329 (1796) (Ellsworth, C.J.). Therefore "matters of controversy between citizens of different states, which do not involve a very considerable interest to the parties, ought not to be subjected to the jurisdiction of the courts of the United States." *Id.* This seems a proper exercise of legislative discretion even though local interests were favored over national interests.

[153] *See supra* notes 91–95 and accompanying text.

[154] *See supra* notes 119–21 and accompanying text.

"matters relative to the administration of justice under the authority of the United States."[155] Randolph was not a member of the first Congress, but he had proposed the Virginia plan at the Constitutional Convention[156] and had followed the Senate's judiciary measure as it progressed through Congress.[157] On December 31, 1790, a little over a year after the Judiciary Act's passage, Randolph submitted his report.[158] This contemporary report by the nation's chief law enforcement officer provides additional evidence regarding the original understanding of congressional power over the jurisdiction of the federal courts.

In the first part of the report, Attorney General Randolph discussed some defects in the existing Act. Among other things, he was dissatisfied with the Supreme Court's appellate jurisdiction over cases from the state courts. Randolph recognized, "[t]hat the avenue to the federal courts ought . . . to be unobstructed."[159] His solution was to eliminate federal appellate review of state court judgments and provide a system of pretrial removal.[160] If the parties elected not to try a case in federal court, "to that election [they] ought to adhere."[161] There would be no subsequent appeal to the federal judiciary. The second part of the report consisted of a proposed new judiciary act that vested the lower federal courts with complete original jurisdiction keyed to the words of the Constitution.[162] After making this broad grant of jurisdiction, the proposed legislation placed a number of specific limitations upon the lower courts' jurisdiction.[163] In addition, the proposed Act made no provision for appeals of state court judgments.[164] Thus,

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[155] 2 ANNALS OF CONG. 1719 (1790).

[156] Although Randolph was an important delegate to the Convention, he refused to sign the Constitution. *See* Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), *reprinted in* 3 FARRAND'S RECORDS, *supra* note 5, at 123–27 (giving his objections, including, inter alia, a need for further "limiting and defining the judicial power"). Nevertheless, he eventually supported ratification, and explained in the Virginia debates that Congress had a broad authority to limit the Supreme Court's appellate jurisdiction. 3 ELLIOT'S DEBATES, *supra* note 70, at 572.

[157] *See* Letter from James Madison to Edmund Randolph (April 12, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 79, at 75–77 (1979); Letter from James Madison to Edmund Randolph (June 17, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 79, at 229–30; Letter from Edmund Randolph to James Madison (June 30, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 79, at 273–74.

[158] AM. STATE PAPERS, Misc. No. 17 (Dec. 31, 1790) [hereinafter cited as Randolph's Report; for convenience, the American State Papers' pagination will be used]. Congress took no action on the Report. *See* J. GOEBEL, *supra* note 7, at 542.

[159] Randolph's Report, *supra* note 138, at 23.

[160] *Id.* According to Randolph, removal would be accomplished by means of the common law writ of certiorari. Randolph twice refers to "removal by certiorari before trial" and concludes by recommending adoption of federal review "by *certiorari*." *Id.* In *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411 (1799), parties seeking to remove a case from a circuit court to the Supreme Court for trial in the Supreme Court resorted to a writ of certiorari.

[161] Randolph's Report, *supra* note 138, at 23.

[162] *Id.* at 26 (district courts); *id.* at 29 (circuit courts). The circuit courts' removal jurisdiction was keyed to their original jurisdiction. *Id.* at 31. A year and a half earlier, Randolph had recommended to Madison that federal court jurisdiction should be established by enacting the words of the Constitution. Letter from Edmund Randolph to James Madison (June 30, 1789), *reprinted in* MADISON PAPERS, *supra* note 79, at 273–74.

[163] Randolph's Report, *supra* note 138, at 26–27 (district courts); *id.* at 29–30 (circuit courts). The major limitations were amount in controversy, an Assignee Clause, and suits against the United States or an individual state. *Id.* at 26–30.

[164] An obscure provision in the proposed act provided, "The Supreme Court shall have power to issue . . . writs of *certiorari* to the circuit and the State courts." *Id.* at 31. Throughout the report,

Randolph recommended that some cases within the judicial power of the United States could not be filed in federal court, could not be removed to a federal court, and could not be appealed to a federal court.

In a note[145] to the proposed statute, the Attorney General examined the constitutionality of one of his proposed blanket limitations — the jurisdictional amount in controversy.[146] He proposed three separate constitutional bases for limiting the courts' jurisdiction.[147] His second analysis is readily recognizable as the now traditional argument of plenary congressional power.

> The Supreme Court, though inherent in the Constitution, was to receive the first motion from Congress; the inferior courts must have slept forever without the pleasure of Congress. Can the sphere of authority over value be more enlarged?[148]

If the original understanding was that the federal courts must be vested with a complete jurisdiction, how could Randolph plausibly have advanced the plenary power argument to a Congress consisting of many of his former fellow delegates to the Convention?[149] Furthermore, Randolph expressly noted that his analysis was not limited to trivial amounts. In view of Congress's power to elect not to establish federal courts in the first instance, Randolph concluded, "Can the sphere of authority over value be more enlarged?"

### D. *A Final Conundrum*

The case of *Wiscart v. D'Auchy*[150] also casts light on the original understanding of congressional power over the federal courts' jurisdiction. In *Wiscart*, the plaintiff in error sought to challenge the federal circuit court's statement of facts. The Supreme Court refused on the ground that Congress had not provided appellate jurisdiction to review factual matters. Chief Justice Ellsworth delivered his opinion in broad, sweeping language:

> [T]he [Supreme Court's] appellate jurisdiction is, likewise, qualified; inasmuch as it is given "with such exceptions, and under such regulations, as the congress shall make." Here, then, is the ground, and the only ground, on

however, Randolph consistently used the idea of *certiorari* to describe pretrial removal. *See supra* note 140. Therefore, the issuance of writs of *certiorari* by the Supreme Court must be taken to refer to cases within the Supreme Court's original jurisdiction. *See* U.S. CONST., art. III, § 2; Randolph's Report, *supra* note 138, at 30–31 (recognizing the Supreme Court's original jurisdiction).

[145] Randolph's Report, *supra* note 138, at 34 n.(6).

[146] *Id.* at 26 (district courts); *id.* at 29 (circuit courts). Randolph left the precise amount blank.

[147] First, "[t]he Constitution has undertaken to describe only the kind of persons and things which should have access to the federal courts, not to estimate the value in debate." Randolph's Report, *supra* note 138, at 34 n.(6)1. Randolph's final argument was that the Constitution should not be construed to require the creation of expensive federal courts for the recovery of trifling sums. *Id.* at 34 n.(6)3.

[148] *Id.*

[149] Randolph and others have been accused of revisionism in the Virginia ratification debates. *See* Clinton, *Mandatory View*, *supra* note 1, at 806, 808–09. If Randolph's actions are viewed in isolation, the charge is plausible. *See supra* note 136. Randolph's analysis in his report to the Congress, however, is consistent with the position that he took in the Virginia ratification debates, *see supra* note 136, and also is consistent with the first Congress' enactment of the Judiciary Act.

[150] 3 U.S. (3 Dall.) 321 (1796).

> which we can sustain an appeal. If congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether congress has established any rule for regulating its exercises?[151]

The Chief Justice then interpreted the Judiciary Act as depriving the Court of jurisdiction to review the circuit court's statement of facts.[152] Justices Wilson and Paterson[153] disagreed with Ellsworth. Wilson construed the Judiciary Act to provide for review of the facts, but he also noted, "[e]ven, indeed, if a positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision."[154]

In deciding *Wiscart*, neither Ellsworth nor Wilson addressed the theory of mandatory aggregate vesting. The theory would not have been pertinent because a federal — rather than a state — court had made the findings of fact sought to be reviewed. Nevertheless, the tenor of Ellsworth's opinion suggests that he had never heard of the theory. Ellsworth used plenary language to describe congressional power over the Supreme Court's appellate jurisdiction: an act of Congress "is the ground, and the only ground, on which we can sustain an appeal."[155] Wilson's argument that Congress could not restrict the Court's review of lower federal court judgments is quite inconsistent with the theory of mandatory aggregate vesting.

Ellsworth's opinion might be dismissed as sloppy writing,[156] but Wilson's dictum verges on the inexplicable. Wilson was in attendance at the Constitutional Convention from almost the beginning to the very end.[157] As a member of the Committee of Detail, he personally drafted the essential outline of article III.[158] If the theory of mandatory aggregate vesting was accepted constitutional coin among the Founders, Wilson surely would have been aware of the doctrine. Yet his dictum in *Wiscart* casually rejected the theory. Perhaps Wilson was being devious; perhaps his memory failed; but perhaps he had never heard of the doctrine.[159]

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[151] *Id.* at 327.

[152] *See generally* J. GOEBEL, *supra* note 7, at 699–702.

[153] Paterson did not give an opinion in *Wiscart*, but during the very next term of Court, he noted, "[t]hough I was silent on the occasion, I concurred in opinion with Judge Wilson upon the second rule laid down in *Wiscart v. D'Auchy*." Jennings v. The Brig Perseverance, 3 U.S. (3 Dall.) 336, 337 (1797). Paterson almost certainly was referring to the issue of statutory construction rather than Wilson's dictum regarding congressional power. *See infra* note 154 and accompanying text.

[154] *Wiscart*, 3 U.S. (3 Dall.) at 325.

[155] *See supra* note 151 and accompanying text.

[156] The more likely explanation is that Ellsworth's choice of broad, sweeping language reflected his understanding of congressional control over federal court jurisdiction. *Accord Landholder* VI, *supra* note 28 (*see supra* notes 27–30 and accompanying text); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799) (*see supra* notes 102–05 and accompanying text).

[157] 3 FARRAND'S RECORDS, *supra* note 5, at 590.

[158] *See supra* note 123.

[159] "Since Wilson sat on the Committee of Detail that was instrumental, as we have seen, in formulating the judicial article, his views on the question of the constitutional authority of the Congress to restrict the appellate jurisdiction of the Supreme Court cannot be lightly dismissed." Clinton, *Mandatory View*, *supra* note 1, at 846 n.351.

## IV. Concluding Analysis

In advancing such a subtle thesis of mandatory jurisdiction, Professor Clinton necessarily assumes the framers of the Constitution were subtle legal thinkers, and indeed they were. Oliver Ellsworth, William Paterson, and James Wilson were not rude colonial philosophers who dabbled in Locke and occasionally read Blackstone. They were experienced, sophisticated attorneys with substantial legal practices. Aggregate vesting would empower Congress to neuter the federal judiciary by refusing to create lower courts and restricting the Supreme Court's appellate jurisdiction to legal issues. If the framers sought meaningful constitutional protection for the federal courts' jurisdiction, would they have agreed to such a plan? This is not a hypothetical loophole. Senator Lee and his confederates in the House attempted to enact such a scheme.[160] Ellsworth and Paterson were practical men who surely would have noticed this loophole in the Constitution,[161] especially Paterson, who "[e]ver since the Adoption of the Const" [had] . . . considered federal Courts of subordinate Jurisd" . . . as inevitable."[162]

The first Judiciary Act was drafted by federalists who presumably wanted to assure a federal forum for disputes in which national interests were implicated, and this federalist plan by and large prevailed. Senators who, like Ellsworth and Paterson, desired a comparatively strong national government undoubtedly agreed that Congress exercised its discretion wisely. In a few cases, however, the federalists were forced to compromise and therefore agreed to significant limitations upon the courts' jurisdiction. This easily can be explained in terms of legislative discretion but is inexplicable in terms of constitutional mandate.[163]

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[160] *See supra* note 52 and accompanying text. *See also* Warren, *New Light*, *supra* note 34, at 66–67, 125; J. Goebel, *supra* note 7, at 494, 504.

[161] During the Revolutionary War, Paterson forcefully argued for a pragmatic approach to the law in New Jersey:

> It is a grand fault of all the fine writers on government that they do not distinguish between theory and practice. It is easy to build up an ingenious system or code of law which shall appear with singular beauty on paper, but which, however, will vanish the instant we attempt to put it in use. We may sit in legislation, we may frame laws, we may have all the wisdom, virtue and sagacity on earth . . . yet fruitless will be the enaction of laws, fruitless will be our utmost efforts, if such laws cannot be carried into execution.

Paterson's Address to a Conference (March 15, 1777), *reprinted in* 2 Somerset County Hist. Q. 1, 4 (1913).

Ellsworth also was a pragmatic attorney who believed in attention to detail. *See* Brown's Ellsworth, *supra* note 10, at 26 n.1. *See also* Letter from William Vans Murray to John Quincy Adams (Nov. 7, 1800), *quoted in* C. Warren, The Making of the Constitution 60 (1928).

[162] Paterson's Speech, *infra* Appendix B, lines 17–20. *See supra* note 55 and accompanying text.

[163] Apparently there is no record of any framer or participant in the ratification debates clearly espousing the thesis of mandatory aggregate vesting. Hamilton's Federalist Nos. 81 and 82 are advanced as clearly but implicitly adopting the thesis. *See* Clinton, *Mandatory View*, *supra* note 1, at 832–37. In neither of these papers, however, did Hamilton purport to address Congress' authority over the federal courts' jurisdiction. Since Hamilton did not present Federalist Nos. 81 and 82 as his analysis of Congress' authority over the federal courts' jurisdiction, his arguments easily can be read as a defense of a Constitutional scheme that authorizes but does not require a complete vesting of the judicial power of the United States. Hamilton did discuss legislative authority over jurisdiction in the concluding paragraph of Federalist No. 80 and seems to have adopted a plenary power analysis. *See* The Federalist No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961). *See also* The Federalist No. 81, at 552 (A. Hamilton) (J. Cooke ed. 1961).

Aside from Hamilton, the strange and obscure musings of one Alexander Contee Hanson are

The limitations enacted by the first Congress cannot be dismissed as trivial and not involving a federal "supremacy interest." To reconcile these limitations with a theory of mandatory vesting, one must assume that some of the heads of jurisdiction in the Constitution are mandatory but others — most notably diversity and alienage jurisdiction — are not. Article III does not suggest this hierarchy, nor has any historical evidence been adduced to support such a constitutional doctrine. This notion of a federal supremacy interest shaping the Judiciary Act's jurisdiction provisions is appealing and probably accurate. But surely the supremacy interest was a prudential consideration guiding Congress's exercise of discretion rather than a mandatory constitutional constraint upon congressional authority.

In the first Congress of the United States, fifty-four members had been delegates to the Constitutional Convention or their state ratification conventions, and all but seven had advocated ratification.[164] This same Congress immediately proceeded to place a variety of significant limitations upon the jurisdiction of the federal courts. The Judiciary Act was drafted by sophisticated lawyers who had been leading delegates at the Convention and who were to become Supreme Court justices. Does it really make sense that William Paterson and Oliver Ellsworth[165] did not understand the compromise that had been struck in Philadelphia? If they were in the dark, so was James Wilson.[166] Edmund Randolph[167] and James Madison[168] also appear to have assumed that Congress had discretion to limit the federal courts' aggregate jurisdiction. When John Marshall forcefully argued for ratification in Virginia, we are told by Professor Clinton that he did not understand the plan of the proposed Constitution.[169] Is it plausible to assume that these

noted and rejected. Hanson thought article III mandated the creation of inferior courts. Clinton, *Mandatory View*, *supra* note 1, at 822 n.270. In Congress, Senator Maclay and Representative Smith erroneously suggested that lower federal courts were required by the Constitution. *See supra* note 70. This specious analysis was based upon the assumption that the Constitution precluded state courts from trying cases within article III, section 2. Thus Maclay and Smith rejected the mandatory aggregate vesting thesis. Indeed, Smith raised the idea in response to a suggestion that state courts could try federal cases with eventual review by the national Supreme Court. *See* 1 ANNALS OF CONG. 798 (J. Gales ed. 1789).

[164] ENCYCLOPEDIA OF AMERICAN HISTORY 145 (R. Morris 6th ed. 1982).

[165] Professor Clinton attacks Ellsworth's opinion in *Wiscart v. D'Auchy*, *see supra* notes 150–59 and accompanying text, on the basis that Ellsworth left the Convention prior to the August 27, 1789, consideration of the judicial article. Clinton, *Mandatory View*, *supra* note 1, at 846, n.351. Professor Clinton's implicit assumption is that Ellsworth never again discussed the work of the Convention with any of the other delegates. Surely the more reasonable assumption is that intelligent and capable individuals interested in the proper governance of their country communicate with their colleagues. *See supra* note 25. We know that Paterson did. *Id.*

[166] *See supra* notes 82, 126. *See also supra* notes 153–59 and accompanying text.

[167] *See supra* notes 135–49 and accompanying text.

[168] Madison spoke in favor of the bill during the course of the House debate. 1 ANNALS OF CONG. 812–13 (J. Gales ed. 1789). At the conclusion of the House debate, he gave the measure a general endorsement and voted for it. Gazette of the United States, Sept. 19, 1789, at 3, col. 2. Although Madison was not entirely pleased with the bill, his correspondence does not suggest that he thought the measure was unconstitutional. *See* Letter from James Madison to Samuel Johnston (July 31, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 79, at 320–21; Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 79, at 402–03.

[169] Clinton, *Mandatory View*, *supra* note 1, at 847–48 ("the uninformed views of Chief Justice Marshall"). *See also id.* at 778, 806, 809–10, 845. Marshall thought Congress had broad legislative discretion to limit the Supreme Court's jurisdiction, but he never suggested that any limitation would require a corresponding expansion of the lower courts' jurisdiction. *See* Durousseau v. United

individuals did not understand the Constitution? Alternatively, one might argue that the first Congress engaged in a vast conspiracy of silence. But the notion that the members knew that the Judiciary Act was unconstitutional and nevertheless decided upon a course of lawlessness to further expedient political interests is equally implausible.

The enactment of the Judiciary Act of 1789, the House and Senate debates, and the papers of the participants simply cannot be reconciled with any historical thesis that the Constitution requires the federal courts to be vested with the complete judicial power of the United States as defined in article III, section 2. The pertinent historical evidence indicates that the framers understood the Constitution to grant Congress extensive legislative discretion over the jurisdiction of the federal courts.[170] As a matter of constitutional policy, some degree of discretion to adjust the courts' jurisdiction is essential in order to fashion a workable system. History — with perhaps a few notable exceptions — has vindicated the framers' faith in the legislative branch.

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States, 10 U.S. (6 Cranch) 307, 313–15, 318 (1810); United States v. More, 7 U.S. (3 Cranch) 159, 172–73 (1805). *See also* Marshall, *A Friend of the Constitution III*, *reprinted in*, JOHN MARSHALL'S DEFENSE OF MCCULLOCH v. MARYLAND 173 (G. Gunther ed. 1969). Paterson was present when the *More* case was decided and apparently concurred in the Chief Justice's opinion. 7 U.S. (3 Cranch) at 159 n.*a*.

In Clarke v. Bazadone, 5 U.S. (1 Cranch) 212 (1803), the Marshall Court considered an appeal from the Northwest Territory General Court. *See generally* Wunder, *Constitutional Oversight: Clarke v. Bazadone and the Territorial Supreme Court as the Court of Last Resort*, in 4 THE OLD NORTHWEST 259 (1978). In a brief per curiam decision, the Court dismissed the appeal on the ground that Congress had failed to authorize appeals from the territory courts to the Supreme Court. 5 U.S. (1 Cranch) at 214. Since the territory courts were not article III courts, the *Clarke* decision is a sweeping rejection of the theory of aggregate vesting. The district and circuit courts could not try civil actions against residents of the Northwest Territory. Judiciary Act, *supra* note 9, § 11. Therefore, Congress completely failed to vest the judicial power of the United States in respect to these cases.

[170] This note has addressed constitutional theories requiring the complete vesting of the judicial power of the United States. Although the Judiciary Act is inconsistent with these theories, it does not necessarily follow that Congress has plenary authority to diminish the federal courts' jurisdiction. Other constitutional theories have been advanced to limit congressional power without mandating a complete vesting of the judicial power. *See generally* Gunther, *Guide*, *supra* note 1. These other theories have not been addressed in this note.

## APPENDIX A

### Paterson's Notes of the Initial Senate Debates and His Preliminary Draft of a Speech.

This document is a handwritten copy of William Paterson's initial notes written during the first day of the closed Senate consideration of the proposed Judiciary Act. The copy was made during the nineteenth century and now is in the New York Public Library's Bancroft Collection.[171] The original notes were written on four pages, and the Bancroft transcript introduces the beginning of each original page with a bracketed lower case letter. The length and narrowness of each page of the Bancroft transcript indicates that the original notes were written two columns to a page.[172]

The document consists of three implicit sections. The first section comprises lines 1–23 and apparently contains Paterson's notes of the arguments advanced by Senators Lee and Grayson in support of their proposed amendment to restrict the inferior federal courts' original jurisdiction to Admiralty cases.[173] The second section comprises lines 24–142. This is a preliminary draft of or notes for the speech that Paterson delivered the next day in opposition to the proposed amendment.[174] The final section begins with line 143. These are either Paterson's random ideas that he decided not to incorporate in the final draft of his speech or his notes of points made by other Senators during the initial debates.

The Initial Notes in this Appendix A almost certainly were written on June 22, 1789, the first day of the Senate debates. We know that on that day Senator Lee submitted an amendment to confine the lower courts' jurisdiction to admiralty and maritime matters.[175] Professor Goebel notes that Lee was charged with proposing this amendment to the Act because the Virginia Convention that previously had ratified the Constitution proposed such a limit on the inferior courts.[176] Consistent with this idea, Paterson's notes begin, "The amendm' proposed by the Convention of Virginia." Senator Maclay noted in his diary that "Mr. Lee brought forward a motion nearly in the words of the Virginia Amendment."[177] Senator Lee's amendment was debated on June 22 and again on June 23 when it was rejected.[178] Paterson's final draft of his speech based upon the preliminary draft in the second section of the notes twice refers to Senate debate that had taken place "yesterday."[179] Thus the subject matter of the notes and the fact that the matter under discussion spanned two days indicates that they cover the Senate's consideration of Senator Lee's June 22 amendment.

George Bancroft thought, and Professor Goebel uncritically adopted Bancroft's assumption,[180] that these notes are "Notes apparently of the debate in the Senate of 8.

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[171] 300 Bancroft Collection 367–83 (available from Rare Books and Manuscripts Division, the New York Public Library, Astor, Lenox and Tilden Foundation).

[172] This is the format that Paterson used in his subsequent notes of the Senate debates. *See* Paterson's Notes, *infra* Appendix C.

[173] *See supra* notes 52–53 and accompanying text.

[174] Paterson's Speech is reprinted *infra*, Appendix B. A comparison of the initial notes in Appendix A with the final draft in Appendix B clearly demonstrates the relationship between the two documents.

[175] *See supra* note 52 and accompanying text.

[176] J. GOEBEL, *supra* note 7, at 494 n.105.

[177] MACLAY'S DIARY, *supra* note 36, at 83.

[178] *See supra* notes 52–61 and accompanying text.

[179] Paterson's Speech, *infra* Appendix B, lines 8, 22.

[180] J. GOEBEL, *supra* note 7, at 494 n.105.

September 1789."[181] On that date the Senate was considering the proposed Bill of Rights,[182] and a motion was made and rejected to limit inferior courts to Admiralty jurisdiction.[183] The Bancroft thesis is implausible because we know that Paterson's notes cover a proposal that was the subject of two consecutive days of Senate debate. The September 8 motion was made and rejected on the same day.[184] Furthermore, Paterson's speech clearly indicates that he was defending the proposed bill — not the Constitution. If the constitutional existence of the inferior courts had been in jeopardy, Paterson surely would have defended the wisdom of Article III at some point during his detailed speech. He did not.[185] In contrast to Bancroft's thesis, Paterson's notes neatly fit the Senate's June 22–23 consideration of the proposed Judiciary Act.

Paterson's Initial Notes of the Senate debates and his preliminary draft of a Speech follow:

[a.]

[Notes apparently of the debate in the Senate of 8. September 1789. See A Hist. of Cong. during first term of Washington's Administration. pp. 164, 166. from original in handwriting of W^m Paterson in the possession of W^m Paterson of Perth Amboy, New Jersey.]

*[In support of Senator Lee's motion]*

1. The amendm^t proposed by the
2. Convention of Virginia — that there shall
3. be no subordinate federal Courts ex-
4. cept Admiralty.
5. 1. A Stigma upon State Courts; that
6. they will not do what is right– Etc.
7. 2. There may be an Appeal from
8. the State Courts to the federal–
9. 3. Circuit-Courts cannot pervade
10. so extensive a Country, as this. The
11. Idea taken from the Mother-Country–
12. How then as to appeals–
13. England– Scotland–
14. Nisi Prius Courts.
15. Mass of people if corrupt
16. no Laws can effect–
17. They operate on the same Objects–
18. 2 Supreme Legislatures,
19. omnipotent–
20. No Proof that the Debt is
21. due–

[181] *See* Bancroft's bracketed introductory comments to the initial notes.

[182] DEPAUW'S SENATE JOURNAL, *supra* note 35, at 160–64.

[183] *Id.* at 163–64.

[184] *Id.* The Senate Journal's coverage of the Senate's action on the Bill of Rights is uncharacteristically detailed. The Senate's actions are reported article by article and the precise wording of proposed amendments are included. There is no indication that the Senate considered the inferior courts' jurisdiction on either the day before or the day after.

[185] *See* Paterson's Speech, *infra* Appendix B.

22. No Time to study–
23. Abolition of State Leg[t]–

[*Paterson's preliminary draft of his speech*]

24. Objects different–
25. Self-Preservation– As to Crimes–
26. as to Revenue– Judges annually appointed– Sheriffs– reg[s].
27. Why Admiralty Juris[dn].
28. When & how are the Facts to be
29. tried–
30. How as to Appeals–
31. Bring Law Home– meet every
32. Citizen in his own State– not drag
33. him 800 miles upon an appeal–
34. The silent operation of Law– or by Force–
35. An appeal from Scotland to England–
36. No appeal in criminal Cases– Sup.
37. Court cannot go into each State–
38. The Necessity– Utility– Policy of [b.]
39. federal Courts– they grow out of the
40. Nature of the Thing–
41. A number of Republics confederated.
42. Why call upon other Tribunals–
43. Clashing of Jurisd[n]– will destroy
44. their Respectability–
45. Uniformity of Decision.

46. A Beauty– if the Bill presents–
47. I consider federal Courts as in–
48. evitable– the Necessity.
49. Who are we–
50. United we have a Head– separated
51. we have a Head, each operating upon
52. different Objects–
53. When we act in Union–
54. The States in their federal Capacity have
55. an Ex– have a Leg– and who shall
56. adjudicate– Judges chosen by the Union–
57. no– Judges &c. They legislate upon dif-
58. ferent objects, their [*sic*] should be other Judges
59. to decide upon them– It grows up out
60. of the very Nature of the Thing.
61. The State Tribunals consist, &c.
62. The Union has no Vote in their Election,
63. &c.
64. Consider how appointed– some
65. annually, &c.
66. Their Salary– how paid–
67. They become your Judges– fixed upon
68. you during good Behaviour– entitled to

69. a permanent Salary– and therefore 117.
70. if the State refuses to elect them the year 118.
71. following, the Union will be saddled 119.
72. with the Expense of 3 or 4 Judges in a 120.
73. State instead of one– Or if your Judges 121.
74. no longer than they are State Judges 122.
75. then you make them entirely dependent 123.
76. upon the State. Is this an eligible 124.
77. Situation–
78. Ap. of casting a Stigma, &c. fear 125.
79. their Virtue– 126.
80. We have as men individually our 127.
81. Interests, &c. So as to States– 128.
82. Shall we suffer Men so situated to 129.
[c.] 130.
83. mingle in our federal Adm$^{n}$.– 131.
84. Their Interests– 132.
85. 1. Different objects– therefore 133.
86. different Tribunals– 134.
87. 2. Situation of the State Judicatures– 135.
136.
88. Again– Consider over what the 137.
89. Dist. Court is to exercise Jurisd$^{n}$. 138.
90. 1.Adm$^{l}$. 2. Crimes of a certain 139.
91. Grade. 3. Revenue– 140.
92. The first conceded. 141.
93. 2. as to Crimes — an axiom, that 142.
94. every Coun$^{y}$ ought to have within itself
95. & to retain in its own Hands the Powers
96. of self preservation.
97. Offenses will arise, &c.– your Existence 143.
98. depends upon their Punishment if com- 144.
99. mitted, will you put it in the Power 145.
100. of S.J. to decide upon them– &c– you 146.
101. put your Life in their Hands– you 147.
102. present with a Sword to destroy yourself–
103. No Appeal. 148.
149.
104. 3. Revenue– Do not give up 150.
105. the Power of collecting your own Revenue–
106. you will collect Nothing– The State 151.
107. Officers will feel it their Interest to con- 152.
108. sult the Temper of the People of the 153.
109. State in which they live rather than 154.
110. that of the Union–
155.
111. 4. Become one People. We must 156.
112. have Tribunals of our own pervading 157.
113. every State, operating upon every Object
114. of a national kind. 158.
115. Hence Uniformity of Decision– 159.
116. Hence we shall approximate to 160.

117. each other gradually–
118. Hence we shall be assimilated in
119. Manner, in Laws, in Customs–
120. Local Prejudices will be removed–
121. State Passions & Views will be done
122. away– the Mind expands– it will
123. embrace the Union; we shall think
124. and feel, & act as one People–

[d.]

125. Circ.[t] Courts– Mistaken Notions of
126. them– Not in the Nature of Nisi Prius.
127. Courts of Orig.[l] Jurisd.[n]– you carry Law
128. to their Homes, to their very Doors–
129. meets every Citizen in his own State–
130. Not many appeals– if q.[r] intricate,
131. adj.[d] till next Term & take the Opinion
132. of the Judges. Appeals from the State
133. Tribunals– monstrous– you make
134. them expensive & oppressive.
135. Cir.[t] Courts cannot pervade the
136. Country– too extensive. Silent operation
137. of Laws.
138. The Laws should be more wisely
139. framed– judiciously expounded, &
140. vigorously executed in Republics
141. than in Monarchies.
142. England– Scotland–

[*Miscellaneous notes*]

143. Two omnipotent Bodies–
144. Aversion of People to
145. strange Judicatures–
146. Pope's authority; &
147. King's.

148. England. Scotland–
149. An appeal from Scotland
150. to England–

151. Some Courts are appointed
152. by the People– limited
153. by Age– some during
154. Pleasure–

155. Cannot compel them
156. to act– or to become
157. our officers–

158. How as to Jayls– what
159. Power over Sheriffs–
160. Gov. of Laws.

161. When a Crime is created,
162. who shall have Jurisd.n of it–
163. you must enlarge the Jurisd.n
164. of a State Court.
165. The Const.n points out a
166. Number of Articles, which the federal
167. Courts must take up.
168. The objects are not different–
169. they legislate upon Persons and Things–
170. Corporations shew the actual
171. Existence of distinct Jurisd.ns.
172. The Const.n has made the Judges
173. of the several States the Judges of the
174. Union; because they have taken an
175. Oath to observe the Const.n
176. This proves too much–
177. Instance the State Legislatures.
178. The Oath is in Nature of an
179. Oath of Allegiance, and not an
180. Oath of Office–



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## APPENDIX B

### Paterson's Speech

This speech was written for the Senate debates on June 23, 1789 in opposition to Senator Lee's motion to restrict the jurisdiction of the inferior courts.[186] The speech was written front and back on a single folded sheet of paper about twice legal size. The original manuscript is in the Rutgers University Library at New Brunswick.[187]

The speech follows:

1. The Proposition now before the House has
2. undergone a very able Discussion. It involves
3. Questions of Magnitude. and no Doubt will receive
4. the most dispassionate Investigation. What objects
5. shall the Jurisd$^{n}$ of your Dist. Court embrace. What
6. Q$^{n}$ of power shall be attached to it. This is the
7. Q$^{n}$ & it is proper to consider it with a critical
8. Eye. Gen$^{l}$ Yesterday took a large Field. they
9. viewed the whole System. they took it in
10. Connection. this perhaps was right. A Beauty
11. frequently results from a View of the Whole which is
12. lost when garbled, or taken by Piecemeal. If the
13. Bill presents a System properly founded, the more
14. thoroughly it is examined the brighter it will
15. appear; it will please. if bad, if radically
16. defective, the sooner it tumbles to the Ground the
17. better. Ever since the Adoption of the Const$^{n}$ I
18. have considered federal Courts of subordinate
19. Jurisd$^{n}$ and detached from state Tribunals as
20. inevitable.

20a. The Necessity, the Utility, the Policy

21. of them strikes my Mind in the most forcible Manner.
22. The arguments made use of Yesterday might carry
23. Conviction. Who are we. how compounded. of what
24. Materials do we consist. We are a Combination of
25. Republics. a Number of free States confederated
26. together, & forming a Social League. United we have
27. a Head. separately we have a Head. each operating
28. upon different Objects. When we act as a Union we
29. move in one Sphere when we act in our individual
30. Capacity we move in another. Totally different &
31. altogether detached from each other. God grant they
32. may remain so. Contemplate the states in their
33. federal Capacity. They have an Executive. They
34. have a Legislature consisting of two Houses to frame
35. Laws for the Weal and Salvation of the Union. and
36. who are to adjudicate upon these Laws. Judges
37. chosen by the Union. No. A new Era indeed. Judges

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[186] *See* Paterson's Initial Notes, *supra* Appendix A, notes 174–79 and accompanying text.

[187] Paterson Papers, file 4, Rutgers University Library. The New York Public Library's Bancroft Collection has a transcript of the speech. 300 Bancroft Collection 387–97.

38. chosen by the respective States; in whose election
39. the Union has no Voice and over whom they have
40. little or no Control. This is a Solecism in
41. Politics. A Novelty in Gov$^{t}$. The State Tribunals
42. consist of Judges elected by the States in their
43. separate Capacity to decide upon State Laws and
44. State Objects. They are not elected to decide upon
45. National Objects or Laws except as they may come in
46. incidentally in a Cause. The Union has no Vote in
47. their Election, no Voice in their Appointment. They
48. are Strangers. Creatures of the State. dependent
49. upon the State for their Subsistence.
50. Consider how appointed. In some states
51. annually. in some States for a Term of Years. in
52. some during good Behavior. In most they depend for
53. their Salary upon the Leg$^{r}$ from Year to Year. It is
54. reducible to this Dilemma. either they become your
55. Judges & so forced upon you during good Behavior &
56. entitled to a permanent Salary, and therefore if the
57. State refuses to choose them the Year following, the
58. Union will be saddled with the Expense of both of
59. them in a State because they are they have become
60. your Judges. or if your Judges no longer than they
61. are state Judges Then you make entirely dependent
62. upon the State. Is this an eligible Situation.
63. It is said that it has the Ap. of casting a
64. Stigma upon State Courts; that you fear their
65. Virtue. that they will not do what is right. I do
66. think it should be viewed in that Light. It is a
67. proper Precaution ag$^{t}$ dependent Men.
68. However I may value a Man, yet if he be dependent
69. upon another, I should not like to submit to his
70. Decision a Dispute in which that other is concerned.
71. We have as Men individually our Interests,
72. Connections and Ambitions. so as to States. Shall
73. we suffer them so situated to mingle in the federal
74. Adm$^{n}$ for their Interests. Virtue. Vice.
75. 1. Different Objects. Different The Objects. 1. Adml.
76. Judicatures 2. Crimes of a certain Grade.
77. 2. Situation of the state Tribunals 3. Revenue.
78. The first conceded. but why. cannot the State
79. Tribunals decide upon Mari Causes subject to an
80. Appeal as well as upon others.
81.
82. 2. As to Crimes. It is an Axiom. That every Coun$^{y}$
83. ought to retain in its own Hands the means of
84. Self-Preservation. If Offences be committed ag$^{t}$ the
85. Union, will you put it in the Power of state Judges
86. to decide thereupon. to acquit or to condemn. I
87. hope not. You put your Life in their Hands. You
88. present them with a Sword to destroy yourself.
89. Suppose New Jersy was to make such a Req$^{t}$ of

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90. Virginia.
91. No appeal.
92. 3. As to the Revenue. do not give up the
93. Power of collecting your own Revenues. How is to be
94. done. You will collect Nothing. The state Officers
95. will feel it their Interest to consult the Temper of
96. the People of the State in which they live rather
97. than of the Union.
98. There must therefore be Dis$^{t}$ Judges of
99. more extent of Jurisd$^{n}$ than maritime Causes.
100. 4. To become one People. We must have one
101. common national Tribunal. Hence Uniformity of
102. Decision. hence a band of Union. we shall
103. approximate to each other gradually. be assimilated
104. in Manners, in Laws, in Customs.

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105. Circuit Courts State Trib$^{s}$ keep up local Prejudices, etc.
106. Mistaken Notions of them. Not in the Nature of Nisi Prius.
107. They are Courts of original Jurisd$^{n}$ You carry Law
108. to their Homes. Courts to their Doors. meet every
109. Citizen in his own State. not many appeals. if Q$^{n}$ is
110. intricate, ad$^{j}$ till next Term & take the Op$^{n}$ of the
111. Judges
112. Appeals from the State Tribunals. Monstrous. you will
113. make it expensive and oppressive.
114. Circuit Courts cannot prevade a Country so extensive as this.
115. Silent Operation of Laws. The Laws should be more wisely
116. framed, judiciously expounded, and promptly executed
117. in Republics than in Monarchies.

118. England. Scotland.

## APPENDIX C

### Paterson's Notes

These notes were written front and back on two roughly legal sized sheets of paper. The original manuscript is in the Rutgers University Library at New Brunswick.[188] A comparison of the notes with Maclay's Diary[189] indicates that they are notes of the Senate debates taken from June 23, 1789 through June 30, 1789. The following seven points appear in exactly the same order in both sources:

| MACLAY'S DIARY | PATERSON'S NOTES |
|---|---|
| *1. June 23*: Maclay notes the following speech that he gave that day — "If the bill stood in its present form and the Circuit Courts were continued, six [Supreme Court] judges appeared to be too few. If the Circuit Courts were struck out, they were too many." | 1. "Too few, if Circuit Courts. too great, if no Circuit Courts." |
| *2. June 23*: A continuation of Maclay's speech, "The mass of causes would remain with the State judges." | 2. "The State Courts will take up the great Mass of Business." |
| *3. June 24*: "The first debate that arose was whether there should be Circuit Courts, or courts of *nisi prius*." | 3. [roughly a page of the notes are devoted to the relative merits of Circuit Courts and *nisi prius* courts] |
| *4. June 29*: "We got on to the clause where a *defendant was required, on oath, to disclose his or her knowledge in the cause, etc.*" (emphasis original) | 4. "May compell a Man to disclose on oath . . . ." |
| *5. June 29*: "Ellsworth moved an amendment that the plaintiff, too, should swear at the request of the defendant." | 5. "Motion, that Clause be amended by swearing the Pltf." |
| *6. June 30*: "Up rose Ellsworth and threw the common law back all the way to the wager of law." | 6. "The Law. Wager." |

[188] Paterson Papers, file 4, Rutgers University Library. The New York Public Library's Bancroft Collection includes a transcript of the notes. 300 Bancroft Collection 495–511.

[189] *See supra* note 36.

| | |
|---|---|
| 7. *June 30:* "Strong went back to the ancient trial by battle." | 7. "Trial by Battle." |

In particular, note the similarity of phrasing between Maclay's Diary and Paterson's Notes in numbers 1 and 2. Finally, Ellsworth's motion in number 5 seems conclusive.

The Notes follow:

[Begin first page of manuscript notes. Supreme Court debate of June 23.[190]]

1. The Number of Judges not
2. Sufficient. Life, Liberty, and
3. Property. House of Lords in England.
4. Sessions in Scotland 13 or 15.
5. No Appeal from them.
6. — Too few, if Circuit Courts. too
7. great, if no Circuit Courts.
8. — The Powers of the S. Court are
9. great. they are to check the
10. Excess of Legislation.
11. The State courts will take
12. up the great Mass of Business.
13. Difficult to get Judges enough
14. Numbers no Security ag.st Corruption.

[Circuit Courts debate of June 24 through June 27.[191]]

15. Saving of Expenses in Nisi Prius
16. Courts. as to W.s [witnesses?]
17. Arguments more Solemn when
18. at Bar.
19. Difficult for parties to attend
20. at the Sup. Court.
21. Extent of the Country. Great
22. Labour & Expenses.
23. Counsel. two sets of them.
24. New Trials.
25. Gaol Delivery. Jury of
26. Assizes to ascertain the
27. Fact.
28. Equity Cases should be
29. referred to Chy. they should
30. not be blended. L.d Mansfield.
31. Equitizing. keep them
32. distinct.
33. Hab. Corpus & Sovereignty

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[190] *See* MACLAY'S DIARY, *supra* note 36, at 85.

[191] A general reading of Maclay's Diary indicates that the Senate considered the bill section by section, beginning with the the first section. The notes in lines 15–82 partially cover the period between June 23 when the nisi prius debate began and June 29 when the procedure debate began. MACLAY'S DIARY, *supra* note 36, at 86, 89–91. Congress was not in session on June 28, a Sunday.

34. of the State.
35. Germany like America.
36. Russians & Peter the Great.
37. People in Extremity bold,
38. interprising, etc not cringing
39. and courting Offices as about
40. the Court. Must have
41. Nisi Prius Courts, & not Circuits.
42. Must trust a great Deal
43. to State courts.
44. Advantages of Nisi Prius
45. 1. Uniformity of Decision.
46. 2. Maturity of Judgment.
47. Comm$^{n}$ swift, easy, and direct
48. None. except as to a new trial.
49. Excon. [Ex continenti?] Affidavits.
50. cases.

[Begin second page of manuscript notes.]

51. Nisi Prius
52. Why should not the
53. Jurisd$^{n}$ of the Dist$^{t}$ Court be
54. complete & extend to all
55. Cases at Law and in Equity,
56. with an Appeal, limiting
57. the same.
58. If a small Sum, it
59. may involve a Question of Law
60. of great Importance, and
61. should be liable to be removed.
62. Hambden, his a Cause of 20 s/.
63. — Sum of 500 D$^{r}$ small enough.
64. General Intercourse.
65. No Complaint as to the Adm$^{n}$
66. of Justice. 2 *Sheriffs*.
67. Def$^{t}$ but how as to the Pltf.
68. Concurrent Jurisd$^{n}$.
69. Pervade the Union.
70. More Satisf$^{n}$ to the Parties.
71. The Farmers in the New England
72. States not worth more than
73. 1,000 D$^{r}$ on an Average.
74. Money. Merchandize. Land
75. bought and sold.
76. Suppose 2 District Courts in
77. a large Dist$^{t}$.
78. Where Titles are held under
79. different States, each State
80. will endeavor to protect its
81. own Grant. they should be
82. tried in the federal Court.
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[192] *See*
[193] *See*

[Begin June 29 debate over procedure in the lower courts.[192]]

83. May compel a Man to
84. disclose on Oath in one Side of
85. the Court & not on the other.
86. Strange.
87. No Ground for the Distinction
88. More within the Reach of
89. Juries. Juries can judge
90. of Evidence.
91. uncertain. Too common.
92. better a particular Mischief
93. than a general Inconvenience
94. Judges cannot infer a
95. Fact from a Fact.
96. A Witness may testify
97. ag$^{t}$ his Interest.
98. May in Com. Law Courts
99. admit a Party's Oath by
100. Consent
101. Cannot compell a man to disclose
102. a Fraud. A Factor

[Begin third page of manuscript notes.]

103. Here the Court possesses the same
104. Jurisd$^{n}$ both Law and Equity.
105. Cheaper swearing in one
106. Court than the other.
107. An interested Person may
108. swear in his own Behalf.
109. Less Delay, & Less Expense in
110. taking the Evidence at Com. Law,
111. than in Equity.
112. Equity has swallowed up
113. the Com. Law Courts.
114. In Delaware they have
115. double Jurisd$^{ns}$ much Confusion.
116. House of Lords take up Appeals
117. from Equity.
118. Motion, that Clause be
119. amended by swearing the
120. Pltf.

[Procedure debate continues on June 30.[193]]

121. 1. The same Judges here exercise
122. both. This perhaps an Imperf$^{n}$

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[192] *See id.* at 89–91.

[193] *See id.* at 91–92. Lines 121–44 appear as a seperate column on the third page of the

123. impracticable.
124. 2. Eq. has swallowed up the
125. Com. Law. overleaped her
126. Bounds. How as to the Com.
127. Law Courts. Too straightlaced.
128. 3. Whether viva voce Testimony
129. preferable to written. not
130. the Question. No Interro.$^{y}$
131. No Ex.$^{n}$ before the Judge or Ex.$^{n}$
132. The Answer. Too sh.
133. 4. Why not swear in one
134. court as well as in the other.
135. Cheaper in one than the
136. other. Make Oaths cheap.
137. An interested Person may
138. swear at Com. Law.
139. Both Pltf and Def.$^{t}$ ought
140. to swear.
141. Novel Idea. — is —
142. The Remedy is not reciprocal
143. at Com. Law. it should be
144. mutual. both swear.

[Begin fourth page of manuscript notes.]

145. Mode of Proof the same in
146. the Bill in both Courts.
147. Provide for Mortgages; and then
148. Equity will have nothing to do.
149 Why have not the Com. Law Courts
150. in England this Power. Parliament
151. sits frequently. it is improper.
152. If the Judges thought with Blackstone,
153. a Bill would have been brought
154. forward.
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155. A Witness interested may be
156. sworn.
157. The Parties by Mutual
158. Consent may swear.
159. The Law. Wager. simple
160. Contract Debt. but not
161. tried by a Jury.
162. Aw Auditors. the Parties
163. there swear before the Auditors.
164. Lord Mansfield's Decisions generally
165. followed.
166. Trial by Battle
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172.

manuscript, and may be part of the June 29 debate that led to Ellsworth's motion (*see* MACLAY'S DIARY, *supra* note 36, at 91), in lines 118–20.

167. It will narrow the Court of
168. Equity.
169. To try the Credibility of
170. W[illegible] To try a Question of Law.
171. Very tedious. very expensive
172. and then an Arb[illegible] advised.

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*see* MACLAY'S

PREPARED STATEMENT OF THE HONORABLE SPENCER BACHUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Thank you Chairman Cabot for holding this very important hearing today on "Limiting Federal Court Jurisdiction to Protect Marriage for the States." I would also like to thank the witnesses for giving their time to be here today. You should know that this is an issue that is personally important to me, as well as many of my constituents.

The circumstances that we find ourselves in are occasioned by an increasingly intrusive and tyrannical judiciary, who through recent court decisions are redefining for all Americans the institution of marriage. These decisions demonstrate a judiciary out of touch with the intent of the Framers as well as the moral norms of society.

I believe that marriage is a sacred commitment between a man and a woman and that it is this commitment that is the foundation of all families. Children deserve to be raised and nurtured by parents who are spiritually devoted to one another. Recognizing that past government studies indicate that giving same-sex couples the same benefits as married heterosexual couples could cost the federal Treasury billions of dollars, it is important that we remember that the consequences of legally recognizing same-sex marriage extend beyond healthcare, insurance, pensions, and taxes. These consequences include: discouraging the rearing of children in two-parent biological families, the creation of fatherless or motherless families by design and the further erosion of an institution that has proved to be a crucial social stabilizer. The fact that these consequences may fall upon some of the most vulnerable members of society—our children—makes it incumbent upon us to act to preserve the institution of marriage which is dedicated to protecting them.

Congress, as an elected body of the people, has a duty to defend marriage against assaults by the judiciary. I will continue to work with my colleagues to prevent activist judges from standing our Constitution on its head.

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PREPARED STATEMENT OF THE HONORABLE STEVE KING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Thank you, Mr. Chairman, for holding this hearing today. It has become increasingly clear in recent times that our federal judiciary no longer sees a line between itself and the legislature. From the Supreme Court's decision in *Lawrence* v. *Texas* to the Partial Birth Abortion Ban decision in San Francisco, the courts are proving to us that they are sitting as super-legislatures, and challenging us to do something about it.

Our Founders created a system of checks and balances, in which each branch would keep the others in line and, in turn, be kept in line by the others. Thomas Jefferson discussed these checks and balances as they relate to the judiciary. In essence, he stated that, if the judiciary is always given the final say on constitutional issues, there is no one to check that power. This is why it is so important for the 535 Members of Congress, elected by the people, to reassert our power and perform our constitutional duties.

Whenever jurisdiction limitation is discussed, the argument that the judiciary is the final arbiter of the Constitution is sure to arise. It is time for this Congress to ask who gave the courts this right? The answer is the Supreme Court itself, in *Marbury* v. *Madison.* Over the last 200 years, however, the judiciary has continued to seize legislative powers, and the legislature has done little to stop that confiscation. I think the words of Thomas Jefferson sum this up best: "Our judges are as honest as other men and not more so. . . . [T]heir power [is] the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control." In other words, there is no reason to believe that the judiciary can be trusted more to ensure that our laws reflect our Constitution than the legislature. It is very likely that the status of the federal judiciary as unelected officials might allow judges to interject more of their personal beliefs into their decisions.

The role of the Supreme Court is to determine whether laws are consistent with the Constitution of the United States. Legislators and the people who elect them get to decide if laws are unwise or unpopular, not judges and justices. It is our duty, on behalf of the American people, to rein in the federal judiciary and prevent them from usurping the role of elected legislatures. Thank you, Mr. Chairman.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

I should thank my Republican colleagues for one thing; for the first time, I truly understand the phrase "beating a dead horse." This is the fourth of five hearings on whether we should pass an amendment enshrining discrimination into the Constitution. All we have heard in this tedium is that right-wing conservatives really, really want a discriminatory amendment in the Constitution.

The fact is, though, that such an amendment does not have the two-thirds support it needs to pass in Congress. That begs the question of why we are even discussing it. To most Americans, the answer is clear: the Republican leadership wants to score political points with its right-wing base in an election year.

The point of this particular hearing is for Republicans to reiterate their opinion that federal judges do not share the values of mainstream Americans and thus should not hear cases involving same sex marriage. I think the word "reiterate" is important because whenever a federal court issues a ruling that conflicts with their conservative leanings, the Republicans try to strip federal courts from hearing similar cases. They did not like the Ten Commandments or Pledge of Allegiance decisions, so they introduced numerous bills to prevent federal courts from hearing cases on those two declarations. They also severely limited the ability of federal courts to issue writs of habeas corpus for state convictions.

What is confusing is that Republicans strongly favor federal court jurisdiction in other instances. Last year, they made it a federal offense for a doctor to comply with a woman's right to choose. In the 1980's, the Republicans clogged up federal courts with new drug prosecutions that were normally handled at the state level. For at least a decade, they have been trying to move all tort cases from state to federal courts.

Finally, but for the highest federal court in the land overruling a state court and the will of the people, George W. Bush would not be the current occupant of the White House. I do not hear my conservative colleagues complaining about that instance of federal court overreaching.

My careful analysis of this matter shows that Republicans favor federal court jurisdiction when state courts and juries issue rulings that conservatives do not like. These areas generally include crime, torts, and presidential elections in which the Democratic candidate has won.

THREE LETTERS SUBMITTED BY THE THE HONORABLE JOHN N. HOSTETTLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Religious Freedom Coalition
717 Second Street NE ✝ Washington, DC 20002
(202) 543-0300 Fax (202) 543-8447

June 18, 2004

The Honorable John Hostettler
United States House of Representatives
Washington, DC 20515

Dear Congressman Hostettler:

I commend you for offering the Marriage Protection Act because it protects the traditional family unit which is the basis of any society, and at the same time it protects the right of states under the Tenth Amendment and by long tradition, to decide for themselves matters such as marriage law.

The travesty of same sex "marriage" that began in Massachusetts, not by the will of the people but by the decree of a handful of arrogant activist judges, should not be forced on the rest of the states. The people of Massachusetts may in time prevail against their overbearing Supreme Court, but the process of reversal will take time, and with each passing day more homosexual "marriages" are performed. It is only a matter of time until an activist federal judge, or even the Supreme Court, tries to force other states to recognize these "marriages."

Every poll shows that legalization of same sex marriage is unwanted by a large majority of American citizens, but even opponents may not fully realize the potential for harm if either civil unions or marriages for homosexuals become the law of the land. There will be an endless barrage of legal assaults against pastors and others who dare to speak out or even to quote verses of Scripture which condemn homosexuality. Children in the public schools will be subjected to "how to" homosexual education and indoctrination, and any teachers who object will likely face lawsuits and loss of employment.

For the sake of our country and future generations, I hope the Congress will stand in defense of the American people against activist judges and will exercise their Constitutional right, even obligation, to put restraints on the judiciary.

Yours sincerely,

William J. Murray
Chairman

National Headquarters: 906 Lafayette Blvd., Fredericksburg, VA 22401
(540) 370-4200 Fax (540) 370-4535 Internet: www.rfcnet.org

April 26, 2004

The Honorable John Hostettler
U.S. House of Representatives
1214 Longworth HOB
Washington, DC 20515
FAX: 5-3284

Dear Congressman Hostettler,

On behalf of the over 500,000 members of Concerned Women for America (CWA), I want to thank you for your leadership in introducing H.R. 3313, The Marriage Protection Act.

CWA fully supports this bill because it strikes to the root of judicial tyranny over the federal Defense of Marriage Act (DOMA). H.R. 3313 rightfully withdraws federal court jurisdiction over cases that may arise under current DOMA law.

As a civil servant, you and the other 534 members of congress have full authority to limit appellate jurisdiction of the Supreme Court and all inferior courts. Considering the laundry list of unconstitutional decisions that have come out of the courts over the past two years, CWA sees H.R. 3313 as the vital first step in restoring the balance of powers and protecting true democracy.

We wholeheartedly endorse this legislation and will work to secure co-sponsors and final passage this year.

Sincerely,

Michael Schwartz
Vice President for Government Relations

CONCERNED WOMEN FOR AMERICA
1015 Fifteenth Street, N.W. • Suite 100 • Washington, D.C. 20005 • Phone (202) 488-7000 • Fax (202) 488-0806 • www.cwfa.org

PHYLLIS SCHLAFLY
PRESIDENT

February 23, 2004

**EAGLE FORUM** *Leading The Pro-Family Movement Since 1972*

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OPERATIONS CENTER: P.O. BOX 618, ALTON, IL 62002, (618) 462-5415, *fax*:(618) 462-8909, *eagle@eagleforum.org*

Dear Representative,

On behalf of Eagle Forum members nationwide, I urge you to co-sponsor the **Marriage Protection Act (H.R. 3313)**, sponsored by Congressman John Hostettler (R-IN).

In 1996, Congress overwhelmingly passed (and President Clinton signed) the Defense of Marriage Act (DOMA), which defines marriage as the union between one man and one woman and also interprets the Full Faith and Credit Clause of the U.S. Constitution to permit each state to define marriage within its jurisdiction. Thirty-seven states responded by passing state DOMAs. Even though DOMA is solid law, many legal scholars are now warning that activist courts will strike it down.

**The Marriage Protection Act would add a third section to the Defense of Marriage Act removing jurisdiction from all federal courts to hear challenges to that law.** Under Article III of the U.S. Constitution, Congress has the power to limit jurisdiction of the federal courts, including the U.S. Supreme Court. This option has been exercised many times; in fact, Senator Tom Daschle (D-SD) has used it for his agenda. While the Marriage Protection Act would not stop the state courts from acting, it would stop federal court mischief, especially in appellate circuits. **This bill is needed to reign in the federal judiciary.**

Your support for H.R. 3313 is especially needed now considering the recent Massachusetts Supreme Court ruling that gay marriage, not civil unions, is the only "remedy." Once Massachusetts begins issuing marriage licenses to homosexual couples, those couples will have legal standing to wage significant challenges to the state and federal Defense of Marriage Acts.

While a constitutional amendment is ultimately needed, the two-thirds vote in Congress plus three-forths ratification by the states is a long-term battle. ***Congress should take action this year to protect DOMA.*** The Marriage Protection only needs simple majorities in Congress and a Presidential signature. There is no silver bullet solution to judicial activists' attempts to redefine marriage, but our first shot should be ensuring that they can't tamper with DOMA. **Please co-sponsor and urge immediate passage of the Marriage Protection Act.**

Faithfully,

Phyllis Schlafly

Staff contact: Lori Waters, Executive Director of Eagle Forum. (202) 544-0353

LETTER FROM WITNESS PROFESSOR MICHAEL GERHARDT TO THE HONORABLE TOM FEENEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

June 28, 2004

The Honorable Tom Feeney,
Constitution Subcommittee
House Judiciary Committee
U.S. House of Representatives
Washington, D.C., 20515

Dear Representative Feeney:

I greatly appreciate the opportunity to clarify how separation of powers constrains both the Congress' powers to abolish inferior federal courts and to regulate the jurisdiction of inferior federal courts or the Supreme Court. I have taken the liberty of copying Representative Hostettler and the Constitution Subcommittee's staff, because I think they each might have an interest in my clarification. I trust this letter will help you, and hope you will not hesitate to let me know if you need any further clarification on my testimony and responses at the June 24th hearing.

As I recall, your concern at the June 24th hearings of the Constitution Subcommittee had to do with the problem of figuring out why the greater power of the Congress to abolish courts did not include within it the lesser power to regulate federal jurisdiction in any way that the Congress saw fit. Generally, it does. But neither the power to abolish nor the power to limit the jurisdiction of inferior federal courts is absolute. Both powers are subject to constitutional limitations. Depending on how those powers are exercised, different constitutional problems may arise.

Academics hotly dispute whether there are any internal constraints on the powers to abolish or withdraw jurisdiction, i.e., whether any of the provisions in Article III restrict these powers. Article III conceivably limits Congress' power to regulate federal jurisdiction in at least two ways (both discussed in Professor Redish's written statement and amply elsewhere in the literature on federal jurisdiction). Justice Story suggested in Martin v. Hunter's Lessee that Article III's provisions constrain the power to regulate federal jurisdiction: He argued that at the very least the text of Article III, by its use of the word "shall," that the entire judicial power of the United States ought to vested, in original or appellate form, in some Article III court. He read the vesting clause of Article III as a mandate. Professor Amar at Yale Law School refines Story' argument. Alternatively, he argues that the text indicates that only three categories of cases – those preceded in Article III's text by the word "all" – ought to be vested in at least one Article III court in some form -- original or appellate.

Academics tend, however, to be in less disagreement over the external constitutional constraints on the Congress' power to regulate federal jurisdiction, i.e., on the application of constitutional guarantees outside of Article III on this power. As I suggested at the hearings, I do not believe there is anything magical about this power; it is subject to the same limitations as other plenary congressional powers, including the authority to regulate interstate Commerce. One such limitation is separation of powers. As you know, separation of powers is a body of law based on inferences from the design of the Constitution. Separation of powers constrains the power to regulate federal jurisdiction (including abolishing some inferior Article III courts) in at least three ways: First, it constrains the Congress from using this power to usurp the authority of the other branches in any way. Second, it constrains the Congress from using this power in any way that undermines the functioning of Article III courts. Consequently, if Congress used its power to abolish inferior federal courts in an effort to retaliate against or to override their substantive constitutional decisions, that would violate separation of powers. Third, separation of powers constrains the Congress from bypassing the constitutional requirements for achieving certain outcomes. For instance, the Supreme Court has recognized in its *Chadha* decision and the decision in City of New York v. Clinton that the presentment and bicameral clauses need to be satisfied in order for a bill to become a law. At the June 24th hearings, you inquired, for instance, about the nature of the separation of powers problem if Congress abolished an inferior court that was occupied. Say, Congress abolished a particular judge's seat on the Ninth Circuit. This would completely undermine that particular judge's ability to exercise Article III power and thus to be an Article III judge. He would have no forum in which to exercise his power unless Congress reassigned his jurisdiction, i.e., assigned him -- for some neutral reason -- to exercise his authority elsewhere within the circuit. (There might still be an equal protection problem with why this judge has been singled out for disparate treatment.) Abolishing a particular judge's seat or perhaps an entire district deviates from the limited paths by which constitutional decisions of Article III courts may be overridden – by constitutional amendment or the Court's overruling itself. Moreover, if the Congress abolished an inferior court that was occupied it would be effectively removing an Article III judge without complying with the constitutional requirements for impeachment and removal of Article III judges. These requirements include impeachment by a majority of the House and a vote to remove by at least two-thirds of the Senate.

Moreover, separation of powers constrains the Congress from regulating federal jurisdiction in a way that eviscerates an essential function of the Supreme Court. Imagine, for instance, Congress withdraws all federal jurisdiction with respect to a particular constitutional claim or a set of constitutional claims. If only state courts retained the power to review congressional laws, then it is likely that such laws would be enforced and construed differently throughout the country. The absence of finality and uniformity in the enforcement and interpretation of federal law violates separation of powers because it robs Article III courts, particularly the Supreme Court, of an essential function – ensuring the finality and uniformity in the enforcement and interpretation of federal law in the United States. I read the Supreme Court's decision in Martin v. Hunter's Lessee, among other decisions, as directing such a result. If the Congress could simply avoid compliance with a constitutional directive of an Article III court through its power to regulate jurisdiction, then every law could evade constitutional judicial

review. Congress would simply insulate every single one of its laws from judicial review in Article III courts.

While the same constitutional limitations apply to the Congress' powers to abolish and withdraw jurisdiction, they may apply differently because these powers have different effects. Abolition tends to be have a general impact, while withdrawal may have a general or more particular effect. Abolishing a single seat in a district that has been vacated is not likely to be constitutionally problematic, because at least some district judges persist in exercising Article III power within that district. But abolishing an entire district could severely compromise the constitutional entitlements of U.S. citizens within the district, depending on which district has been abolished and the alternative remaining fora. If, for instance, the Congress abolished a state's only district, then the citizens of that state have been left in a precarious circumstance with respect to their federal claims. I have argued, inter alia, that withdrawing a particular class of constitutional claims poses a problem for the vindication of the affected interests. Recall that a major premise of Article III is that state courts cannot be entirely trusted with respect to vindicating federal interests or claims. If state courts remain as the only forum available for vindicating particular constitutional or federal claims (because of abolition or withdrawal), the constitutional or federal claims of the affected residents are compromised. This is especially true if the effect of a congressional law is to leave state courts as the residents' only fora for adjudicating their federal or constitutional claims in retaliation against particular substantive judicial decisions.

At the June 24th hearing, a question arose about the possible constitutional differences in abolishing executive agencies or departments and withdrawing jurisdiction. To begin with, I liken the abolition of an agency or department more to the abolition of a court than to the withdrawal of jurisdiction. Abolishing an agency or department does not necessarily eviscerate the executive branch or the President's constitutional authority. But if it does undermine the functioning of the executive branch, then there is a constitutional problem. A lot depends on what is being abolished, how, and why. Say that the Congress decides to abolish the Justice Department or the White House Counsel's office, in which case a separation of powers problem arises because Congress has undermined the President's ability to discharge his constitutional duties (as well as President's ability to oversee the exercise of executive power). If executive power has been moved elsewhere within an administration, there is likely not any real harm to the President. Indeed, the President's ability to discharge his duties might have been enhanced. Such was the case with creation of the Department of Homeland Security. If the abolition of some agency or department has been done in the course of shrinking the government, there may also be a neutral justification – saving money or reducing the deficit, for instance. If the abolition includes withdrawing federal entitlements, then there may be a procedural due process problem, depending on the interests affected and the manner in which they have been withdrawn.

It is also generally true that the Congress may withdraw, or repeal, a statute without constitutional difficulty. Congress, for instance, allowed the Independent Counsel statute to lapse. Once that statute lapsed, then an alternative mechanism for investigating and prosecuting

high-ranking officials came into effect. But if Congress repeals the statute creating some inferior courts that are occupied, then it runs into a separation of powers problem – it has, among other things, effectively removed the federal judges on the affected courts without complying with the requirements in the Constitution for removing judges. Those requirements are, as I have, impeachment by the House and removal by a supermajority vote of the Senate. Congress does not have the authority to remove Article III judges by means other than the federal impeachment process.

The difference between abolition and withdrawal is particularly clear in the equal protection context. If you will allow me, I ask that you consider a possible analogy to the Supreme Court's decision in Palmer v. Thompson. In that case, the Court upheld a city's decision to close its public pools rather than open them to African-Americans. The city abolished its public pools. (Some local governments responded to the decision in Brown v. Board of Education by closing their schools rather than opening them to African-American children.) The decision was constitutional because it was a facially neutral classification with a disproportionate impact. As Professor Redish noted, such a classification is usually subject only to the rational basis test. It is constitutional to abolish a public pool or even a pubic school, because that is a facially neutral classification likely to satisfy the rational basis test because it can be defended as saving money. Professor Redish did not say, but I am sure he is aware that the Supreme Court has ruled that a facially neutral classification is not always subject to a rational basis test. If such a classification has an overwhelming or severe disproportionate impact against a particular racial minority, then it is subject to strict scrutiny. The Court said as much in both Yick Wo v. Hopkins and Gomillion v. Lightfoot, cases in which there were facially neutral classifications with almost a 100% disproportionate impact against racial minorities.

It would also be unconstitutional to close a public pool or school only to African-American or Jewish children, because the closure would no longer be facially neutral but instead be a race-based or faith-based classification, either of which would trigger strict scrutiny. If Congress abolishes a seat or two on a circuit court because it believes that the caseload within that circuit no longer justifies retaining the same number of judges on that circuit, then it has effectively enacted a facially neutral statute with respect to that circuit. It also has a rational basis for that facially neutral classification. If, however, the Congress withdrew jurisdiction on the basis of a classification directed against African-Americans or Jews for particular claims unique to their respective class, that would pose a serious equal protection problem. The Court has held strict scrutiny is appropriate with respect to race-specific subjects (so that a state's decision to override a locality's decision to require busing children as a means to facilitate integration was subjected to strict scrutiny).

Last but not least, I think that at least two Supreme Court decisions, released earlier today, reinforce the constitutional arguments I have made in this letter and in the June 24th hearing. In particular, both decisions recognize that, as Justice O'Connor suggested, the war power is not a "blank check" and thus cannot justify restricting access altogether to an Article III court for an "enemy combatant" or, for that matter, a detainee at Guantanamo Bay to challenge

the conditions of their detention. I have argued that the power to regulate is also not a "blank check"to do as Congress pleases with respect to particular plaintiffs or particular constitutional or federal claims.

I trust that I have clarified my perspective on the relevant constitutional law that constrains or limits the Congress' authority to regulate federal jurisdiction. If you have any other questions or need any other information, I hope you will not hesitate to let me know. I appreciate the civility with which our hearing was conducted, and I greatly appreciate the privilege of testifying before you.

Very truly yours,

Michael J. Gerhardt
Arthur B. Hanson Professor of Law

CC: The Honorable John Hostettler, R.-Ind.,
Catherine Graham, Staff Assistant, Constitution Subcommittee, House Judiciary Committee
David Lachmann, Minority Professional Staff, Constitution Subcommittee, House Judiciary Committee

CBO REPORT SUBMITTED BY THE HONORABLE TAMMY BALDWIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN



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June 21, 2004

Honorable Steve Chabot
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

At your request, the Congressional Budget Office has prepared the enclosed analysis of the potential budgetary effects of recognizing same-sex marriages.

If you wish further details on this analysis, we will be pleased to provide them. The CBO staff contacts are Roberton Williams (revenue effects), Jeanne De Sa (impact on Medicaid), and Kathy Ruffing (effects on Social Security and other benefits).

Sincerely,

Douglas Holtz-Eakin

Enclosure

cc: Honorable Jerrold Nadler
Ranking Member

Honorable F. James Sensenbrenner Jr.
Chairman
Committee on the Judiciary

Honorable John Conyers Jr.
Ranking Member

# The Potential Budgetary Impact of Recognizing Same-Sex Marriages

June 21, 2004

The federal government does not recognize "marriages" of same-sex couples either for receipt of federal benefits or for tax purposes. The 1996 Defense of Marriage Act (Public Law 104-199) provides that the federal government will honor only marriages between one man and one woman. It also stipulates that no state, territory, or possession of the United States or Indian tribe can be required to recognize a same-sex marriage performed in any other jurisdiction.

The potential effects on the federal budget of recognizing same-sex marriages are numerous. Marriage can affect a person's eligibility for federal benefits such as Social Security. Married couples may incur higher or lower federal tax liabilities than they would as single individuals. In all,

the General Accounting Office has counted 1,138 statutory provisions--ranging from the obvious cases just mentioned to the obscure (landowners' eligibility to negotiate a surface-mine lease with the Secretary of Labor)--in which marital status is a factor in determining or receiving "benefits, rights, and privileges."[1] In some cases, recognizing same-sex marriages would increase outlays and revenues; in other cases, it would have the opposite effect. The Congressional Budget Office (CBO) estimates that on net, those impacts would improve the budget's bottom line to a small extent: by less than $1 billion in each of the next 10 years (CBO's usual estimating period). That result assumes that same-sex marriages are legalized in all 50 states and recognized by the federal government.

The number of same-sex couples who would marry if they had the opportunity is unknown, but the 2000 census offers some insights. The census does not ask about sexual orientation, but it allows people living with a nonrelative to identify themselves as "partners" instead of "housemates/roommates." Almost 600,000 households (or 1.2 million people) identified themselves as same-sex partners in 2000, roughly half in male couples and half in female couples. They represented about 0.6 percent of the total adult population and almost 1 percent of people between the ages of 30 and 50.[2] By several common measures of stability--age, home ownership, and length of residence--those 600,000 same-sex couples resemble married couples more than they resemble other cohabiting households, so it seems reasonable to assume that many of them would marry if given the chance.[3] Some would not, of course; but other same-sex couples who did not live together, or who labeled themselves "roommates" rather than "partners" in the census, might choose to marry. The census also contained limited data about the income, earnings, and assets of those 600,000 couples--clues that CBO used to gauge budgetary impacts.

For the purposes of this analysis, CBO assumed that about 0.6 percent of adults would enter into same-sex marriages if they had the opportunity. (That proportion is equivalent to nearly 600,000 couples in 2000, with adjustment for subsequent population growth of about 1 percent a year.) CBO's estimates reflect significant uncertainty because predicting how many same-sex couples would marry is difficult and because data on their incomes, assets, and participation in federal benefit programs are sparse.

## Effects on Revenues

Recognizing same-sex marriages would affect federal revenues through both the individual income tax and the estate tax. Neither effect would be large relative to total federal revenues. Receipts from other taxes--in particular, payroll taxes-- would be unlikely to change significantly.

On balance, legalization of same-sex marriages would have only a small impact on federal tax revenues, CBO estimates. Revenues would be slightly higher: by less than $400 million a year from 2005 through 2010 and by $500 million to $700 million annually from 2011 through 2014. Those amounts represent less than 0.1 percent of total federal revenues.

The impact on revenues varies over time in part because, under current law, tax provisions will change in almost every year between now and 2011 and in part because incomes change over time. CBO's estimates are based on current law and assume that provisions in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and the Jobs Growth and Tax Relief Reconciliation Act of 2003 (JGTRRA) expire as scheduled rather than be extended.

The estimates are highly uncertain for several reasons. First, data from the 2000 census may not accurately represent the number of same-sex couples, both because of misreporting by respondents and because of misinterpretation of reported relationships by the Census Bureau. Second, how many same-sex partners would marry if allowed is unknown; CBO assumed that age and income would influence their decision, as appears to be the case for heterosexual couples. And third, allowing same-sex marriages could result in behavioral changes that would alter the number of gay and lesbian people in partnered relationships. Despite those uncertainties, however, CBO

concluded that any effect of same-sex marriages on federal revenues would be small.

### Income Tax Revenues

Recognizing same-sex marriages for federal tax purposes would require people in those marriages to file income tax returns as couples, either jointly or separately. For almost all married couples, filing jointly rather than separately results in lower tax liability. Depending on the division of income between spouses, marriage can lead to either higher income tax liability (a "marriage penalty") or lower liability (a "marriage bonus"). The greater the similarity in the two spouses' earnings, the more likely the couple is to incur a marriage penalty. Conversely, the greater the disparity in earnings, the more likely the couple is to receive a marriage bonus. When one spouse earns all of a couple's income, the couple always gets a bonus.

Together, EGTRRA and JGTRRA will reduce the number of couples incurring marriage penalties and increase the number receiving bonuses between now and 2010. JGTRRA provided relief from marriage penalties for 2003 and 2004 in the form of a higher standard deduction and broader 15 percent tax bracket for married couples. For 2005 through 2010, that relief is first reduced and then reinstated under the provisions of EGTRRA. Because of those changes and rising real (inflation-adjusted) incomes, marriage penalties would dominate during that period, and same-sex marriages would increase revenues by between $200 million and $400 million each year. After 2010, the expiration of all of EGTRRA's provisions would raise marriage penalties further, and revenues would be $500 million to $700 million higher each year than they would be if same-sex marriages were not recognized. (Permanently extending the marriage-penalty provisions in EGTRRA would reduce those revenue gains to less than $400 million per year after 2010.)

### Estate Tax Revenues

A second effect of same-sex marriages on federal revenues could come through the estate tax, but that effect is almost certain to be small. Little is known about the estate taxes that same-sex couples pay under current law. However, the effect of allowing same-sex marriages can be gauged by assuming that the partners would behave like other couples in terms of leaving inheritances.

The main impact of same-sex marriages on estate taxes would come through the unlimited spousal exemption, which allows a person to leave any amount of assets to his or her spouse without incurring estate tax liability. As a result, wealthy married couples can exempt twice as much wealth from estate taxes as single people can and thus can often pay lower estate taxes than they would if they were unmarried.[4] Furthermore, marriage can defer the payment of estate taxes until the death of the second spouse, thus shifting revenues into later years. Because the estate tax is scheduled to decline steadily through 2010 and then return abruptly to its pre-2001 levels, that shift could increase revenues by moving taxation from a relatively low-tax year (through 2010) into a higher-tax year (after 2010). Extending the estate tax provisions of EGTRRA beyond 2010 would eliminate that possible revenue gain.

Notwithstanding those complexities, under current law, allowing same-sex marriages would have little impact on estate tax liabilities. That conclusion assumes that same-sex married couples would behave similarly to heterosexual married couples in terms of how they bequeathed their estates. If they behaved differently, however, allowing same-sex marriages could have different effects on estate tax revenues. For example, anecdotal evidence suggests that gay decedents currently leave more of their assets to charitable institutions than their heterosexual counterparts do. If allowing same-sex marriages caused that behavior to change-- for example, if same-sex couples had more children to whom they left their estates-- revenues could rise. Currently, about one in three lesbian couples and one in five gay couples live in a household with their own children.[5] Those proportions might rise if same-sex marriages were legalized.

## Effects on Outlays

Marital status has a direct impact on people's eligibility for some federal payments, such as Social Security benefits, veterans' benefits, and civil service and military pensions. It can affect other benefits indirectly if a spouse's income and assets enter into determinations of eligibility. The discussion below focuses on so-called mandatory, or direct, spending--programs like Social Security that make payments to anyone who is qualified and applies--because the budgetary effects on those programs of recognizing same-sex marriages would occur automatically and would not depend on future annual appropriations.

Recognizing same-sex marriages would increase outlays for Social Security and for the Federal Employees Health Benefits (FEHB) program, CBO estimates, but would reduce spending for Supplemental Security Income (SSI), Medicaid, and Medicare. Effects on other programs would be negligible. Altogether, CBO concludes, recognizing same-sex marriages would affect outlays by less than $50 million a year in either direction through 2009 and reduce them by about $100 million to $200 million annually from 2010 through 2014.

### Social Security

With estimated payments of $488 billion in 2004, Social Security is both the largest federal program and the one in which marital history plays the greatest role in determining benefits. Under Social Security rules:

- The spouse of a retired or disabled worker--assuming that he or she meets age and other requirements--can receive 50 percent of the worker's benefit, subject to reductions for early retirement (before age 65 or, eventually, age 67) and, if children are also eligible, subject to a cap on total family benefits. Thus, the basic benefit for a married couple with one earner is 1.5 times that for an unmarried worker with the same work history.
- The widow or widower of an insured worker--again, if he or she meets age and other requirements--can receive 100 percent of the worker's benefit.
- Divorced spouses can collect either type of benefit described above if they were married to an eligible worker for at least 10 years.[6]

If a spouse or widow(er) has worked long enough (generally 10 years) to earn retired- or disabled-worker benefits on his or her own, Social Security does not pay both benefits. Instead, it pays the larger of the two amounts for which the recipient is eligible. Technically, such people are labeled "dually entitled" and receive their own benefit plus the excess, if any, of their other benefit.

As a general rule, married people fare better under Social Security than single people do, and married couples with one earner fare better than two-earner couples do. One-earner couples get an extra 50 percent of the worker's check while both spouses are alive and a lifetime benefit if the worker dies first. (In a typical pension plan, by contrast, benefits stop at the worker's death unless he or she chose a reduced, joint-and-survivor annuity.) Two-earner couples gain less from the spousal benefit because it may exceed the lower earner's own benefit by little or nothing.[7] But even in two-earner couples, the husband typically earns more and dies first, and his widow gets his higher benefit for life. People who never marry do not gain from those provisions.

Benefits paid to spouses and widow(er)s account for almost one-fifth of Social Security spending. In 2004, $21 billion in benefits will go to 5.5 million spouses and $69 billion to 8 million aged widows and widowers, CBO estimates. Almost half of those recipients are dually entitled.[8]

If permitted to marry, same-sex couples would benefit from those spousal and survivor features. However, their gains would be modest, CBO expects, for two reasons. First, most same-sex

couples include two workers, and on average, their earnings are closer to one another's than is the case for a husband and wife in a two-earner couple. Second, same-sex partners would generally collect survivor benefits for a shorter period. On average, such partners are the same age, and statistically they have the same life expectancy. By contrast, husbands are an average of two to three years older than their wives, earn more, and have a shorter life expectancy. An average married woman can expect to spend six or seven years as a widow.

From analyzing the joint earnings (and Social Security income, if applicable) of the same-sex partnerships in the 2000 census, CBO judges that only 30 percent would receive higher benefits as a retired couple than they would as two single people. And about half of same-sex couples would collect higher benefits after one partner died than they would under current law. Taking into account the age mix and expected mortality of same-sex couples, CBO estimates that additional Social Security benefits would total about $50 million in 2005 and grow to $350 million in 2014 (equivalent to $250 million in today's dollars, adjusted for intervening wage growth and cost-of-living increases).

That additional cost is small in the near term and grows over time as the couples age. According to the census, the average member of a same-sex couple in 2000 was in his or her early 40s. In only about 10 percent of partnerships were both partners age 62 or older, the earliest age for receiving Social Security retirement benefits. In the next few decades, many more couples will reach age 62, and some members will die, leaving their survivors eligible for widow(er)s' benefits if their marriages were recognized.

Children--chiefly the minor children of workers who have died--account for about 5 percent of Social Security benefits. Although large numbers of same-sex partners in the 2000 census were raising children, CBO estimates that allowing same-sex marriages would not add significantly to those benefits. Children may qualify for benefits on the earnings record of a biological or adoptive parent; the parent's marital status does not matter. Even if same-sex marriages led to more adoptions by such couples, the children involved would essentially replace one set of parents (their biological parents) with another (their adoptive parents). The two sets of parents might differ in key respects such as mortality and earnings, but any net effect on Social Security benefits for their children would most likely be small.

Finally, some recipients face marriage penalties in Social Security. Disabled adult children--grown children whose disability (usually mental retardation) occurred before age 22 and who therefore collect on a parent's record--lose their benefits if they marry. Widows and widowers who remarry before age 60 lose their former eligibility, although they may reclaim it if the remarriage ends in death or divorce. Same-sex marriages would trigger those penalties in a handful of cases, but CBO expects that such effects would be negligible.

### Other Federal Programs

Although Social Security is the program that would be most obviously affected by changes in marital status, legalization of same-sex marriage would also change federal spending for various income-support and health programs.

**Supplemental Security Income.** Partners who now collect benefits from SSI--a means-tested program for the elderly and disabled--could lose some or all of their benefits if same-sex marriages were recognized, because their spouse's income and assets as well as their own would count toward their eligibility. In almost 25,000 (about 4 percent) of the same-sex partnerships reported in the 2000 census, one or (rarely) both partners received SSI benefits. Those participants would be unlikely to marry, but some would. More plausibly, partners who do not now collect SSI benefits would find their future applications rejected because of their spouse's income. As a result, legalization of same-sex marriages would save the SSI program about $100 million a year by 2014, CBO estimates.

**Medicaid.** A joint federal/state program, Medicaid provides health coverage to some poor elderly

and disabled people, children, and families. The federal share of spending will reach an estimated $174 billion this year and $352 billion in 2014. CBO expects about 58 million enrollees in 2014--18 million elderly and disabled people and 40 million other adults and children.

As with SSI, eligibility for Medicaid is generally linked to income and assets, so counting a spouse's resources could make some individuals ineligible. Participation in SSI generally confers Medicaid eligibility, which means that some people who lost SSI benefits would also lose Medicaid coverage. Other elderly and disabled individuals (including a small number of nursing-home residents) who qualify for Medicaid under current law could also lose eligibility if a couple's combined incomes and assets were considered. The extent to which people lost coverage would vary among states depending on the degree to which states disregard assets and income. By 2014, about 30,000 fewer elderly and disabled individuals would have Medicaid coverage than under current law, CBO estimates.

Counting a spouse's income and assets would likewise push some welfare recipients and other poor families above Medicaid's eligibility limits. Although an increase in family size could boost some families' chances of qualifying, the prevailing effect of combining incomes would be to reduce Medicaid eligibility. Most of the people losing Medicaid coverage would be children. Because parents face tighter eligibility rules than children do in most states, fewer of them are eligible for the program. In a same-sex couple in which one partner has little or no income, his or her children may qualify for Medicaid under current law. Those children could lose Medicaid coverage if both partners' incomes were considered in determining eligibility.[9] Furthermore, same-sex marriages might make some children who would otherwise be enrolled in Medicaid eligible for health insurance through an adoptive parent's or stepparent's employer. Such children might shift from Medicaid to private coverage. CBO estimates that by 2014, about 100,000 fewer children and their parents would have Medicaid coverage than under current law.

Conversely, Medicaid spending could increase for a small number of nursing-home residents. Under special rules for spouses living in the community--the so-called spousal impoverishment exemption--a noninstitutionalized spouse may shield a home and some other jointly owned assets from Medicaid's resource limits. Recognizing same-sex marriages would allow couples to protect more assets than they could as individuals (under current law) and thus shrink their expected contribution to the cost of nursing-home care.

In all, CBO expects, federal spending for Medicaid would decline by about $400 million (or about 0.1 percent) in 2014 because of same-sex marriages and by smaller amounts in earlier years. Because states pay about 43 percent of the program's total costs, they would realize savings of about $300 million in 2014.

**Medicare.** Savings would also occur in the new Medicare prescription drug benefit's low-income subsidy program. Under current law, people who meet certain income and asset tests are eligible to receive government subsidies for their cost- sharing payments and premiums for the drug benefit. Some of those people would no longer qualify if the income and assets they shared with a partner were considered for eligibility purposes. The resulting savings for Medicare would amount to less than $50 million a year through 2014, CBO estimates.

**Federal Employees Health Benefits Program.** By recognizing same-sex marriages, the government would automatically extend health care insurance under the FEHB program to civil servants and civil service retirees who elected to cover a spouse. Under that program, the government pays almost three-quarters of health care premiums, and employees and annuitants pay the rest. The government's payments for annuitants constitute direct spending (spending that does not require an annual appropriation). CBO estimates that covering the same-sex spouses of retired enrollees in the FEHB program would cost the government less than $50 million a year through 2014. Premiums for current employees, by contrast, come from agencies' salary and expense budgets, which are funded by appropriations. CBO expects that those additional premiums would cost agencies less than $30 million annually through 2014.[10]

**Food Stamps and Other Programs.** In the Food Stamp program, the basic unit is the household (people who live together and usually buy and prepare food together), not necessarily the family. Thus, CBO expects that recognizing same-sex marriages between partners who already live together would not affect Food Stamp spending.

In addition, the costs or savings for veterans' benefits, civil service retirement, and military retirement would be negligible if the federal government recognized same-sex marriages, CBO estimates.

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1. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R (January 23, 2004).
2. By comparison, the 2000 census counted 54 million married-couple households and 4.9 million households with unmarried, opposite-sex partners. See Bureau of the Census, *Married-Couple and Unmarried-Partner Households: 2000*, Census 2000 Special Reports, No. CENSR-5 (February 2003).
3. Before the 2000 census, researchers James Alm, M.V. Lee Badgett, and Leslie A. Whittington used a variety of sources (the National Health and Social Life Survey, the General Social Survey, and data from the National Opinion Research Center) to reach a similar estimate: that about 550,000 same-sex couples might marry. See Alm, Badgett, and Whittington, "Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage," *National Tax Journal*, vol. 53, no. 2 (June 2000), pp. 201-214. That study estimated that male couples would make up almost two-thirds of those marrying. By contrast, about two-thirds of the same-sex couples who wed in San Francisco; Portland, Oregon; and Massachusetts in early 2004 were female. See Evelyn Nieves, "The Women's Marriage March: Majority of Same-Sex Couples Who Took Vows Are Female," *Washington Post*, May 25, 2004, p. A3.
4. That effective doubling of the exemption occurs as follows: when the first spouse dies, he or she can pass on to heirs other than the surviving spouse an amount equal to the single exemption without owing estate tax. The balance of the estate goes to the surviving spouse, also without tax because of the unlimited spousal exemption. When the second spouse dies, an additional amount equal to the single exemption goes to heirs, again without tax. The couple thus has an effective exemption equal to twice the single exemption. If each spouse has assets of his or her own exceeding the exemption, marriage will have no effect on estate tax liability, other than on the timing of tax receipts. But if the assets of one spouse exceed the exemption and those of the other spouse do not, marriage will result in a higher combined exemption.
5. Bureau of the Census, *Married-Couple and Unmarried-Partner Households: 2000*, Table 4, p. 9.
6. Relatively few people collect on an ex-spouse's record: about 375,000 spouses and 625,000 widow(er)s did so in December 2002 (including those who were eligible for smaller benefits in their own right) out of a total of 46 million Social Security recipients. The 10-year requirement clearly limits that number. More than half of marriages that end in divorce do so before the couple's eighth anniversary, according to Bureau of the Census, *Number, Timing, and Duration of Marriages and Divorces: 1996*, Current Population Reports, P70-80 (February 2002), Table 6, p. 12.
7. As a rule of thumb, the lower earner--usually the wife--will not receive a spousal benefit if she earned at least one-third as much as her husband over their lifetimes, because her own benefit will be higher. That outcome stems from the weighted formula used to calculate benefits. Social Security bases benefits on a worker's highest 35 years of earnings and aims to "replace" more earnings for a lower-paid worker than for a higher-paid one. Thus, a worker who earned an average of $4,500 a month (in today's dollars) might get a benefit of about $1,655 a month (before any reductions for early retirement), and a worker who earned only one-third as much ($1,500 a month, on average) would qualify for a basic monthly benefit of $835--more than half of the higher earner's amount.
8. The most readily available figures from the Social Security Administration show far fewer spouse and widow(er) recipients--about 2.8 million and 4.6 million, respectively. That is because dually entitled people are already included among retired workers and disabled workers, so listing them again would constitute double-counting. Adding an estimated 2.7 million dually entitled spouses and 3.6 million dually entitled widow(er)s yields the totals cited above. For more information, see Social Security Administration, *Annual Statistical Supplement* (various years), Table 5G2.
9. Even if a child is related by blood or adoption to only one of the spouses--for example, if the child was born during a previous marriage--most states consider a stepparent's income and resources when determining the child's eligibility for welfare and Medicaid. Some stepparents, though, could newly gain Medicaid coverage, depending on their states' rules.
10. In 2003, CBO analyzed the Domestic Partnership Benefits and Obligations Act of 2003, a bill that would

expand certain fringe benefits--notably health insurance--to "domestic partners" of federal civilian employees. CBO estimated that 83 percent of the potential beneficiaries would be people in opposite-sex rather than same-sex partnerships. At the sponsor's request, CBO confined its analysis to current federal employees, not retirees. See Congressional Budget Office, ***Cost Estimate for H.R. 2426, the Domestic Partnership Benefits and Obligations Act of 2003*** (August 4, 2003).

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