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Congressional Authority Over the Federal Courts

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Congressional Authority Over the Federal Courts

Summary

This report examines Congress' legislative authority with respect to the Judicial Branch. While Congress has broad power to regulate the structure, administration and jurisdiction of the courts, its powers are limited by precepts of due process, equal protection and separation of powers. Usually congressional oversight of the judicial branch is noncontroversial, but when Congress proposes to use its oversight and regulatory powers in a manner designed to affect the outcome of pending or previously decided cases, constitutional issues can be raised. In recent years, Congress has considered using or has exercised its authority in an effort to affect the results in cases concerning a number of issues, including abortion, gay marriage, freedom of religion, "right to die" and prisoners' rights.

This report addresses the constitutional foundation of the federal courts, and the explicit and general authorities of Congress to regulate the courts. It then addresses Congress' ability to limit the jurisdiction of the courts over particular issues, sometimes referred to as "court-stripping." The report then analyzes Congress' authority to regulate the availability of certain judicial processes and remedies for litigants. Congressional power to legislate regarding specific judicial decisions is also discussed.

Recent laws which are relevant to this discussion include the Prison Litigation Reform Act Legislation and a law "For the relief of the parents of Theresa Marie Schiavo." Various proposals were also passed by the House, but not the Senate, in the 108th Congress. For instance, starting 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. 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 Act. 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.

Much of the material in the section on congressional power over court jurisdiction is also included in CRS Report RL32171, *Limiting Court Jurisdiction Over Federal Constitutional Issues: 'Court-Stripping,'* by Kenneth R. Thomas.

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This report addresses the constitutional foundation of the federal courts, and the explicit and general authorities of Congress to regulate the courts. It then addresses Congress' ability to limit the jurisdiction of the courts over particular constitutional issues, sometime referred to as "court-stripping." The report then analyzes Congress' authority to limit the availability of certain judicial processes and remedies for constitutional litigants. Congressional power to legislate regarding specific judicial decisions is also discussed. Much of the material in the section on congressional power over court jurisdiction is also included in CRS Report RL32171, *Limiting Court Jurisdiction Over Federal Constitutional Issues: 'Court-Stripping,'* Kenneth R. Thomas.

I. Congressional Powers Under the Constitution

A. Over the Federal Courts

If one reads the first three Articles of the Constitution carefully, a striking observation immediately emerges. Article I (the legislative branch) is quite detailed and specific with respect to the authority of and limits on Congress, especially when compared with Article II (the executive branch) and Article III (the judicial branch). One reason for this detail is that Article I deals not only with the nature of the legislature but also with the overall powers of the Federal Government. But this contrast also makes it clear that Congress possesses the authority to fill out the powers conferred on the Executive and Judiciary. This is revealed in several specific provisions but most notably in the final provision of the Article, the "necessary and proper clause."[1] That clause not only empowers Congress to enact all "necessary and proper" laws in order to execute the powers conferred on Congress, but also allows

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[1] U.S. CONST. Art. I, § 8, cl. 18.

Congress to make laws to execute "all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

The Constitution contains few requirements regarding the structure of the federal courts. Article III, Section 1, of the Constitution provides that

> 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.[2] The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Although Article III provides for a Supreme Court headed by the Chief Justice of the United States,[3] nothing else about its structure and its operation is specified, so the size and composition of the Court is left to Congress.[4] The lack of a constitutionally prescribed number has provided opportunities to manipulate, or to attempt to manipulate, the Court.[5] As Congress also determines the time and place of the Supreme Court's meeting,[6] it has also used this power to influence the make-up of the judiciary. [7]

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[2] The latter part of this quoted language dovetails with clause 9 of § 8 of Article I, under which Congress is authorized "[t]o constitute tribunals inferior to the supreme Court."

[3] Although the position of Chief Justice is not specifically mandated, it is referenced in Article I, § 3, Cl. 6, in connection with the procedure for the Senate impeachment trial of a President:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without Concurrence of two-thirds of the Members present.

[4] By the Judiciary Act of 1789, it was established that the Court was to be composed of the Chief Justice and five Associate Justices. The number of Justices was gradually increased to ten, until in 1869 the number was fixed at nine, where it has remained to this day.

[5] Thus, following Lincoln's assassination and acrimonious dispute between President Andrew Johnson and the Reconstruction Congress, the legislators took a number of steps to ensure that Johnson would have no appointments to the Court by providing that the number of Justices would be reduced from ten to seven as vacancies occurred. A more far-reaching, though ultimately unsuccessful, effort occurred as a result of the Supreme Court's decisions blocking several initiatives of the New Deal. In February 1937, President Franklin D. Roosevelt proposed, in part, that Congress authorize the appointment of an additional Justice for each of the incumbent Justices older than 70 who did not retire within six months of his 70th birthday. This would have given the President four appointees and an opportunity for reversal of some of the decisions to which he objected. Although the President was coming off his overwhelming 1936 re-election, Congress could not be prevailed on to give him this victory.

[6] Thus, the traditional "first Monday in October" is solely a statutory creation.

[7] In 1801, after the Jeffersonians took control of the Presidency and of Congress, the Judiciary Act of 1801, enacted by the Federalists after the 1800 elections to maintain control

(continued...)

Utilizing its power to establish inferior courts, Congress has created the United States district courts,[8] the courts of appeals for the thirteen circuits,[9] and other federal courts,[10] identified their location,[11] the places in which they sit,[12] and the number of justices or judges for each court.[13] Congress, has also addressed a range of aspects of the administration of the courts. For example, Congress, through its exercise of Spending Clause power,[14] provides funding for the operation of the courts, including judicial salaries,[15] subject to the limitation on diminution of compensation of judges during their terms of office. The Administrative Office of the United States Courts is established by statute,[16] as are the judicial councils of the circuits,[17] the judicial conferences of the circuits,[18] and the Judicial Conference of the United States.[19]

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[7] (...continued)
of the courts by creating additional judgeships and circuit courts (as well as abolishing circuit riding by the Justices), was repealed. No provision was made for the displaced judges, despite the "good behavior" tenure guarantee. Fearful that the repeal, at least in part, would be challenged before a Court composed of Federalist appointees, Congress, in the same law, changed the dates of the Terms of the Court so that the Justices did not convene for fourteen months. Ultimately, the constitutionality of the 1801 repeal was not litigated, but the Court in the aftermath did render one of its most seminal cases, in *Marbury v. Madison*, 1 Cr. (5 U.S.) 137 (1803)(chastising the Jeffersonians, but holding invalid a section of the Judiciary Act of 1789, which Chief Justice Marshall construed as illegally vesting original jurisdiction in the Court). *See also* Stuart v. Laird, 1 Cr. (5 U.S.) 299 (1803)(sustaining circuit riding by Justices and scarcely noticing the question of the repeal of the 1801 Act).

[8] 28 U.S.C. §§ 81-131, 132.

[9] 28 U.S.C. §§ 41, 43 (District of Columbia Circuit, First Circuit through Eleventh Circuit, Federal Circuit).

[10] *See, e.g.*, 28 U.S.C. §§ 151 (U.S. bankruptcy courts); 251 (U.S. Court of International Trade).

[11] *See, e.g.*, 28 U.S.C. §§ 41 (U.S. courts of appeals);

[12] *See, e.g.*, 28 U.S.C. §§ 48 (U.S. courts of appeals); 81-131 (U.S. district courts).

[13] *See, e.g.*, 28 U.S.C. §§ 1 (U.S. Supreme Court justices); 44 (circuit judges for U.S. courts of appeals for the eleven circuits); 133 (U.S. district court judges).

[14] Art. I, § 9, cl. 7, U.S. Constitution, states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

[15] *See, e.g.*, H.R. 3349 (108th Congress), to authorize salary adjustments for justices and judges. For further discussion of the current provisions of law governing judicial pay and some historical context on the subject, see CRS Report RS20278, "Judicial Salary-Setting Policy," Sharon S. Gressle.

[16] 28 U.S.C. § 601-613.

[17] 28 U.S.C. § 332.

[18] 28 U.S.C. § 333.

[19] 28 U.S.C. § 331.

On the other hand, Congress has delegated much of its court rule-making authority to the federal courts.[20] For example, in the Judiciary Act of 1789,[21] Congress gave the federal courts power "to make and establish all necessary rules for the orderly conducting of business in said courts, provided such rules are not repugnant to the laws of the United States."[22] Pursuant to these statutory authorities, the United States Supreme Court has promulgated rules of civil procedure (including supplemental rules for admiralty and maritime cases), *habeas corpus*, criminal procedure, evidence, appellate procedure, and bankruptcy.[23] Where Congress has

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[20] Under current law, 28 U.S.C. §§ 2071-2075 and 2077 set forth statutory authority for promulgation of rules of procedure and practice. Under 26 U.S.C. § 7453, the Tax Court has authority to prescribe rules to govern procedure and practice before it. The United States Supreme Court, the United States Claims Court, and the United States Court of International Trade have each promulgated rules to govern procedure and process in the cases before them. U.S. district courts and U.S. courts of appeals have also promulgated local rules under Section 2071 authority.

[21] Act of Sept. 24, 1789, c. 20, § 17(b), 1 Stat. 73, 83.

[22] Five days later, the First Congress directed that, in actions at law, procedures in federal court should parallel in each state the rules then used or allowed by the supreme court of that state. Act of Sept. 29, 1789, c. 21, § 2, 1 Stat. 93. In 1792, Congress confirmed by statute that procedures for actions at law in federal courts were to be in conformity with 1789 state procedures, but provided for independent federal regulation of procedure in equity and admiralty proceedings. Act of May 8, 1792, c. 36, § 2, 1 Stat. 275, 276. A thorough examination of the legislative evolution of the rule-making power with respect to the federal courts is beyond the scope of this memorandum. For a discussion of the evolution of the rules of procedure applicable in U.S. district courts, see Charles Alan Wright, *The Law of Federal Courts*, ch. 10, at 399-411 (1983).

In Wayman v. Southard, 10 Wheat (23 U.S.) 1 (1825), the U.S. Supreme Court upheld the constitutional sufficiency of the congressional delegation to the federal courts of the power to establish rules of practice in the 1789 and 1792 acts, as an exercise of the necessary and proper clause, so long as those rules are not contrary to the laws of the United States. For a more in depth discussion of the *Wayman* case, *see* Congressional Research Service, *The Constitution of the United States of America, Analysis and Interpretation*, S. Doc. 103-6, 103rd Cong., 1st Sess., at 75-76, 644 (1996)(hereinafter *Constitution Annotated*). An updated version of this treatise is available on the CRS website, at [http://www.crs.gov/products//index.shtml]). *See also*, Sibbach v. Wilson & Co., 312 U.S. 1 (1941)(holding that Congress has the power to regulate the procedure and practice of the federal courts and may delegate to the Supreme Court or other federal courts the power to make rules not inconsistent with the U.S. Constitution or statutes). It is worthy of note that, under the express terms of 28 U.S.C. § 2072(b), statutes in conflict with rules promulgated under Section 2072 at the time those rules go into effect have no further force or effect.

[23] In the order transmitting proposed amendments to the Federal Rules of Civil Procedure to the Speaker of the House by Chief Justice Rehnquist on April 23, 2001, on behalf of the U.S. Supreme Court, the Court also approved the abrogation of the Rules of Practice and Procedure under section 25 of An Act To Amend and Consolidate the Acts Respecting Copyright (March 4, 1909), promulgated by the Court on June 1, 1909, as revised. *Amendments to the Federal Rules of Civil Procedures* [sic], *Communication from the Chief Justice, the Supreme Court of the United States Transmitting Amendment to the Federal Rules of Civil Procedure that have been Adopted by the Court, Pursuant to 28 U.S.C. 2072*, H. Doc. 107-61, at 1,3 (April 24, 2001).

deemed it appropriate, it has by statute rejected or amended proposed rules, delayed the effective dates of proposed rules, or drafted and enacted court rules itself.[24]

B. Over Federal Judges

The remainder of Section 1 of Article III contains two critical provisions regarding federal judges. First is "good behavior" tenure,[25] which effectively has come to mean lifetime tenure for Article III judges subject to removal only through conviction on impeachment. The second provision relates to security of compensation, meaning that a federal judge's compensation may "not be diminished during their continuance in office," although, as controversies over the years have shown, the compensation need not be sufficient within the judges' understanding.[26]

Impeachment, which is addressed in Article II of the Constitution, applies to all civil officers of the United States in both the executive and judicial branches.[27] However, a majority of the fifteen[28] officials who have been impeached in the House of Representatives and tried in the Senate, and all of the seven convicted and removed from office, have been judges.[29] The imposition of punishment for judicial

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[24] Prior to the adoption of the Federal Rules of Evidence in 1975, Congress had never used the report and weight provisions of the Rules Enabling Act to delay, block, or change rules prescribed by the Supreme Court. When the Supreme Court proposed the Federal Rules of Evidence, however, Congress intervened to postpone the effective date of the rules, and two years later promulgated its own version of the rules. Todd Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 Wis. L. Rev. 993, 1030-31 (1998).

[25] Article III, § 1 of the U.S. Constitution states, in part, "The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

[26] *See, e.g.*, United States v. Will, 449 U.S. 200 (1980); United States v. Hatter, 532 U.S.557 (2000).

[27] Article II, Section 4 of the U.S. Constitution provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

[28] This number does not include Judge George W. English, District Judge for the United States District Court for the Eastern District of Illinois. The House impeached Judge English and voted articles of impeachment against him, and the House Managers appeared before the Senate to advise the Senate of the House action and to begin the process which would lead to a Senate trial. When Judge English resigned from office six days before his trial was scheduled to begin in the Senate, the House voted to discontinue the proceedings, and the Senate terminated the impeachment proceedings.

[29] See CRS Report 98-882: Impeachment Grounds: A Collection of Selected Materials, by Charles Doyle (October 29, 1998) (available from author). These proceedings have only rarely been subject to litigation. *See, e.g.*, Nixon v. United States, 506 U.S. 224 (1993), *affirming*, 938 F.2d 239 (D.C. Cir. 1991), *affirming*, 744 F. Supp. 9 (D.D.C. 1990); *compare with* Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1990), *vacated and remanded on court's own motion*, 988 F.2d 1280 (Table Case), 1993 U.S. App. LEXIS 11592 (1993)(unpublished per curiam vacating and remanding for reconsideration in light of Nixon

(continued...)

misconduct by the federal judiciary has also been addressed by statute,[30] but these provisions do not provide for the removal of a judge or Justice from office.[31]

That Congress "may from time to time ordain and establish inferior courts" may be thought to imply that Congress may expand *and contract* the units of the system. But what happens to the judges who occupy posts on the courts that are abolished or reduced in the number of judges? This was the question that occurred with the repeal of the Judiciary Act of 1801, but no resolution of the issue was achieved at that time. Congress did not exercise this power again until 1913, when it abolished the special Commerce Court, which had proved disappointing to its sponsors. In 1913, Congress provided for the redistribution of the judges of the Commerce Court among the circuit courts. Since then, as Congress has rearranged some courts, it has always provided for the same kind of redistribution, usually assigning judges to those courts that received the jurisdiction of the abolished courts.

II. Limits on Congress' Constitutional Powers

A. Textual Limitations

On its face, there is no limit on the power of Congress to make exceptions to and regulate the Supreme Court's appellate jurisdiction, to create inferior federal courts and to specify their jurisdiction. However, that is true of the Constitution's other grants of legislative authority in Article I and elsewhere, but this does not prevent the application of other constitutional principles to those powers. "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas," Justice Black wrote for the Court in a different context, but "these granted powers are always subject to the limitations that they may not be

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[29] (...continued)
v. United States, *supra*).

[30] Judicial discipline was established by the Judicial Misconduct and Disability Act of 1980 at former 28 U.S.C. § 372(c) and later replaced by similar provisions appearing at 28 U.S.C. §§ 351-361. The Judicial Improvements Act of 2002, Pub. L. 107-273, Division C, Title I, Subtitle C. The constitutional sufficiency of the 1980 act has been upheld at the lower court level. *See, e.g.*, Committee to Review Circuit Council Conduct and Disability Orders of Judicial Conference of the United States v. McBryde, 264 F.3d 52 (D.C. Cir.), *cert. den.*, 123 S. Ct. 99 (2002); Hastings v. Judicial Conference of the United States, 829 F.2d 91 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988); Matter of Certain Complaints under Investigation by an Investigating Committee of Judicial Council of Eleventh Circuit, 783 F.2d 1488, 1499-1515 (11th Cir.), *cert. denied sub nom* Hastings v. Godbold, 477 U.S. 904 (1986). The Supreme Court has yet to pass on the validity of either Act or of any exercise of the judicial discipline power under the Act. *But compare* Chandler v. Judicial Council, 382 U.S. 1003 (1966); Chandler v. Judicial Council, 398 U.S. 74 (1970)(a pre-Act case).

[31] Currently, disciplinary actions that can be imposed by the judiciary's Judicial Council of the Circuits include 1) ordering that, on a temporary basis for a time certain, no further cases be assigned to a judge; 2) censuring or reprimanding a judge by means of private communication; 3) censuring or reprimanding a judge by means of public announcement; 4) certifying disability of a judge pursuant to the procedures and standards provided under section 372(b); or 5) requesting that a judge voluntarily retire.

exercised in a way that violates other specific provisions of the Constitution."[32] The elder Justice Harlan seems to have had the same thought in mind when he said that, with respect to Congress' power over jurisdiction of the federal courts, "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."[33]

Thus, it is clear that while Congress has significant authority over administration of the judicial system, it may not exercise its authority over the courts in a way that violates the Fifth Amendment due process clause or that violates precepts of equal protection. For instance, Congress could not limit access to the judicial system based on race or ethnicity.[34] Nor, without amendment of the Constitution, could Congress provide that the courts may take property while denying a right to compensation under the takings clause.[35] In general, the mere fact Congress is exercising its authority over the courts does not serve to insulate such legislation from constitutional scrutiny.

B. Separation of Powers

It is also clear that Congress may not exercise its authority over the courts in a way that violates precepts of separation of powers. The doctrine of separation of powers is not found in the text of the Constitution, but has been discerned by courts, scholars and others in the allocation of power in the first three Articles, i.e., the "legislative power" is vested in Congress, the "executive power" is vested in the President, and the "judicial power" is vested in the Supreme Court and the inferior federal courts. That interpretation is also consistent with the speeches and writings of the framers. But while the rhetoric of the Supreme Court points to a strict separation of the three powers, its actual holdings are far less decisive.[36]

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[32] Williams v. Rhodes, 393 U.S. 23, 29 (1968).

[33] United States v. Bitty, 208 U.S. 393, 399-400 (1908).

[34] Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.- C.L.L. Rev. 129, 142-43 (1981). For instance, segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience, Johnson v. Virginia, 373 U.S. 61 (1963), or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible. Hamilton v. Alabama, 376 U.S. 650 (1964)(reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

[35] The Fifth Amendment provides that no "private property [ ] be taken for public use without just compensation."

[36] For instance, the Supreme Court has declared categorically that "the legislative power of Congress cannot be delegated." United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). The categorical statement has never been literally true, the Court having upheld the delegation at issue in the very case in which the statement was made (the Court in the cited case upheld the power of the Food and Drug Administration to allow reasonable variations, tolerances, and exemptions from misbranding prohibitions). The Court has long recognized that administration of the law requires exercise of discretion, and that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general

(continued...)

Nevertheless, beginning with *Buckley v. Valeo*,[37] the Supreme Court has reemphasized separation of powers as a vital element in American federal government.[38]

The two approaches that the Court has used in its separation of powers cases have been characterized as a formalist or strict approach and as a functionalist approach. A formalist or strict approach examines the text of the Constitution to determine the degree to which branch powers and functions may be intermingled, emphasizing that powers committed by the Constitution to a particular branch are to be exercised exclusively by that branch. Such an approach looks to a textual analysis to determine whether and the extent to which the actions of one branch aggrandize the power of that branch or encroach upon that of another branch.[39] In contrast to such a textual analysis, the more flexible functionalist approach to separation of powers focuses upon the preservation of the core functions of the three branches, looking in a given case to whether the exercise of power by one branch impinges upon a core function of a coordinate branch.[40] In articulating its functionalist approach in *Nixon v. Administrator of General Services*, the Court stated that, where a question arose as to whether an Act of Congress

> . . . disrupts the proper balance between coordinate branches, the proper inquiry focuses upon the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[41]

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[36] (...continued)
directives." Mistretta v. United States, 488 U.S. 361, 372 (1989). *See also* Whitman v. American Trucking Assn., Inc., 531 U.S. 457 (2001).

[37] 424 U.S. 1, 109-43 (1976)

[38] It is true that the Court has wavered between two approaches to cases raising separation-of-powers claims, using a strict approach in some cases and a less rigid balancing approach in others. Nevertheless, the Court looks to a test that evaluates whether the moving party, usually Congress, has "impermissibly undermine[d]" the power of another branch or has "impermissibly aggrandize[d]" its own power at the expense of another branch; whether, that is, the moving party has "disrupt[ed] the proper balance between the coordinate branches [by] preventing the [other] Branch from accomplishing its constitutionally assigned functions." Morrison v. Olson, 487 U.S. 654, 695 (1988). *See also* INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986); Mistretta v. United States, 488 U.S. 361 (1989); Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252 (1991).

[39] *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986); Myers v. United States, 272 U.S. 52 (1926).

[40] *See, e.g.*, Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977); Morrison v. Olson, 487 U.S. 654 (1988); Commodities Future Trading Comm'n v. Schor, 478 US. 833 (1986); Mistretta v. United States, 488 U.S. 361 (1989).

[41] Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). For further discussion of the separation of powers doctrine, *see generally* CRS Report RL30249, *The* (continued...)

The federal courts have long held that Congress may not act to denigrate the authority of the judicial branch. In the 1782 decision in *Hayburn's Case*,[42] several Justices objected to a congressional enactment that authorized the federal courts to hear claims for disability pensions for veterans. The courts were to certify their decisions to the Secretary of War, who was authorized either to award each pension or to refuse it if he determined the award was an "imposition or mistaken." The Justices on circuit contended that the law was unconstitutional because the judicial power was committed to a separate department and because the subjecting of a court's opinion to revision or control by an officer of the executive or the legislative branch was not authorized by the Constitution. Congress thereupon repealed the objectionable features of the statute.[43] More recently, the doctrine of separation of powers has been applied to prevent Congress from vesting jurisdiction over common-law bankruptcy claims in non-Article III courts.[44]

III. Congressional Power Over Court Jurisdiction

Allocation of court jurisdiction by Congress is complicated by the presence of state court systems that can and in some cases do hold concurrent jurisdiction over cases involving questions of federal statutory and constitutional law. Thus, the power of Congress over the federal courts is really the power to determine how federal cases are to be allocated among state courts, federal inferior courts, and the United States Supreme Court. Congress has significant authority to determine which of these various courts will adjudicate such cases, and the method by which this will occur. 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 law such as busing, abortion, prayer in school, and most recently, reciting the Pledge of Allegiance.[45]

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[41] (...continued)
Separation of Powers Doctrine: An Overview of its Rationale and Application, by T.J. Halstead; Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 Geo. Wash. L. Rev. 627 (1989); Peter R. Strauss, *Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987); Constitution Annotated, *supra* note 22, at 65-70.

[42] 2 Dall. (2 U.S.) 409 (1792). This case was not actually decided by the Supreme Court, but by several Justices on circuit.

[43] Those principles remain vital. *See, e.g.*, Chicago & S. Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 113-14 (1948)("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); Connor v. Johnson, 402 U.S. 690 (1971).

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

[45] Such proposals from the 108th 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 (continued...)

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 108th 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.[46] 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 Act.[47] 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.[48] These proposals are often referred to as "court-stripping" proposals, and some of these proposals may raise significant constitutional questions.[49]

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[45] (...continued)
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 over cases involving the Pledge of Allegiance, display of the Ten Commandments, or use of the motto "In God we Trust"); and H.R. 3190, the Safeguarding our Religious Liberties Act (same).

[46] 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 7247 (July 22, 2003) (amending H.R. 2799). 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 Representative 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).

[47] "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, 108th Cong., 2nd Sess. For further information on the Defense of Marriage Act, *see* CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, Alison M. Smith.

[48] "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, 108th Cong., 2nd Sess.

[49] For further information on the issue of congressional regulation of federal judicial power, *see* Constitution Annotated, *supra* note 22, 779-784 (1992).

A. The Allocation of Federal Judicial Power

As noted, 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 Congress may from time to time ordain and establish."[50] Article III also 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.[51] 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.[52] The remaining cases

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[50] U.S. CONST. Art. III, § 1. Even with respect to the grants of original jurisdiction, Congress has some statutory authority. While the Constitution has given the Supreme Court original jurisdiction over cases to which a state is a party, by statute in 28 U.S.C. § 1251(a), Congress has made the jurisdiction of the U.S. Supreme Court over all controversies between two or more States exclusive. Under the Court's holding in Ames v. Kansas, 111 U.S. 449 (1884), the original jurisdiction conferred on that Court by Article III, § 2, cl. 2, of the U.S. Constitution was not made exclusive by operation of that constitutional provision. Rather, Congress has the power to grant or deny exclusiveness. In subsection 1251(b), Congress, by statute, provided that the Supreme Court would have original, but not exclusive, jurisdiction of "all actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;" "all controversies between the United States and a State;" and "all actions or proceedings by a State against the citizens of another State or against aliens."

[51] "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.

[52] "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.

(continued...)

in the second group, along with the Court's previously noted substantive authority, are heard under the Court's appellate jurisdiction.[53]

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 make.[54] 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.[55] Congress does not appear to have the authority to establish state courts of competent jurisdiction.[56] However, once such state courts exist, 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.[57] 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

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[52] (...continued)
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).

[53] "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 52, at 55.

[54] "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.

[55] "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.

[56] The Constitution appears to contain no authority to create state courts. *Martin v. Hunter's Lessee*, 14 U.S. 304, 331 (1816).

[57] *See* Richard Fallon, Daniel Meltzer, David Shapiro, *supra* note 52, at 636- 644.

judicial result, few have become law, 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.[58] First, there are proposals which, by limiting inferior federal court jurisdiction, would, in effect, cause a particular class of constitutional decisions to be heard in state courts, with appeal to the Supreme Court.[59] Second, there have been proposals to vest exclusive jurisdiction to hear such constitutional cases in the state courts without appeal to the Supreme Court.[60] Third, proposals may exclude any judicial review over a particular class of constitutional cases from any court, whether state or federal.

It should be noted that at least one court-stripping proposal does not limit the court's jurisdiction, but rather limits the remedy available. 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,[61] would seem likely to be analyzed similarly to an amendment limiting lower court jurisdiction over constitutional cases. As will be discussed later, however, in situations where some sufficient remedies remain, a court might determine that the constitutional right could be effectuated despite such limits.[62]

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[58] 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.

[59] *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. (no jurisdiction of inferior federal courts over cases involving the Pledge of Allegiance); Protect the Pledge Act of 2003, S. 1297, 108th Congress, 1st Sess. (same).

[60] *See, e.g.*, The Marriage Protection Act H.R. 3313, 108th Cong., 2nd Sess. (limiting federal court review of the Defense of Marriage Act); The Pledge Protection Act, H.R. 2028, 108th Cong., 2nd Sess. (limiting federal court review of cases involving the validity of the Pledge of Allegiance); 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).

[61] *See supra* note 46 and accompanying text.

[62] *See, e g.*, Miller v. French, 530 U.S. 327 (2000)(upholding the Prison Litigation Reform Act). *See also* 28 U.S.C. 1341 (a district courts may not enjoin the collection of tax under State law where a remedy is available in the court system).

B. Limiting Judicial Review

Under the doctrine of judicial review, federal and state courts review the constitutionality of legislation passed by Congress and state legislatures.[63] There are few examples of Congress attempting to use its power over federal court jurisdiction to limit judicial review of substantive constitutional law, and no examples of Congress successfully precluding federal courts from an entire area of constitutional concern. Most commentators agree that the constitutional problems with "court-stripping" provisions do not just arise from an analysis of the extent of Congress' Article III powers, but must also address an examination of constitutional limitations on this authority.[64]

The Court has struck down attempts by Congress to pass legislation intended to directly overturn constitutional decisions of the Supreme Court.[65] It would seem unlikely that the Supreme Court would allow Congress to achieve the same results using Congress' power over jurisdiction and procedure. As noted previously, legislation that has the effect of encroaching upon the Judicial Branch or aggrandizing Congress's authority may be limited by the doctrine of separation of powers.[66] In particular, significant issues of separation of powers issue might arise if Congress attempted to prevent the Supreme Court from reviewing the constitutionality of legislation that Congress had passed.[67]

In *United States v. Klein*,[68] 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 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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[63] *Marbury v. Madison*, 1 Cr. (5 U.S.) 137 (1803).

[64] *See* notes 32-44 and accompanying text, *supra.*

[65] *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).

[66] See note 36-44 and accompanying text, *supra.*

[67] *See, e.g.*, The Protection of Marriage Act, H.R. 3313, 108th Cong., 2nd Sess. The proposed Act provided that "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."

[68] 80 U.S. (13 Wall.) 128 (1871).

the appellate power."[69] 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.[70]

When specific constitutional rights are singled out by Congress for disparate treatment, a question also arises as to whether that class of litigants is being treated in a manner inconsistent with the Equal Protection Clause. As noted earlier, it is generally agreed that a law that limited a federal court's power for an illegitimate purpose, such as to deny access to the courts based on race, would run afoul of provisions of the Constitution apart from Article III. But, what if members of a group being excluded from the courts were not defined by membership in a suspect class, but instead by their status as plaintiffs in a particular type of constitutional case?

In general, Article III allows Congress to provide different legal procedural rules for different types of cases if there is a rational reason to do so.[71] 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.[72] As mere disagreement with the results reached by the federal courts in prior cases regarding the Constitution may not be viewed as a legitimate legislative justification, alternative justifications for such laws would need to be established before such a rational basis test would be met.

It should be noted, however, that not all variations of the courts' jurisdiction absolutely limit the rights of litigants to have constitutional issues reviewed by some court. Thus, 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. Thus, the question may well turn on how such legislation burdened a particular group or impaired a fundamental right. For instance, requiring litigants in particular federal constitutional cases to pursue their cases in state courts may not represent a significant burden,[73] 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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[69] 80 U.S. at 146. The Court also found that the statue impaired the effect of a presidential pardon, and thus "infring[ed] the constitutional power of the Executive." *Id.* at 147.

[70] *See* Miller v. French, 530 U.S. 327, 350-51 (2000)(Souter, J., concurring).

[71] *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).

[72] Romer v. Evans, 517 U.S. 620, 634-636 (1995)(animus against a particular group not a legitimate governmental interest).

[73] *See* Richard H. Fallon, Daniel J. Meltzer, David L. Shapiro, *supra* note 52, at 351-354.

C. Eliminating Inferior Federal Court Review.

Various proposals have been made that would eliminate lower federal court review over certain constitutional issues, leaving such decisions to state courts, with Supreme Court review. The argument has been made that because 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.[74]

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 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.

Once Congress has agreed to the creation of inferior courts, however, the question then arises as to whether it 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 available under Article III.[75] A 1816 decision by Justice Story, *Martin v. Hunter's Lessee*,[76] however, suggests that the Constitution requires that if inferior courts are established, there are some aspects of the judicial power which Congress may not abrogate. For instance, Justice Story argued that Congress would need to vest inferior courts with jurisdiction to hear cases that are not amenable to state court jurisdiction.[77] Thus, arguably, a constitutional issue which arose under a law within the exclusive federal jurisdiction[78] would need to be decided by a federal court.

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[74] 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 124 (1911).

[75] Paul Bator, *Congressional Power over the Jurisdiction of the Federal Court*, 27 Vill. L. Rev. 1030, 1031 (1982).

[76] 14 U.S. (1 Wheat.) 304 (1816).

[77] 14 U.S. at 330-331.

[78] Modern examples 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).

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 must 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.[79]

There is also Supreme Court precedent that holds that Congress need not vest the lower courts with all jurisdiction authorized by Article III. In *Sheldon v. Sill*,[80] the Court was asked to evaluate whether 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."[81] 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."[82]

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. 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 noted earlier, such "court stripping" proposals would still need to meet requirements of equal protection, due process, or separation of powers.

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[79] *See* Richard H. Fallon, Daniel J. Meltzer, David L. Shapiro, *supra* note 52, at 2. Section 11of the 1789 Judiciary Act did not confer general federal question jurisdiction (jurisdiction arising under the Constitution, laws, and treaties) on the inferior federal courts, but rather conferred diversity jurisdiction (with some limits) and a few other grants, So, absent the ability of litigants to obtain original jurisdiction in the inferior federal courts under some other jurisdictional basis, the constitutionality of federal statutes could not be attacked in these courts. Some few instances of federal question jurisdiction appear in the historical record, but it was not until 1875 when Congress conferred general federal question jurisdiction on the inferior federal courts, subject to a jurisdictional amount limitation. 18 Stat. 470.

[80] 49 U.S. (8 How.) 441 (1850).

[81] 49 U.S. at 448.

[82] 49 U.S. at 449.

D. Eliminating Inferior and Supreme Court Review

Other proposals noted above would eliminate all federal court review of certain constitutional issues, leaving these decision to be finally decided by various state courts. Elimination by Congress of all federal question review over a particular constitutional question by the Supreme Court appears to be unprecedented. While there was a time when inferior federal courts did not have general federal jurisdiction,[83] constitutional challenges against a state's actions could still be brought in the state courts, with appellate review in the Supreme Court.

Initially, the Supreme Court's appellate review was limited to only certain procedural postures. Under § 25 of the Judiciary Act of 1789,[84] there were three categories of appellate jurisdiction to the Supreme Court available:

> 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.
>
> 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.
>
> 3. Where a state court construes a United States constitution, treaty, statute, or commission and decides against a title, privilege, or exemption under any of them.[85]

The first category of appellate jurisdiction was clearly intended to promote a national, uniform resolution of questions of the validity of federal laws or treaties by providing Supreme Court review where a federal law or treaty was invalidated. Thus, if a federal law was found to violate the Constitution, the case could be reviewed by the Supreme Court. Similarly, if a federal law and a state law conflicted, and the state law was upheld, the litigant could appeal to the Supreme Court, thus providing for review of state laws upheld despite constitutional challenge. Finally, where a state court decided against a title, privilege, or exemption of a litigant based on federal law, the Court could hear the case. Only if a state court upheld a federal law or treaty, or struck a state law as inconsistent with federal law did the Supreme Court lack jurisdiction. Thus, in those procedural postures where the federal interest was not being challenged, § 25 would have the effect of insulating a federal law from a constitutional attack.[86]

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[83] S*ee supra* note 79.

[84] 1 Stat. 85.

[85] W. Casto, The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction, 26 B.C. L. Rev. 1101, 1118-20 (1985).

[86] The law, incidentally, was not changed until 1914, 38 Stat. 790, as a result of the decision in Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911), invalidating a regulatory measure under a Lochner-like application of the Fourteenth Amendment's due process clause. One may wonder how often this kind of thing happened if the law was not changed for 85 years.

Thus, while a constitutional challenge might be postponed because of the procedural posture of a case, state and federal laws were not protected from appellate review from the Supreme Court. For instance, if a state law was invalidated by a state court as being in conflict with a federal law, precluding the losing party from appealing that decision, no principle of res judicata or collateral estoppel would prevent a challenge to such state laws being brought in other States. If another state court upheld such a state law, this decision could be appealed, and the precedent would apply to the state where the first challenge was brought.[87] Thus, there was no general bar on such issues coming before the Supreme Court.

Whether a complete bar of federal court review of a constitutional issue could be implemented by Congress first 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*,[88] 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.[89] 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 the theory that some federal powers must be vested in the Supreme Court 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 subsequent case

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[87] As there were thirteen states when the Judiciary Act was passed in 1789, and around 40 states by 1875 (when the inferior federal courts were invested with federal question jurisdiction), the possibility of conflicting constitutional decisions by states arising in that period of time seems likely.

[88] 14 U.S. (1 Wheat.) 304 (1816).

[89] *See* note 50, *supra.*

law.[90] Other commentators, however, have taken issue with this analysis.[91] 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 McCardle.*[92] In *Ex Parte McCardle,* Congress had authorized federal judges to issue writs of *habeas corpus.* McCardle, 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, McCardle 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, Congress repealed the jurisdiction of the Supreme Court to hear appeals from *habeas corpus* decisions.

In *McCardle,* 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."[93] Consequently, the Supreme Court accepted the withdrawal of jurisdiction over the defendant's case, and dismissed the appeal.

The case of *Ex Parte McCardle,* while it made clear the authority of 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 McCardle 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.[94] Consequently, unlike what would be provided for in some of the court-stripping proposals noted previously, the Supreme Court in *McCardle* maintained the ability to otherwise consider the underlying constitutional issues being raised.

As noted previously, it would also be the case that court-stripping proposals in this category would raise significant questions of separation of powers. For instance, if Congress were to provide that the Supreme Court were unable to consider

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[90] 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).

[91] Daniel Meltzer, *The History and Structure of Article III,* 138 U. Pa. L. Rev. 1569 (1990).

[92] 74 U.S. (7 Wall.) 506 (1869).

[93] 74 U.S. at 514.

[94] 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).

constitutional challenges to federal law, this would clearly raise the question of whether Congress was moving to aggrandize Congressional power at the expense of the judicial branch. As noted in section II(B) of this report, under a textual analysis, such aggrandizement or encroachment can be the basis for a finding that such legislation is unconstitutional.[95] Even under a more flexible functionalist approach to separation of powers, the question would arise as to whether such legislation impinges upon a core function of a coordinate branch.[96]

In sum, there is no direct court precedent on the issue of whether Congress can eliminate all federal court jurisdiction over a constitutional issue, and little or no consensus among scholars. The practical consequences of enacting such proposals is also unclear. While it is presently the case that Supreme Court precedent binds state 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.[97] 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.[98]

E. Eliminating State and Federal Court Review

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, whether in federal or state courts. For instance, in 1946, a series of Supreme Court decisions[99] under the Fair Labor Standards Act of 1938[100] exposed employers to five billion dollars in damages, and the United States itself was threatened with liability for over 1.5 billion dollars. Subsequently, Congress enacted the Portal to Portal Act of 1947,[101] 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 cases 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

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[95] *See, e.g.,* INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986); Myers v. United States, 272 U.S. 52 (1926).

[96] *See, e.g.*, Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977); Morrison v. Olson, 487 U.S. 654 (1988); Commodities Future Trading Comm'n v. Schor, 478 US. 833 (1986); Mistretta v. United States, 488 U.S. 361 (1989).

[97] *See* Richard H. Fallon, Daniel J. Meltzer, David L. Shapiro, *supra* note 52, at 351.

[98] *Id.* at 366-67.

[99] *See, e.g.*, Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

[100] 29 U.S.C. § 201-219.

[101] 29 U.S.C. § 251-262.

or just compensation. . . ."[102] 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.[103]

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.[104] Other commentators point to sovereign immunity and the ability of the government to limit the remedies available to plaintiffs.[105] 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 Constitution mandates the availability of effective remedies for takings.[106] 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.

F. Vesting Judicial Power in Non-Article III Court.

Congress has occasionally sought to vest the "judicial power of the United States" in tribunals whose judges do not have the attributes of Article III judges, that is, good-behavior tenure and security of compensation.[107] How is it possible to vest the "judicial power of the United States" in Article I or Article IV tribunals or in tribunals that are located in the executive branch? The Court's explanations have varied over time, and it has vacillated over the permissibility of some such vesting. The doctrine is far from settled.[108]

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[102] Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d. Cir. 1948).

[103] *See, e.g.*, Webster v. Doe, 486 U.S. 592 (1988).

[104] 486 U.S. at 612-13 (Scalia, J., dissenting).

[105] Bartlett v. Bowen, 816 F.2d 695, 719-720 (1987)(Bork, J., dissenting).

[106] First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987).

[107] The creation of some courts lacking Article III judges is obviously desirable in some instances. One such instance is long established. When Congress governs territories and other possessions under Article IV, § 3, Clause 2, it must provide for courts, but the status of these entities is far from permanent; that is, some territories may be slated for statehood, others may be given independence, and some may stay dependent. In all such instances, Congress will want to maintain its discretion and not tie its hands by creating judges with lifetime tenure. Thus, in American Ins. Co. v. Cantor, 1 Pet. (26 U.S.) 511 (1828), Chief Justice Marshall for the Court approved the authority of Congress to create such courts in the territories, and those courts continue to this day in some entities. Cf., Nguyen v. United States, 123 S. Ct. 2130 (2003). *Dicta* in Territory of Guam v. Olsen, 431 U.S. 195, 201-02, 204 (1977), asserts that there may be limits to Congress' discretion in creating territorial courts and vesting them with judicial power. The local courts of the District of Columbia are Article I courts, although the history of these courts and their permissible powers is checkered. In addition, military courts have long been recognized as Article I (or II) courts.

[108] The real controversy that has seen wavering and changing opinions by the Supreme Court (continued...)

The importance of this doctrinal area for purposes of this report concerns the power that Congress can exercise over legislative tribunals. Because the officeholders of these tribunals lack Article III security, designed to maintain judicial independence, Congress may limit tenure to a term of years, as it has done in acts creating territorial and local District of Columbia courts and in such tribunals as the Tax Court and others; and it may subject the judges of such courts to removal by the President, and reduce their salaries during their terms. Similarly, Congress can vest nonjudicial functions in these courts that it may not vest in Article III courts. It is obvious that if there is congressional power to create non-Article III tribunals and vest in them jurisdiction over "public rights" and other matters that are traditionally the subject of Article III cases, then Congress has potential leverage vis-a-vis federal courts that can alter federal separation of powers.

IV. Congressional Power Over Judicial Processes and Remedies

Regulation of the procedures and remedies available to a litigant are clearly within Congress' authority.[109] However, just as an exception or a regulation of jurisdiction can constrain the courts in the performance of their duties, so restrictions on judicial processes, such as the ability to afford injunctive relief, can equally constrain the courts.[110] While major interpretive differences have arisen between

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[108] (...continued)
has swirled about the ability of Congress to give non-Article III courts the power to adjudicate general matters of federal legislation and constitutional questions. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.* 458 U.S. 50 (1982), a sharply divided Court held unconstitutional the vesting of jurisdiction over common-law claims arising under the bankruptcy code in non-Article III courts, either Article I tribunals or adjuncts attached to Article III courts. The case is premised on the decision that the vesting of any but the most limited amount of judicial power in non-Article III tribunals effected an unwarranted encroachment upon the judicial power of the United States, a classic statement of the doctrine of separation of powers as it emerged in the late 20th Century. The dissenters did not disavow the notion that Congress could encroach on the authority of the federal courts by vesting the judicial power elsewhere, but they advocated a balancing test based on the particular facts of each case to determine whether Congress had indeed impermissibly interfered with another branch. But the use of non-Article III tribunals has become too widespread to maintain this position, and in subsequent cases, *see* Thomas v. Union Carbide, 473 U.S. 568 (1985); CFTC v. Schor, 478 U.S. 833 (1986), the Court backed away, finding ways to sustain the vesting of judicial power in non-Article III tribunals without disavowing *Marathon*. Then, in *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33 (1989), the Court veered back toward *Marathon.* Whatever these cases may stand for, they do recognize that Congress may vest jurisdiction over matters of "public rights," mainly under federal statutes, in non-Article III tribunals.

[109] *See* South Carolina v. Katzenbach, 383 U.S. 301, 331-32 (1966)(Court upheld the provision of the Voting Rights Act of 1965 that made a special, three-judge district court in the District of Columbia the exclusive avenue of relief for states seeking to remove themselves from the coverage of the Act).

[110] While the courts have some inherent authority over its procedures, Congress has regulated such processes as the power to hold persons in contempt, to issue writs, and many
(continued...)

Congress and the courts regarding the construction of these legislative enactments, the Supreme Court has never expressed any doubt that Congress has the power to enact them. The Court has, however, always left open the possibility that Congress might go too far.[111]

For instance, in 1793, for reasons lost to history, Congress enacted a statute to prohibit the issuance of injunctions by federal courts to stay state court proceedings. While construction of this statute has varied over the years,[112] it remains as an indication that Congress has the power to regulate such judicial process and remedies.[113] During this century, the propensity of the federal courts to issue injunctions to limit labor unions in disputes with management,[114] led Congress to adopt the Norris-LaGuardia Act,[115] forbidding the issuance of injunctions in labor disputes except after compliance with a lengthy hearing and fact-finding process.[116] Although earlier case law appeared to recognize a due process objection to such a restraint,[117] the Supreme Court had no difficulty sustaining the constitutionality of the law in *Lauf v. E. G. Shinner & Co*.[118]

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[110] (...continued)
other matters since the Judiciary Act of 1789.

[111] *See, e.g.*, 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.)

[112] Over many years, numerous exceptions to this law were judicially created, until, in Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941), the Court in a lengthy opinion largely wiped out these exceptions to restore what had been purported to be the original intent. In contrast to the usual congressional-judicial confrontation, Congress immediately amended the statute, announcing its intention to restore the pre-Toucey interpretation affording the federal courts considerable discretion. See, 28 U.S.C. § 2283.

[113] In other examples, Congress responded to the exercise of judicial power to enjoin federal and state taxes and state rate-making proceedings. *See* 26 U.S.C. § 7421; 28 U.S.C. §§ 1341-42. In these contexts, Congress enacted separate statutes permitting court actions only when complaining parties lacked the right to a complete and adequate remedy at law through other avenues.

[114] This often occurred during the era following the Court's decision in Lochner v. New York 198 U.S. 45 (1905)(striking down a law restricting employment in bakeries to ten hours per day and 60 hours per week as a violation of the right to enter into a contract). *See* Constitution Annotated, *supra* note 22, at 1582-83.

[115] 29 U.S.C. §§ 101-15.

[116] This process required the district court to determine that only through the injunctive process could irremediable harm through illegal conduct be prevented.

[117] *See* Truax v. Corrigan, 257 U.S. 312 (1921).

[118] Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938)("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."). But by the time *Lauf* was decided, however, *Lochner* was effectively dead; as in so many of these precedents, the actual holding may not permit Congress to go as far as it might wish.

Congress' power to confer, withhold, and restrict both jurisdiction and equity authority was also powerfully revealed in the cases arising from the Emergency Price Control Act of 1942.[119] Fearful that the price control program 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 from which appeals from the court to the Supreme Court could be taken. The constitutionality of the Act was sustained in *Lockerty v. Phillips*,[120] although those skeptical of the breadth of the law note that the Court itself referred to the fact that it arose in "the exigencies of war."[121]

One modern example of congressional control over the processes of the federal courts[122] is the Prison Litigation Reform Act (PLRA) of 1996. For the last 20 - 30 years, many prisons and jails in this country have been enjoined to make certain changes based on findings that the conditions of these institutions violated the constitutional rights[123] of inmates. Many of these injunctions came as a result of consent decrees entered into between inmates and prison officials and endorsed by federal courts, so that relief was not necessarily tied to violations found. Many state officials and Members of Congress have complained of the breadth of relief granted by federal judges, as these injunctions often required expensive remedial actions.

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[119] *See, e.g.*, Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9-10 (1942), *quoted in* Miller v. French, 536 U.S. 327, 360 (2000)(Justice Breyer dissenting).

[120] 319 U.S. 182 (1943). In Yakus v. United States, 321 U.S. 414 (1944), the Court upheld the expansive provisions of the Act which conferred jurisdiction on the special court to hear challenges to any order or regulation and foreclosed a plea of invalidity of any such order or regulation as a defense to any criminal proceeding under the Act in any regular district court, whether or not the person proceeded against had ever made use of the special court.

[121] Outside the scope of a wartime price control measure, the Court has viewed similar preclusions of judicial review as raising serious due process problems, resulting in a construction that bypassed the constitutional issues. *See, e.g.*, Adamo Wrecking Co. v. United States, 434 U.S. 275 (1975); United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[122] Another modern example involves prisoners seeking *habeas corpus* relief. A convicted person is entitled to relief if a court finds that a federal right has been violated. But it is not up to the court to issue the writ simply because that court concludes in its independent judgment that the state court acted contrary to federal law. Instead, Congress has instructed federal courts, in 28 U.S.C. § 2254(d), that the writ may issue if the prisoner demonstrates that the adjudication of his claim by the state courts

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence in the State court proceedings.

The Court has not passed on constitutional claims based on this standard, but it has in several cases applied the standard, sometimes unanimously, without any suggestion that a constitutional question may be presented. *See, e.g.*, Price v. Vincent, 123 S. Ct. 1848 (2003), and cases cited therein.

[123] Generally, these rights include freedom from cruel and unusual punishment or the right to due process.

The PLRA was designed to curb the discretion of the federal courts in these types of actions. Thus, the central requirement of the Act was a provision that a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[124] The most pointed provision of the PLRA in this context is the so-called "automatic stay" section, which states that a motion to terminate prospective relief "shall operate as a stay" of that relief during the period beginning 30 days after the filing of the motion (extendable to up to 90 days for "good cause") and ending when the court rules on the motion.[125]

In *Miller v. French*,[126] inmates attacked the constitutionality of the "automatic stay" provision,[127] as a violation of separation of powers.[128] By a 5-to-4 vote, the Supreme Court reversed. The Court held that the PLRA did not set aside a final judgment of a federal court, but rather it operated to change the underlying law and thus required the altering of the prospective relief issued under the old law.[129] Secondly, the Court noted that separation of powers did not prevent Congress from changing applicable law and then imposing the consequences of the court's application of the new legal standard. Finally, the Court held that the stay provision did not interfere with core judicial functions as it could not be determined whether the time limitations interfered with judicial functions through its relative brevity.[130]

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[124] 18 U.S.C. § 3626(a)(1)(A). Under PLRA, the same criteria apply to existing injunctions, whether entered after trial or through approval of a consent decree. 18 U.S.C. § 3626(b)(3). To ensure that an injunction granting prospective relief does not remain in effect during the months or years that a trial of a prison conditions case typically takes, the Act requires courts to rule "promptly" on motions to terminate prospective relief, with mandamus available to remedy failure to do so.

[125] 18 U.S.C. § 3626(e)(2). Thus, the statute expressly provided for the suspension of existing prospective relief within 30 days (or 90 days) from the filing of a motion to terminate the prospective relief. That suspension continues only until the court conducts a trial and makes the findings the Act requires of it, but this period will doubtless be for an extended time given the complexities of the trial that must be conducted.

[126] 530 U.S. 327 (2000).

[127] None of the other provisions described herein was put in issue.

[128] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); United States v. Klein, 13 Wall. (80 U.S.) 128 (1872).

[129] *Miller*, 530 U.S. at 341-50.

[130] On the other hand, if the time limits interfered with the inmates' meaningful opportunity to be heard, that would be a due process problem. *Id.* at 350. Since the decision below had been based on separation of powers, the due process argument was not before the Court. Thus, the constitutionality of the PLRA overall, and of the "automatic stay" in particular, is as yet undetermined, although the Court's opinion seems disposed to a measure of acceptance.

V. Congressional Power to Revise Specific Judicial Decisions

A. Constitutional versus Statutory Decisions

As the federal courts are the prescribed authorities to interpret the Constitution and to establish precedents,[131] Congress is relatively limited in its ability to change constitutional holdings. The primary route by which Congress can implement such changes is also a difficult one: proposing an amendment to the Constitution and working to secure ratification. The Eleventh Amendment, the first sentence of Section 1 of the Fourteenth Amendment, the Sixteenth Amendment, the Twenty-fourth Amendment, and the Twenty-sixth Amendment were all directed to overturning the results of court decisions. The alternative method of amendment set out in Article V, the congressional calling of a constitutional convention upon petition by two-thirds of the states, has never been successfully used, although an effort to call a convention to propose an amendment to override the "one person, one vote" decision of *Reynolds v. Sims*[132] fell just one state short.[133]

Congress has, of course, passed legislation which was intended to change the results or effects of judicial decisions. Although the Supreme Court considers itself bound by *stare decisis*, it is in effect loosely bound, and thus is in a position to consider the positions of its coordinate branches on constitutional issues. Nonetheless, this qualification has not appeared to have concerned the Court in most cases, as the Court has generally invalidated statutes that Congress has enacted to set aside constitutional decisions by the Supreme Court.[134]

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

[132] 377 U.S. 533 (1964),

[133] R. Caplan, CONSTITUTIONAL BRINKMANSHIP – AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 73-78 (1988) .

[134] In some of these cases, Congress had not acted in these cases so much in defiance of the Court as it had been misled by earlier decisions of the Court, especially *Katzenbach v. Morgan*, 384 U.S. 641 (1966), suggesting that when Congress acted pursuant to its enforcement powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment it could interpose its own interpretation of the Constitution before the Court. *See, e.g.*, City of Boerne v. Flores, 521 U.S.507. 536 (1997)("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. . . . When the Political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed."); Dickerson v. United States, 527 U.S. 150 (2000). *See also* Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); Board of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); *but see* Nevada Dept. of Human Resources v. Hibbs, ___ U.S. ___, 123 S. Ct. 1972 (2003).

B. Pending Decisions versus Final Decisions

Congress has significantly more authority to affect decisions by the federal courts interpreting either statutes or common law than it does regarding constitutional decisions. However, even here Congress is limited to affecting pending or future court decision, not final ones. Thus, in *Plaut v. Spendthrift Farm, Inc.*,[135] the Court had rendered a final decision determining the limitation period applicable to the filing of securities litigation, finding a much shorter period than had been thought to apply, so that many pending suits had to be dismissed for lack of timely filing. Congress passed a new law, establishing the longer limitations period that had been thought to be applicable, and it authorized refiling of the dismissed suits and adjudication of them. The Court in *Plaut* held that the federal courts had the authority to render a judgment conclusively resolving a case, and Congress violates the separation of powers when it purports to alter final judgments of Article III courts.[136]

The Court was careful to delineate the difference between attempting to alter a final judgment (one rendered by a court and either not appealed or affirmed on appeal), and legislatively amending a statute so as to change the law as it existed at the time a court issued a decision that was on appeal or otherwise still alive at the time a federal court reviewed the determination below. A court must apply the law as revised when it considers the prior interpretation, even in a pending case.[137] Thus, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[138] the Court had held that a bridge was an obstruction of navigable waters and ordered an injunction issued to abate it. Congress passed a statute pronouncing the bridge not an obstruction of navigable waters, and the Court required the withdrawal of the injunction, inasmuch as it was within Congress' power to regulate commerce and navigable waters.

Similarly, in *Robertson v. Seattle Audubon Society*,[139] a federal district court had held that the environmental impact statement prepared to support the issuance of logging permits that endangered the spotted owl was inadequate and must be done over. Congress passed a rider to an appropriation act excusing the necessity for the statement, and the Court upheld the new law and its effect on future actions as a permissible change in law. Clearly, however, the difference between *Plaut* and

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[135] 514 U.S. 211 (1995)

[136] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995). The Court explained that the concept of finality did not alone depend on the actions of a single court, because Article III as implemented by Congress creates not a collection of unconnected courts but a judicial department composed of "inferior courts" and "one Supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole.

[137] *Id.* at 226-27. This has long been established law. *See, e.g.*, United States v. Schooner Peggy, l Cr. (5 U.S.)103 (1801).

[138] 18 How. (59 U.S.) 421 (1856).

[139] 503 U.S. 432 (1992).

Robertson is a matter of degree and Congress walks close to the line when it legislates against the background of a decided case.[140]

C. General Cases versus Specific Cases

1. Due Process and Equal Protection.

On occasion, Congress has attempted to legislate regarding a specific court case or cases,[141] such as a recent attempt by Congress to intervene in the case of Theresa Marie Schiavo despite court findings that she had previously expressed her desires to not receive medical treatment under certain circumstance.[142] An argument could be made that congressional legislation that applies to a specific court case may be construed as imposing additional burdens on the litigants involved. Legislation that identifies specified individuals to bear additional legal burdens raises issues of due process and equal protection. For instance, in *News America Publishing, Inc. v. FCC*,[143] the United States Court of Appeals for the District of Columbia applied heightened scrutiny to an act of Congress that singled out "with the precision of a laser beam," a corporation controlled by Rupert Murdoch. Murdoch's corporation had applied for, and received, temporary waivers from the FCC's cross-ownership rules, so that the corporation could acquire two TV licenses, one in Boston, and the other in New York.[144] Subsequently, Congress passed a law that prevented the FCC from extending any existing temporary waivers; at the time, Murdoch's corporation was the only current beneficiary of any such temporary waivers. The corporation sued, arguing a violation of Equal Protection in the context of the First Amendment.

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[140] But the peril may be enhanced if the Court follows certain dicta in *Plaut.* As noted in the discussion of separation of powers, the Court often varies between a flexible test and a strict test. The language in *Plaut* suggests that as a prophylactic measure the Court would not require proof of actual or threatened congressional intent to tread on judicial turf when Congress acted in the face of judicial decisions. Thus, even if it is sometimes impossible to discern any actual threat to separation-of-power concerns when Congress seeks to instruct courts respecting decisions, that is irrelevant because "the doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut*, 514 U.S. at 239.

[141] Pub. L. 104-205, "Treatment of Certain Pending Child Custody Cases in Superior Court of District of Columbia" (provided for specific procedures to be followed in resolving child custody cases in the District of Columbia Superior Court, but was written so narrowly as to apply to just one case involving Elizabeth Morgan and Eric Foretich.)

[142] *See* Pub. L. 109-3, "For the relief of the parents of Theresa Marie Schiavo" (providing that either parent of Theresa Marie Schiavo shall have standing to bring a suit in federal court regarding a court decision to allow withdrawal of nutrition and hydration from a patient in a persistent vegetative state). It should be noted that, except for some *dicta*, *see, e.g.*, Schiavo v. Schiavo, 2005 U.S. App. LEXIS 5073 (11th Cir. 2005) (J. Birch, concurring), the Schiavo case was resolved on statutory grounds. S*ee* CRS Report RL32830, *The Schiavo Case: Legal Issues*, Kenneth R. Thomas.

[143] 844 F.2d 800, 814 (D.C. Cir. 1988).

[144] *Id.* at 804.

Based on this argument, the court evaluated the law under a heightened scrutiny standard, and struck it down.[145]

2. Bill of Attainder.

If Congress does legislate regarding a particular court case, this may also raise the issue of the prohibition on Bills of Attainder.[146] Under this provision, Congress is prohibited from passing legislation which "appl[ies] either to a named individual or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."[147] Generally, the prohibition on Bills of Attainder is intended to prevent Congress from assuming judicial functions and conducting trials.[148]

The two main criteria which the courts will look to in order to determine whether legislation is a Bill of Attainder are 1) whether specific individuals are affected by the statute, and 2) whether the legislation inflicts a punishment on those individuals.[149] The Supreme Court has held that legislation meets the criteria of specificity if it applies to a person or group of people who are described by past conduct,[150] which would seem to include participation in a court case. The mere fact that focused legislation imposes burdensome consequences, however, does not require that a court find such legislation to be an unconstitutional of Bill of Attainder. Rather, the Court has identified three types of "punitive" legislation which are barred by the ban on Bills of Attainder: 1) where the burden is such as has traditionally been found to be punitive;[151] 2) where the type and severity of burdens imposed cannot reasonably be said to further non-punitive legislative purposes;[152] and 3) where the legislative record evinces a congressional intent to punish.

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[145] *Id.* at 815.

[146] U.S. CONST. Art. 1, Sec. 9, cl. 3 provides that "No Bill of Attainder or ex post facto Law shall be passed."

[147] United States v. Brown, 381 U.S. 437, 447 (1965).

[148] *Id.*

[149] Nixon v. Administrator of General Services, 433 U.S. 425, 472-484 (1977).

[150] Selective Service System v. Minnesota Public Interest Group, 468 U.S. 841, 847 (1984).

[151] The Supreme Court has identified various types of punishments which have historically been associated with Bills of Attainder. These traditionally have included capital punishment, imprisonment, fines, banishment, confiscation of property, and more recently, the barring of individuals or groups from participation in specified employment or vocations. 433 U.S. at 474-75. There are no indications by the Court that harming a person's reputation or intervening in guardianship rights is a type of "punishment" traditionally engaged in by legislatures as a means of punishing individuals for wrongdoing.

[152] The Supreme Court has indicated that some legislative burdens not traditionally associated with Bills of Attainder might nevertheless "functionally" serve as punishment. 433 U.S. at 475. The Court has stated, however, that the type and severity of a legislatively imposed burden should be examined to see whether it could reasonably be said to further a non-punitive legislation purpose. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); Nixon v. Administrator of General Services, 433 U.S. at 476.

An opinion by the United States Court of Appeals for the District of Columbia specifically addressed the issue of whether a congressional bill addressing a pending court case was a Bill of Attainder. In *Foretich v. United States*,[153] the court considered a legislative rider to the 1997 Department of Transportation Appropriations Act that provided for specific procedures to be followed in resolving child custody cases in the District of Columbia Superior Court, but was written so narrowly as to apply to just one case.[154] This case involved a protracted custody battle, where allegations of sexual abuse by the husband had been made. Because the child in the case was no longer a minor, the issue of removal of custodianship was declared by the court to be moot. However, the court found that act imposed "punishment" under the functional test because it harmed the father's reputation, and because it could not be said to further non-punitive purpose.

VI. Conclusion

Congress has a wide range of tools available to it to exercise its legislative authorities with respect to the Judicial Branch, and these powers may be used to alter almost all aspects of how the federal courts are organized and administered. However, as with other constitutional authorities, these powers are subject to some constitutional limitations. Although the exact parameters of these limitations have not been established, it is likely the Supreme Court would impose limitations on congressional legislation that did not comply with dictates of due process, equal protection, and separation of powers.

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[153] 351 F.3d 1198 (2003).

[154] The act provided:

(a) In any pending case involving custody over a minor child or the visitation rights of a parent of a minor child in the Superior Court which is described in subsection (b)

(1) at anytime after the child attains 13 years of age, the party to the case who is described in subsection (b)(1) may not have custody over, or visitation rights with, the child without the child's consent; and

(2) if any person had actual or legal custody over the child or offered safe refuge to the child while the case (or other actions relating to the case) was pending, the court may not deprive the person of custody or visitation rights over the child or otherwise impose sanctions on the person on the grounds that the person had such custody or offered such refuge.

(b) A case described in this subsection is a case in which -

(1) the child asserts that a party to the case has been sexually abusive with the child;

(2) the child has resided outside of the United States for not less than 24 consecutive months;

(3) any of the parties to the case has denied custody or visitation to another party in violation of an order of the court for not less than 24 consecutive months; and

(4) any of the parties to the case has lived outside of the District of Columbia during such period of denial of custody or visitation.