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## **Limiting Court Jurisdiction Over Federal Constitutional Issues: “Court-Stripping”**

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# Limiting Court Jurisdiction Over Federal Constitutional Issues: “Court-Stripping”

## Summary

Over the years, various proposals have been made to limit the jurisdiction of federal courts to hear cases regarding particular areas of constitutional law such as busing, abortion, prayer in school, and most recently, reciting the Pledge of Allegiance. Several such proposals passed the House in the 108<sup>th</sup> Congress, including an amendment to H.R. 2799 to limit the use of funds to enforce a federal court decision regarding the Pledge of Allegiance; H.R. 2028, to limit the jurisdiction of federal courts to hear cases regarding the Pledge of Allegiance; and H.R. 3313, to limit federal court jurisdiction over questions regarding the Defense of Marriage Act. Generally, proponents of these proposals are critical of specific decisions made by the federal courts in that particular substantive area, and the proposals are usually intended to express disagreement with cases in those areas and/or to influence the results or applications of such cases. Proposals of this type are often referred to as “court-stripping” legislation. The label arises from the fact that many of these proposals invoke the Congress’s power to regulate federal court jurisdiction, i.e., the courts’ power to consider cases of a particular class and in a particular procedural posture. It should be noted, however, that some proposals characterized as “court-stripping,” rather than focusing on jurisdiction, address what remedies are available to litigants or what procedures must be followed to bring constitutional cases. Although the United States Congress has broad authority to regulate in all three of these areas of judicial power — jurisdiction, procedure and remedies — this authority is generally used to address broader issues of court efficiency and resource allocation. This report, however, is limited to proposals to allocate judicial power in a way that affects or influences the result in cases concerning specific constitutional issues.

There are at least three different types of “court-stripping” proposals: (1) limiting the jurisdiction of the inferior federal courts, (2) limiting the jurisdiction of all federal courts, and (3) limiting the jurisdiction of both state and federal courts together. While the Congress has broad authority under Article III of the Constitution to regulate the jurisdiction, procedures and remedies available in state and federal courts, this power is generally not used as a means to affect substantive law. Consequently, the federal courts have only rarely faced the question of what happens when the Congress acts under Article III to limit substantive litigation, and the Supreme Court has not squarely faced a modern law limiting jurisdiction to affect or influence litigation of constitutional questions. Thus, an analysis of these proposals relies to some extent on textual analysis and scholarly discussion. Congress’s authority to limit the jurisdiction of inferior federal courts appears relatively broad, so that laws limiting the jurisdiction of the lower federal courts would appear to raise fewer constitutional issues. Significant constitutional questions arise, however, with regard to whether Congress could eliminate both inferior federal court and Supreme Court review of constitutional matters. Further, elimination of review of constitutional issues by any court — state or federal court — seems the least likely to survive constitutional scrutiny. Various commentators, however, have suggested that limiting jurisdiction for any court for a particular class of cases raises questions regarding both the separation of powers doctrine and the Equal Protection Clause.

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# Limiting Court Jurisdiction Over Federal Constitutional Issues: “Court-Stripping”

The power to hear cases regarding federal statutory and constitutional law is allocated among state courts, federal inferior courts, and the United States Supreme Court. The Congress has significant authority to determine which of these various courts will evaluate such cases, and the method by which this will occur. In its exercise of such power, the Congress has passed many laws that affect issues such as standards of judicial review, procedural rules, jurisdiction and remedies. For most purposes, the exercise of this power is relatively noncontroversial.

Over the years, however, various proposals have been made to limit the jurisdiction of federal courts to hear cases in particular areas of constitutional law such as busing, abortion, prayer in school, and most recently, reciting the Pledge of Allegiance.<sup>1</sup> Generally, proponents of these proposals are critical of specific decisions made by the federal courts in that particular substantive area, and the proposals are usually intended to express disagreement with decisions in those areas and/or to influence the results or applications of such cases.

Several such proposals passed the House in the 108<sup>th</sup> Congress. For instance, in July 2003, an amendment was passed by the House to limit the use of funds to enforce a federal court decision regarding the Pledge of Allegiance.<sup>2</sup> Then, in July 2004, the House passed H.R. 3313, the Marriage Protection Act, which would have limited Federal court jurisdiction over questions regarding the Defense of Marriage

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<sup>1</sup> Such proposals from the 108<sup>th</sup> Congress include H.R. 3799, the Constitution Restoration Act of 2004 (limiting federal court jurisdiction over cases regarding governmental acknowledgment of God); H.R. 1546, the Life-Protecting Judicial Limitation Act of 2003 (providing that the inferior courts of the United States do not have jurisdiction to hear abortion-related cases); S. 1297, the Protect the Pledge Act of 2003 (same); S. 1558, the Religious Liberties Restoration Act (amending jurisdiction of federal courts of over cases involving the Pledge of Allegiance, Display of the Ten Commandments, or use of motto “In God we Trust”); and H.R. 3190, the Safeguarding our Religious Liberties Act (same).

<sup>2</sup> This amendment provided that “None of the funds appropriated in this act may be used to enforce the judgment in *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002).” 149 Cong Rec H 7277 (July 22, 2003). The amendment appears to have been intended to prevent enforcement of the above-cited case, which held that because of the use of the words “under God” in the Pledge of Allegiance, a California school district’s policy of sponsoring a teacher-led recitation of the Pledge was unconstitutional. Proposed by Rep. Hostettler as an amendment to H.R. 2799 (the proposed 2004 Appropriations Act for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies), this language was adopted by the House. 149 Cong Rec H 7298 (July 22, 2003). It was not, however, included in H.R. 2673, the Consolidated Appropriations Act of 2004. *See* Conference Report on H.R. 2673, 149 Cong. Rec. H12335-12352 (November 25, 2003).

Act.<sup>3</sup> Finally, in September 2004, the House passed H.R. 2028, the Pledge Protection Act, which was intended to limit the jurisdiction of the federal courts to hear cases regarding the Pledge of Allegiance.<sup>4</sup>

All of these proposals appear to be distinguishable from other bills relating to judicial power in that they are narrowly focused on substantive constitutional issues. Further, proponents of these proposals are generally critical of specific decisions made by the federal courts in the particular substantive area, and the proposals are represented as intended to influence the results or applications of such cases.

This report addresses the constitutionality of proposals to allocate or limit judicial power for the purpose of affecting or influencing the substantive result of cases regarding particular constitutional issues.<sup>5</sup> These proposals are often referred to as “court-stripping” proposals. The label arises from the fact that many of these proposals invoke the Congress’s power to regulate federal court jurisdiction, i.e., the courts’ power to consider cases of a particular class and in a particular procedural posture. It should be noted, however, that some proposals characterized as “court-stripping” actually involve either changing what remedies are available to litigants or amending the procedures that must be followed to bring constitutional cases. Although the United States Congress has broad authority to regulate in all of these areas of judicial power — jurisdiction, procedure and remedies — this authority may be subject to certain constitutional limits.

## Background

The authority of Congress to regulate the jurisdiction, procedures and remedies available in federal courts is principally found in Article III of the United States Constitution. Article III 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

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<sup>3</sup> “No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C or this section.” H.R. 3313, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess. For further information on the Defense of Marriage Act, see CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.

<sup>4</sup> “No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, as defined in section 4 of title 4, or its recitation.” However, “[t]he limitation in this section shall not apply to the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.” H.R. 2028, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess.

<sup>5</sup> For further information on the issue of congressional regulation of federal judicial power, see Johnny Killian, George Costello, UNITED STATES CONSTITUTION: ANALYSIS AND INTERPRETATION 779-784 (1992) . An updated version of the treatise is available on the CRS website, (see Constitution Annotated at [<http://www.crs.gov/products/conan/index.shtml>]). The cited materials starts at the topic titled “Power Of Congress To Control The Federal Courts,” which can be found under the discussion of Article III, § 2, cl. 2.

may from time to time ordain and establish.”<sup>6</sup> Article III identifies the cases covered by this judicial power by two separate criteria — the subject matter of particular cases or the identity of the litigants or persons affected. The subject matter of the federal judicial power is quite broad, as it includes the power to consider “all” cases arising under either the Constitution, federal law or treaty, or arising from the admiralty or maritime jurisdiction. As noted, Article III also extends the federal judicial power to cases based on the types of parties affected or involved. These latter cases can be divided into two different groups.

The first group includes “all” cases which affect an Ambassador or other public Ministers or Consuls, or which involve a controversy between two or more States. The second group includes cases involving disputes between the United States and another party; a state and citizens of another State; citizens of different States; citizens of the same state claiming land under grants of different states; and between a State, or the Citizens thereof, and foreign states, citizens or subjects.<sup>7</sup> The cases in the first group, and any other cases where a State is a party, are to be heard directly by the Supreme Court under the Court’s original jurisdiction.<sup>8</sup> The remaining cases in the second group, along with the Court’s previously noted substantive authority, are heard under the Court’s appellate jurisdiction.<sup>9</sup>

It is important to note that the Court’s appellate jurisdiction (unlike its original jurisdiction) is subject to “Exceptions, and under such Regulations” as Congress shall

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<sup>6</sup> U.S. CONST. Art. III, § 1. *See also* Article I, § 8 (“The Congress shall have the power to . . . constitute Tribunals inferior to the supreme Court.”).

<sup>7</sup> “The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; — to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States, — between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. CONST. Art. III, § 2, cl. 1.

<sup>8</sup> “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.” U.S. Const. Art. I, § 2, cl. 2. “Original Jurisdiction” is a when a court has jurisdiction to hear a case without it having been heard previously in a lower court. Under 28 U.S.C. § 1251, however, only disputes between states are considered exclusively by the Supreme Court. Thus, Original cases in the Supreme Court are few, but are often complex. When the Court exercises original jurisdiction, it generally appoints a special Master to do the fact finding in the case. Richard Fallon, Daniel Meltzer, David Shapiro, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 55 (1996).

<sup>9</sup> “In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact . . .” U.S. CONST. Article III, §2, cl. 2. Most of the cases appealed to the Supreme Court are first heard in a federal courts of appeals or state courts. The large majority of these cases are heard by the Court pursuant to writs of *certiorari*. *See* Richard Fallon, Daniel Meltzer, David Shapiro, *supra* note 8, at 55.

make.<sup>10</sup> It should also be noted, however, that the Constitution provides for jurisdiction in “all” cases under its substantive jurisdiction or under the first group of cases based on parties. As will be discussed later, this has led some commentators to suggest that while Congress has the power to limit the Supreme Court’s appellate jurisdiction, that at least some cases must be considered by some federal court, whether it be the Supreme Court or an inferior court.

The Supremacy Clause, found in Article VI, provides that the judges in every State are bound to follow the United States Constitution and applicable federal law.<sup>11</sup> The Congress does not appear to have the authority to establish state courts of competent jurisdiction.<sup>12</sup> However, once such state courts exist, the Congress can endow them with concurrent power to consider certain cases concerning federal law. When a state court has rendered a decision on an issue of federal law, and a final determination has been made by the highest court in that state, then that case may generally be appealed to the Supreme Court.<sup>13</sup> Thus, state court cases can also fall under the Supreme Court’s appellate jurisdiction.

The question arises, however, precisely how the “judicial power” should be allocated between the various courts, and what sort of limitations can be implemented on the combined court systems by Congress. While there have been many proposals to vary federal court jurisdiction in order to affect a particular judicial result, few have passed, and even fewer have been subjected to scrutiny by the courts. Further, those laws that did pass varied from modern proposals. Thus, the answer to these complex questions must be ascertained by reference to constitutional text, historical practice, a limited set of case law, and scholarly commentary.

Federal district courts and courts of appeal (the inferior federal courts) are authorized to consider most questions of federal statutory and constitutional law, with appeal to the Supreme Court. In general, most modern “court-stripping” proposals appear to be intended to increase state court involvement in constitutional cases by decreasing federal court involvement. There are at least three possible variations to these proposals.<sup>14</sup> First, there are proposals which, by limiting inferior federal court jurisdiction, would, in effect, cause a particular class of constitutional decisions to

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<sup>10</sup> “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.” U.S. CONST. Art. III, § 2.

<sup>11</sup> “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST., Art. VI, cl. 2.

<sup>12</sup> The Constitution appears to contain no authority to create state courts. *Martin v. Hunter’s Lessee*, 14 U.S. 304, 331 (1816).

<sup>13</sup> See Richard Fallon, Daniel Meltzer, David Shapiro, *supra* note 8, at 636- 644.

<sup>14</sup> It should be noted that, unlike the limiting of federal court jurisdiction, that the limiting of state court jurisdiction to consider federal constitutional issues is well established.

be heard in state courts, with appeal to the Supreme Court.<sup>15</sup> Second, there are proposals to vest the exclusive jurisdiction to hear such constitutional cases in the state courts without appeal to the Supreme Court.<sup>16</sup> Third, the Congress might act to exclude any judicial review over a particular class of constitutional cases from any court, whether state or federal.

It should be noted that there are also proposals, not examined in depth here, that would limit the methods available to the various courts to remedy constitutional injury.<sup>17</sup> To the extent that these remedy limitations actually prevent the vindication of established constitutional injury, they would appear to fall under the same category as proposals that limit the jurisdiction of particular courts. Thus, for instance, the amendment noted above which would prohibit the use of funds for enforcement of a particular district court decision,<sup>18</sup> would seem likely to be analyzed similarly to an amendment limiting lower court jurisdiction over constitutional cases. However, in situations where other sufficient remedies are left unchanged, a court might determine that the constitutional right could be effectuated despite limits on a particular remedy.<sup>19</sup>

## Analysis

As noted previously, the Congress considers and passes many laws that are exercises of its control over judicial power under Article III. There appears, however, to be no direct legislative precedent for the types of “court-stripping” proposals noted above. While federal court jurisdiction or remedies have occasionally been varied by Congress to affect a particular judicial result, the associated case law is of only limited applicability to the modern proposals. Thus, an analysis of these proposals will principally concern a textual analysis of the extent and limit of

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<sup>15</sup> *See, e.g.*, Life-Protecting Judicial Limitation Act of 2003, H.R. 1546, 108th Cong, 1st Sess. (providing that the inferior courts of the United States do not have jurisdiction to hear abortion-related cases); Pledge Protection Act of 2003, H.R. 2028, 108th Cong., 1st Sess. (amending of inferior federal courts over cases involving the Pledge of Allegiance); Protect the Pledge Act of 2003, S. 1297, 108th Congress, 1st Sess. (same).

<sup>16</sup> *See, e.g.*, A Bill to Modify the Jurisdiction of the Federal courts with Respect to Abortion, H.R. 1624, 104th Cong., 1st Sess. (limiting federal court jurisdiction over abortion.)

<sup>17</sup> For instance, the Prison Litigation Reform Act (PLRA) provides specific standards for the maintenance or termination of ongoing civil injunctions in prison conditions cases, cases which are generally based on the Eighth Amendment prohibition on cruel and unusual punishment. The PLRA provides that a court shall immediately terminate prospective relief of prison conditions unless the court finds that such relief is “narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.” 18 U.S.C. § 3626. Or, a provision of the Anti-Terrorism and Effective Death Penalty Act of 1996, provides for a time limitation on the application for federal habeas corpus relief. 28 U.S.C. § 2263 (2003)

<sup>18</sup> *See* note 2 and accompanying text.

<sup>19</sup> *See* *Miller v. French*, 530 U.S. 327 (2000) (upholding the Prison Litigation Reform Act).



Congress's power under Article III, a scholarly discussion on that subject, and related case law.

It should be noted, however, that various commentators have suggested that the constitutional problems with “court-stripping” provisions are more fundamental than an analysis of Congress' Article III powers.<sup>20</sup> The most significant issue is whether Congress, by attempting to change constitutional law by statute rather than constitutional amendment, is in violation of the doctrine of separation of powers. Further, when specific constitutional rights are singled out for disparate treatment, a question arises as to whether that class of litigants is being treated in a manner inconsistent with the Equal Protection Clause. Ultimately, an evaluation of a particular piece of “court-stripping” legislation may vary depending on what jurisdiction, remedies or procedures are affected, and what ultimate impact this is likely to have on the specified constitutional rights.

### **Limiting Consideration of Specific Constitutional Issues to State Courts, Subject to Supreme Court Review**

The argument has been made that because the Congress has the authority to decide whether or not to create inferior federal courts, it also has authority to determine which issues these courts may consider. There appears to be significant historical support for this position. While the establishment of a federal Supreme Court was agreed upon early in the Constitutional Convention, the establishment of inferior federal courts was not a foregone conclusion. At one point, it was proposed that the Convention eliminate a provision establishing such inferior courts. This proposal would have had state tribunals consider most federal cases, while providing Supreme Court review in order to enforce national rights and ensure uniformity of judgments.<sup>21</sup>

James Madison opposed the motion to eliminate lower federal courts, arguing that such a decentralized system would result in an oppressive number of appeals, and would subject federal law to the local biases of state judges. A compromise resolution, proposed by Madison and others, was agreed to, whereby the Congress would be allowed, but not compelled, to create courts inferior to the Supreme Court. The new plan, referred to as the “Madisonian Compromise,” was ultimately adopted. Thus, Article III provides that Congress has the power to create courts inferior to the Supreme Court, but that it need not exercise it.

Once the Congress has agreed to the creation of inferior courts, however, the question then arises as to whether the Congress must grant these courts the full extent of the jurisdiction contemplated by Article III. Some commentators have argued that the very nature of the Madisonian Compromise described above plainly allowed the establishment of federal courts with something less than the full judicial power

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<sup>20</sup> See notes 50-57 and accompanying text, *supra*.

<sup>21</sup> 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 124 (1911).

available under Article III.<sup>22</sup> An 1816 decision by Justice Story, *Martin v. Hunter's Lessee*,<sup>23</sup> however, suggested that the Constitution requires that if inferior courts are established, there are some aspects of the judicial power which the Congress may not abrogate. For instance, Justice Story argued that the Congress would need to vest inferior courts with jurisdiction to hear cases that are not amenable to state court jurisdiction.<sup>24</sup> Thus, arguably, a constitutional issue which arose under a law within the exclusive federal jurisdiction<sup>25</sup> would need to be decided by a federal court.

There is significant historical precedent, however, for the proposition that there is no requirement that all jurisdiction that could be vested in the federal courts should be so vested. For instance, the First Judiciary Act implemented under the Constitution, the Judiciary Act of 1789, is considered to be an indicator of the original understanding of the Article III powers. That act, however, falls short of having implemented all of the “judicial powers” which were specified under Article III. For instance, the act did not provide jurisdiction for the inferior federal courts to consider cases arising under federal law or the Constitution. Although the Supreme Court’s appellate jurisdiction did extend to such cases when they originated in state courts, its review was limited to where a claimed statutory or constitutional right had been denied by the court below.<sup>26</sup>

There is also Supreme Court precedent that holds that the Congress need not vest the lower courts with all jurisdiction authorized by Article III. In *Sheldon v. Sill*,<sup>27</sup> the Court was asked to evaluate whether the Congress need grant a federal circuit court jurisdiction in a case where diversity (jurisdiction based on parties being from different states) had been manufactured by assignment of a mortgage to a person in another state. The Court held that “Congress, having the power to establish the courts, must define their respective jurisdictions.”<sup>28</sup> The Court further indicated that “Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies” so that “a statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.”<sup>29</sup>

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<sup>22</sup> Paul Bator, *Congressional Power over the Jurisdiction of the Federal Court*, 27 Vill. L. Rev. 1030, 1031 (1982).

<sup>23</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>24</sup> 14 U.S. at 330-331.

<sup>25</sup> Modern example of exclusive federal jurisdiction include the Securities Exchange Act of 1934, 15 U.S.C. 78aa (exclusive federal jurisdiction to enforce criminal and civil liabilities created by Act); 28 U.S.C. 1333 (exclusive federal for admiralty, maritime and cases involving prizes); and 28 U.S.C. 1338 (federal courts have exclusive jurisdiction in suits arising under the patent, copyright, and trademark laws).

<sup>26</sup> See Richard H. Fallon, Daniel J. Meltzer, David L. Shapiro, *supra* note 8, at 2.

<sup>27</sup> 49 U.S. (8 How.) 441 (1850).

<sup>28</sup> 49 U.S. at 448.

<sup>29</sup> 49 U.S. at 449.

As noted earlier, the Supremacy Clause provides that state courts are bound to follow the United States Constitution, so that state courts which have cases within their jurisdiction are required to consider and decide such constitutional issues as they arise. The Congress does not have the authority to establish the jurisdiction of state courts, and consequently those “court stripping” proposals that relate to the inferior federal courts do not generally specify that state courts will become the primary courts for vindication of specified constitutional rights. To the extent, however, that state courts provide a forum for the complete vindication of constitutional rights, then concerns about removal of such issues from a federal court are diminished. However, as will be addressed later, critics maintain that such “court stripping” proposals may suffer from other constitutional defects.

### **Limiting Consideration of Specific Constitutional Issues to State Courts with No Supreme Court Review**

This scenario requires evaluation of two aspects of Article III: the power of Congress to allocate federal judicial power and the power of Congress to create exceptions to the Supreme Court’s appellate jurisdiction under the Exceptions Clause. As to the former, the question arises as to whether Congress need allocate any of the authorities delineated in Article III to the federal courts beyond cases decided under the “Original Jurisdiction” of the Supreme Court. In *Martin v. Hunter’s Lessee*,<sup>30</sup> Justice Story noted that the Constitution provides that the judicial power “shall” be vested in the Supreme Court, or in the such inferior courts as are created. His opinion thus asserted that it is the duty of Congress to vest the “whole” judicial power where it is so directed, either in the Supreme Court or in the inferior courts.

Justice Story did, however, note that the text of the Constitution suggests some limits to the requirement that the “whole” judicial power shall vest. This limit arises from the previously noted fact that some types of federal “judicial power” are extended by the text of the Constitution to “all” such cases, i.e., cases arising under either the Constitution, federal law, treaty, admiralty or maritime jurisdiction, or cases affecting an Ambassador or other public Ministers or Consuls.<sup>31</sup> The vesting of other types of cases cited in Article III (such as cases between citizens of different States) is not so characterized, and thus arguably Congress would have discretion whether or not to establish these powers in the federal courts.

Under this textual analysis, the power to consider cases concerning the Constitution must be vested in some federal court. Thus, according to Justice Story, a statute limiting consideration of specific constitutional issues to state courts with no Supreme Court review would be unconstitutional. This analysis, however, has attracted large amounts of scholarly attention, and there is significant dispute over Justice Story’s conclusion. On one hand, at least one commentator asserts that not only is this theory supported by analysis of the text of the Constitution, but that it is also consistent with jurisdictional limitations found in the Judiciary Act of 1789 and

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<sup>30</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>31</sup> See note 7, *supra*.

subsequent case law.<sup>32</sup> Other commentators, however, have taken issue with this analysis.<sup>33</sup> Absent additional court precedent on this point, a resolution of this scholarly debate would be largely speculative.

The second issue, whether Supreme Court review over a category of cases can be limited by legislation under the Exceptions Clause, has been addressed to some extent by the Supreme Court in *Ex Parte McCordle*.<sup>34</sup> In *Ex Parte McCordle*, the Congress had authorized federal judges to issue writs of *habeas corpus*. McCordle, the editor of the Vicksburg Times, was arrested by federal military authorities on the basis of various editorials published in his newspaper, and charged with disturbing the peace, libel, incitement and impeding Reconstruction. Claiming constitutional infirmities with his case, McCordle sought and was denied a writ of *habeas corpus* in an inferior federal court, a decision which he then appealed to the Supreme Court. During the pendency of that appeal, however, in an apparent attempt to prevent the Supreme Court from hearing the appeal, the Congress repealed the jurisdiction of the Supreme Court to hear appeals from *habeas corpus* decisions.

In *McCordle*, the Congress purported to be acting under its authority under Article III to make exceptions to the appellate jurisdiction of the Court. In reviewing the statute repealing the Supreme Court's jurisdiction, the Court noted that it was "not at liberty to inquire into the motives of the legislature. We can only examine its power under the Constitution: and the power to make exceptions to the appellate jurisdiction of this court is given by express words."<sup>35</sup> Consequently, the Supreme Court accepted the withdrawal of jurisdiction over the defendant's case, and dismissed the appeal.

The case of *Ex Parte McCordle*, while it made clear the authority of the Congress to make exceptions to the appellate jurisdiction of the Supreme Court, does not appear to answer the question as to whether all Supreme Court review of a constitutional issue can be eliminated. The Court specifically noted that McCordle had other avenues of review to challenge the constitutionality of his arrest apart from appellate review, namely the invocation of *habeas corpus* directly by the Supreme Court.<sup>36</sup> Consequently, unlike the instant proposals, the Supreme Court in *McCordle* maintained the ability to otherwise consider the underlying constitutional issues being raised.

In sum, there is no direct court precedent on this issue, and little or no consensus among scholars. The practical consequences of enacting these proposals is also unclear. While it is presently the case that Supreme Court precedent binds state

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<sup>32</sup> Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L.Rev. 205 (1985); Akhil Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U.Pa. L. Rev. 1499 (1990).

<sup>33</sup> Daniel Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569 (1990).

<sup>34</sup> 74 U.S. (7 Wall.) 506 (1869).

<sup>35</sup> 74 U.S. at 514.

<sup>36</sup> 74 U.S. at 515. In a subsequent cases, such an alternate route was in fact utilized. *See, e.g. Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

courts, it is not clear if this would continue to be the effect if the states became the court of final resort on a particular issue.<sup>37</sup> Even if existing precedent was adhered to, over time it could become the case that divergent constitutional doctrine would arise in each of the fifty states on any issue where Supreme Court review was precluded. Arguments have been made that such a result would undercut the intention of the Founding Fathers to establish a uniform federal constitutional scheme.<sup>38</sup>

## **Prohibiting Any Court, State or Federal, From Considering a Specific Constitutional Issue**

A series of lower federal court decisions seems to indicate that in most cases, some forum must be provided for the vindication of constitutional rights. For instance, in 1946, a series of Supreme Court decisions<sup>39</sup> under the Fair Labor Standards Act of 1938<sup>40</sup> exposed employers to 5 billion dollars in damages, and the United States itself was threatened with liability for over 1.5 billion dollars. Subsequently, the Congress enacted the Portal to Portal Act of 1947,<sup>41</sup> which limited the jurisdiction of any court, state or federal, to impose liability or impose punishment with respect to such liabilities. Although the act was upheld by a series of federal district courts and Courts of Appeals, most of the courts disregarded the purported jurisdictional limits, and decided the case on the merits.

As one court noted, “while Congress has the undoubted power to give, withhold, or restrict the jurisdiction of courts other than the Supreme Court, it must not exercise that power as to deprive any person of life, liberty, or property without due process or just compensation. . . .”<sup>42</sup> The Court has also construed other similar statutes narrowly so as to avoid “serious constitutional questions” that would arise if no judicial forum for a constitutional claim existed.<sup>43</sup>

The Supreme Court has not directly addressed whether there needs to be a judicial forum to vindicate all constitutional rights. Justice Scalia has pointed out that there are particular cases, such as political questions cases, where all constitutional review is in effect precluded.<sup>44</sup> Other commentators point to sovereign immunity and the ability of the government to limit the remedies available to plaintiffs.<sup>45</sup> However, the Court has, in cases involving particular rights, generally found a requirement that effective judicial remedies be present. Thus, for instance, the Court has held that the

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<sup>37</sup> See Richard H. Fallon, Daniel J. Meltzer, David L. Shapiro, *supra* note 8, at 351.

<sup>38</sup> *Id.* at 366-67.

<sup>39</sup> See, e.g., *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

<sup>40</sup> 29 U.S.C. § 201-219.

<sup>41</sup> 29 U.S.C. § 251-262.

<sup>42</sup> *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d. Cir. 1948).

<sup>43</sup> See, e.g., *Webster v. Doe*, 486 U.S. 592 (1988).

<sup>44</sup> 486 U.S. at 612-13 (Scalia, J., dissenting).

<sup>45</sup> *Bartlett v. Bowen*, 816 F.2d 695, 719-720 (1987)(Bork, J., dissenting).

Constitution mandates the availability of effective remedies for takings.<sup>46</sup> These cases would seem to indicate a basis for the Court to find that parties seeking to vindicate other particular rights must have a judicial forum for such challenges.

### **Limiting the Remedies and Procedures Available to the Court after a Constitutional Injury Has Been Established**

Once a constitutional violation has been alleged, the question arises as to whether the Congress can limit the remedies available to prevailing litigants. Various such proposals have been made, such as the previously noted amendment limiting funds available to the courts for enforcement of a particular court decision.<sup>47</sup> While the Congress would certainly be within its authority to regulate certain aspects of remedy, it is not at all clear that Congress could eliminate all remedies available to a court,<sup>48</sup> or eliminate such remedies as would make the vindication of a constitutional right meaningless.<sup>49</sup> Arguably, laws that had such an effect would be analyzed by a court as having the same impact as limiting a court's jurisdiction, and thus would be interpreted under the same analysis.

### **Laws Intended to Influence Constitutional Results Generally**

Finally, there is a more general constitutional concern that would apply to proposals in all of the above categories, and that is the extent that Congress is prohibited from exercising powers allocated to another branch of government.<sup>50</sup> In *United States v. Klein*,<sup>51</sup> the Congress passed a law designed to frustrate a finding of the Supreme Court as to the effect of a presidential pardon. The Court struck down the law, essentially holding that the Congress had an illegitimate purpose in passage of the law. "[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. . . . It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to

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<sup>46</sup> *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).

<sup>47</sup> See note 2 and accompanying text, *supra*.

<sup>48</sup> See note 36 and accompanying text, *supra*.

<sup>49</sup> See *Miller v. French*, 530 U.S. 327, 350-51 (2000)(Souter, J., concurring)(arguing that application of Prison Litigation Reform Act would be a violation of separation of powers doctrine if the time allowed for a court to decide a prison conditions case was inadequate.)

<sup>50</sup> See *Dickerson v. United States*, 530 U.S. 428, 438 (2000)(striking down Congressional statute purporting to overturn the Court's Fourth Amendment ruling in *Miranda v. Arizona*); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)(Congress' enforcement power under the Fourteenth Amendment does not extend to the power to alter the Constitution); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 225 (Congress may not disturb final court rulings).

<sup>51</sup> 80 U.S. (13 Wall.) 128 (1871).

the appellate power.”<sup>52</sup> Similarly, a law which was specifically intended to limit the ability of a court to adjudicate or remedy a constitutional violation could violate the doctrine of separation of powers, as providing relief from unconstitutional acts is a judicial branch function.<sup>53</sup>

Constitutional considerations other than separation of powers could also be at issue if proposed legislation was intended to significantly burden a particular group or to impair a fundamental right. It is generally agreed that a law that limited a federal court’s power for an illegitimate constitutional purpose could run afoul of provisions of the Constitution apart from Article III. For instance, a law which limited access to the judicial system based on membership in a suspect class would appear to violate the Equal Protection Clause of the 14<sup>th</sup> Amendment.<sup>54</sup>

But, what if members of a group being discriminated against were not defined by membership in a suspect class, but instead by their status as plaintiffs in a particular type of constitutional cases? In general, Article III allows the Congress to provide different legal procedural rules for different types of cases if there is a rational reason to do so.<sup>55</sup> However, even a rational basis analysis of such disparate treatment might not be met if the Court finds the argument put forward for burdening a particular class of cases is illegitimate.<sup>56</sup> As mere disagreement with the results reached by the federal courts in prior cases regarding the Constitution may not be a legitimate legislative justification, alternative justifications for such laws would need to be developed.

The level of burden imposed by such proposals might also be a factor in evaluating their constitutionality. For instance, requiring litigants in particular federal constitutional cases to pursue their cases in state courts may not represent a significant burden,<sup>57</sup> and thus might require less legislative justification. However, more serious attempts to impair either the burden of litigation or the remedies available might well require the establishment of a more significant governmental interest before such a law could be enforced.

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<sup>52</sup> 80 U.S. at 146. The Court also found that the statue impaired the effect of presidential pardon, and thus “infringe[ed] the constitutional power of the Executive.” *Id.* at 147.

<sup>53</sup> See *Miller v. French*, 530 U.S. 327, 350-51 (2000)(Souter, J., concurring).

<sup>54</sup> Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.- C.L.L.Rev. 129, 142-43 (1981).

<sup>55</sup> See, e.g., *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938)(Article III allows for Norris-LaGuardia Act limitations on jurisdiction of federal court to grant relief for labor disputes); *But see Truax v. Corrigan*, 257 U.S. 312, 339 (1921)(state limitations on injunctions for labor disputes violate Equal Protection Clause).

<sup>56</sup> *Romer v. Evans*, 517 U.S. 620, 634-636 (1995)(animus against a particular group not a legitimate governmental interest).

<sup>57</sup> See Richard H. Fallon, Daniel J. Meltzer, David L. Shapiro, *supra* note 8, at 351-354.

## Conclusion

Congress's authority to limit the jurisdiction of inferior federal courts appears relatively broad, so that limiting the jurisdiction of these courts to consider particular constitutional cases is arguably within its Article III authority. A more serious question is whether Congress could eliminate review of constitutional matters by both inferior courts and the Supreme Court. Finally, elimination of review of constitutional issues by any court, state or federal, seems the least likely to survive constitutional scrutiny.

It should be noted, however, that various commentators have suggested that any limitation of jurisdiction for a particular class of constitutional cases raises questions regarding both the separation of powers doctrine and the Equal Protection Clause. There appears, however, to be no direct legislative or judicial precedent for modern "court-stripping" proposals. While federal court jurisdiction or remedies have been otherwise varied by Congress to affect a particular judicial result, few have passed, and even fewer have been subjected to scrutiny by the federal courts in modern times. Thus, a resolution of these broader questions would depend on further judicial developments in this area.