

June 24, 2004

Rep. Steve Chabot, Chairman
Constitution Subcommittee
U.S. House Committee on the Judiciary
362 Ford House Office Building
Washington, D.C. 20515

Mr. Chairman and members of the Subcommittee:

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

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

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

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

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

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

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

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

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

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In *Ex Parte McCardle* 6 Wall. (73 U.S.) 318 (1868), the Supreme Court accepted review on certiorari of a denial of a petition for a writ of habeas corpus by the circuit court. Congress, fearful the Supreme Court would honor the writ, passed a law repealing the act which authorized the appeal. The Supreme Court dismissed the case for lack of jurisdiction.

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

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

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

Congressman William E. Dannemeyer

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

June 17, 2004

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

Dear Members:

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

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

1. Letter dated January 15, 2004, entitled "Coalition to Acknowledge That God Exists and to Allow Expression of Faith" signed by leaders of 26 organizations.
 - a. Op Ed piece in the Washington Times, October 7, 2003, on the use of Article 3 2.2.
 - b. Op Ed piece in the Orange County Register of September 21, 2003, Judges are stealing our Judeo-Christian heritage.
2. Analysis by Congressional Research Service dated June 29, 1992, describing the history of Congressional use of Article 3 2.2 of the U.S. Constitution from 1789 to 1992.
3. List of 12 times that Article 3 2.2. was used by Congress in the 107th Congress (2001-2002) to limit Federal Court jurisdiction
4. Page 20-21 of Booklet by David Barton showing polling data supporting voluntary prayer in Public Schools

5. Letter dated February 7, 2003, indicating White House support for this legislative effort.
6. Article dated January 12, 2004, by Professor John Eidsmoe describing the need to end Judicial Tyranny.
7. Copy of S1558 by Senator Allard of Colorado
8. Copy of HR 3190 by Congressman Pickering - identical to S1558.
9. S 2323 by Senator Shelby
10. HR 3799 by Congressman Aderholt - identical to S 2323
11. Article in the Orange County Register of June 15, 2004 on the ruling by the U.S. Supreme Court.

Very truly yours,


William E. Dannemeyer

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

January 15, 2004

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

ADDRESSED TO CONGRESSIONAL LEADERS

HOUSE

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

SENATE

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

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

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

Enacting "a wall of separation between church and state"
(Everson v. Board of Education, 1947)

Banning nondenominational prayer from public schools
(Engel v. Vitale, 1962)

Removing the Ten Commandments from public school walls
(Stone v. Graham, 1980)

Striking down a "period of silence not to exceed one minute...for mediation or voluntary prayer"
(Wallace v. Jaffree, 1985)

Censoring creationist viewpoints when evolutionist viewpoints are taught
(Edwards v. Aguillard, 1987)

Barring prayers at public school graduations
(Lee v. Weisman, 1992)

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

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

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

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

Congressman Akin of Missouri – HR 2028 IH, 222 co-sponsors
Statute to retain "God" in pledge and uses Article 3, 2.2 to except this from Federal Court jurisdiction.

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

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

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

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

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

Polling data overwhelmingly supports this legislation:

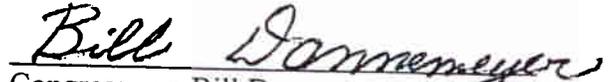
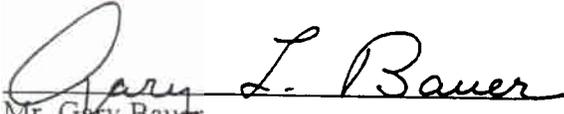
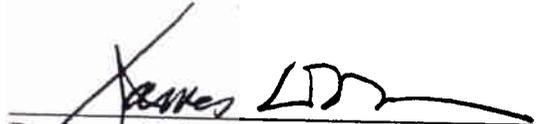
"For example, in 1985, 69 percent of Americans supported school prayer; by 1991, that number had increased to 78 percent. Similarly, in 1988, 68 percent of Americans supported a constitutional amendment to reinstate school prayer; by 1994, that number had risen to 73 percent.

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

Signed,



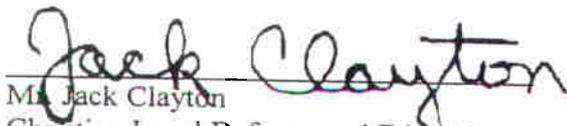
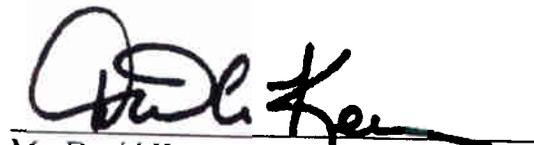
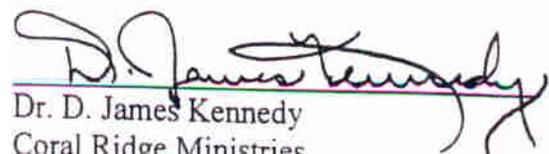
Mr. David Barton
Wallbuilders, Inc.
Aledo, TX

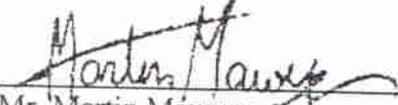

Congressman Bill Dannemeyer (1979-1992)
Americans For Voluntary School Prayer
Mr. Gary Bauer
Campaign For Working Families
Dr. James Dobson
Focus on the Family
Colorado Springs, CO

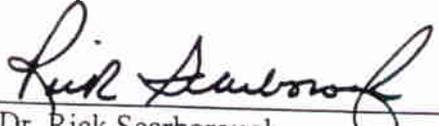
Mr. Joel Belz
World Magazine

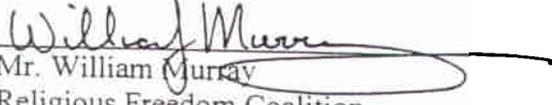

Rev. Jerry Falwell
Liberty Alliance
Lynchburg, VA

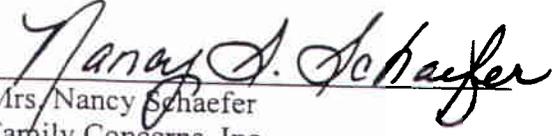
Mr. Phil Burrell
Citizens For Community Values
Cincinnati, OH


Mr. Mike Farris
Home School Legal Defense Association
Mr. Jack Clayton
Christian Legal Defense and Education
Foundation
Rev. Ted Haggard
National Association of Evangelicals
Washington, D.C.
Mr. Chuck Colson
Prison Fellowship
Washington, D.C.
Mr. David Keene
American Conservative Union
Mrs. Roberta Combs
Christian Coalition
Washington, D.C.
Dr. D. James Kennedy
Coral Ridge Ministries
Ft. Lauderdale, FL


Mr. Martin Mawyer
Christian Action Network

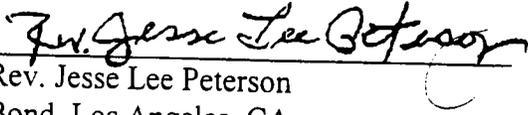

Dr. Rick Scarborough
Vision America, Houston, TX


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

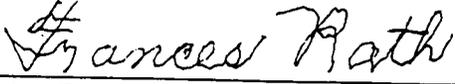

Mrs. Nancy Schaefer
Family Concerns, Inc.
Turnerville, GA

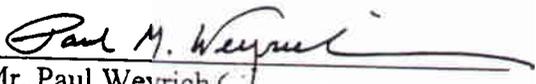

Mr. Tony Perkins
Family Research Council
Washington, D.C.

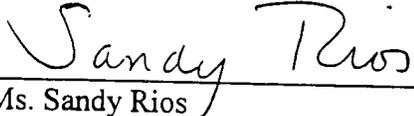

Mrs. Phyllis Schlafly
Eagle Forum


Rev. Jesse Lee Peterson
Bond, Los Angeles, CA

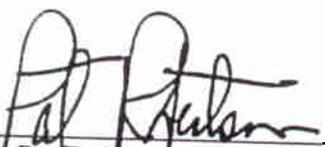

Rev. Lou Sheldon
Traditional Values Coalition
Washington, DC


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


Mr. Paul Weyrich
Free Congress Foundation


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


Mr. Don Wildmon
The American Family Association
Tupelo, MS


Rev. Pat Robertson
CBN, Virginia Beach, VA

Article III, Section 2

Uphold America's Judeo-Christian heritage

By William E. Dannemeyer

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

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

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

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

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

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appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

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

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

Congress responds to pressure from the public. Call, write, e-mail or fax your senator or member of the House to enact S1558 by Sen. Allard, Colorado Republican, and HR 3190 by Rep. Pickering, Mississippi Republican. These bills allow the Ten Commandments to be displayed and retain God in the Pledge of Allegiance and use Article III, Sec. 2.2.

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

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most prominent spokes-
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Judges are stealing our Judeo-Christian heritage

The Orange County Register



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

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

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

Decisions of the federal judiciary over the last half-century have resulted in the theft of our Judeo-Christian heritage.

Here's a brief sampling:

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

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

public school from using the word "God" in the Pledge of Allegiance.

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

For example, in 1985, 69 percent of Americans supported school prayer; by 1991, that number had increased to 78 percent. Similarly, in 1983, 68 percent of Americans supported a constitutional amendment to reinstate school prayer; by 1994, that number was up to 73 percent.

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

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

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

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

Legislation using this approach has been introduced in Congress.

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

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

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

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

103d Congress
1st Session

SENATE

DOCUMENT
No. 103-6

THE CONSTITUTION
of the
UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

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



PREPARED BY THE
CONGRESSIONAL RESEARCH SERVICE
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JOHNNY H. KILLIAN
GEORGE A. COSTELLO
CO-EDITORS

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1996

68-766 CC

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

Sec. 2—Jurisdiction

Cl. 2—Original Jurisdiction of Supreme Court

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

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

Clause 2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

THE ORIGINAL JURISDICTION OF THE SUPREME COURT

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

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

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

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

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

Sec. 2—Jurisdiction

Cl. 2—Original Jurisdiction of Supreme Court

therefore self-executing without further action by Congress.¹⁰⁴¹ In *Chisholm v. Georgia*,¹⁰⁴² the Court entertained an action of assumpsit against Georgia by a citizen of another State. Congress in § 3 of the Judiciary Act of 1789¹⁰⁴³ purported to invest the Court with original jurisdiction in suits between a State and citizens of another State, but it did not authorize actions of assumpsit in such cases nor did it prescribe forms of process for the exercise of original jurisdiction. Over the dissent of Justice Iredell, the Court, in opinions by Chief Justice Jay and Justices Blair, Wilson, and Cushing, sustained its jurisdiction and its power to provide forms of process and rules of procedure in the absence of congressional enactments. The backlash of state sovereignty sentiment resulted in the proposal and ratification of the Eleventh Amendment, which did not, however, affect the direct flow of original jurisdiction to the Court, although those cases to which States were parties were now limited to States as party plaintiffs, to two or more States disputing, or to United States suits against States.¹⁰⁴⁴

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

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

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

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

¹⁰⁴³ 1 Stat. 80.

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

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

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

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

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

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

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

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

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

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

¹⁰⁵² *Marbury v. Madison*, 1 Cr. (5 U.S.) 137 (1803). The Chief Justice declared that “a negative or exclusive sense” had to be given to the affirmative enunciation of the cases to which original jurisdiction extends. *Id.*, 174. This exclusive interpretation has been since followed. *Ex parte Bollman*, 4 Cr. (8 U.S.) 75 (1807); *New Jersey v. New York*, 5 Pet. (30 U.S.) 284 (1831); *Ex parte Barry*, 2 How. (43 U.S.) 65 (1844); *Ex parte Vallandigham*, 1 Wall. (68 U.S.) 243, 252 (1864); *Ex parte Yerger*, 8 Wall. (75 U.S.) 85, 96 (1869). In the curious case of *Ex parte Levitt*, 302 U.S. 633 (1937), the Court was asked to unseat Justice Black on the ground that his appointment violated Article I, § 6, cl. 2. Although it rejected petitioner’s application, the Court did not point out that it was being asked to assume original jurisdiction in violation of *Marbury v. Madison*.

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

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

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

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

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

POWER OF CONGRESS TO CONTROL THE FEDERAL COURTS

The Theory of Plenary Congressional Control

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

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

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

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

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

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

“The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.”¹⁰⁶³ Later Justices viewed the matter differently than had Marshall. “By the constitution of the United States,” it was said in one opinion, “the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress.”¹⁰⁶⁴ In order for a case to come within its appellate jurisdiction, the Court has said, “two things must concur: the Con-

¹⁰⁶⁰ 3 Dall. (3 U.S.) 321 (1796).

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁶⁹ *Id.*, 514.

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

¹⁰⁷¹ *Supra*, pp. 597–598, 599–600.

¹⁰⁷² Article III, § 1, 2.

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

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

Thus, in *Turner v. Bank of North America*,¹⁰⁷⁵ the issue was the jurisdiction of the federal courts in a suit to recover on a promissory note between two citizens of the same State but in which the note had been assigned to a citizen of a second State so that suit could be brought in federal court under its diversity jurisdiction, a course of action prohibited by § 11 of the Judiciary Act of 1789.¹⁰⁷⁶ Counsel for the bank argued that the grant of judicial power by the Constitution was a direct grant of jurisdiction, provoking from Chief Justice Ellsworth a considered doubt¹⁰⁷⁷ and from Justice Chase a firm rejection. “The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution: but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant.”¹⁰⁷⁸ Applying § 11, the Court held that the circuit court had lacked jurisdiction.

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

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

¹⁰⁷⁵ 4 Dall. (4 U.S.) 8 (1799).

¹⁰⁷⁶ “Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee; unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.” 1 Stat. 79.

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

¹⁰⁷⁸ *Ibid.*

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

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sprinkled with assumptions that the power of Congress to create inferior federal courts necessarily implied "the power to limit jurisdiction of those Courts to particular objects."¹⁰⁸⁰ In *Cary v. Curtis*,¹⁰⁸¹ a statute making final the decision of the Secretary of the Treasury in certain tax disputes was challenged as an unconstitutional deprivation of the judicial power of the courts. The Court decided otherwise. "[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."¹⁰⁸² Five years later, the validity of the assignee clause of the Judiciary Act of 1789¹⁰⁸³ was placed in issue in *Sheldon v. Sill*,¹⁰⁸⁴ in which diversity of citizenship had been created by assignment of a negotiable instrument. It was argued that inasmuch as the right of a citizen of any State to sue citizens of another flowed directly from Article III, Congress could not restrict that right. Unanimously, the Court rejected these contentions and held that because the Constitution did not create inferior federal courts but rather authorized Congress to create them, Congress was also empowered to define their jurisdiction and to withhold jurisdiction of any of the enumerated cases and controversies in Article III. The case and the principle has been cited and reaffirmed numerous times,¹⁰⁸⁵ and has been quite recently applied.¹⁰⁸⁶

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

¹⁰⁸¹ 3 How. (44 U.S.) 236 (1845).

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

¹⁰⁸³ *Supra*, n. 1076.

¹⁰⁸⁴ 8 How. (49 U.S.) 441 (1850).

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

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

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

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

Congress' power to confer, withhold, and restrict jurisdiction is clearly revealed in the Emergency Price Control Act of 1942¹⁰⁹⁴ and in the cases arising from it. Fearful that the price control pro-

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

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

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

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

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

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

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

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

¹⁰⁹⁴ 56 Stat. 23 (1942).

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

The Theory Reconsidered

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

Contra

¹⁰⁹⁵ 319 U.S. 182 (1943).

¹⁰⁹⁶ 321 U.S. 414 (1944).

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

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

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

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

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

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

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

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

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

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

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

¹¹⁰⁴ Article I, § 9, cl. 2.

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

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

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

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

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

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

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

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

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

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."¹¹¹⁰ The statute was void for two reasons: it "infring[ed] the constitutional power of the Executive,"¹¹¹¹ and it "prescrib[ed] a rule for the decision of a cause in a particular way."¹¹¹² *Klein* thus stands for the proposition that Congress may not violate the principle of separation of powers¹¹¹³ and that it may not accomplish certain forbidden substantive acts by casting them in jurisdictional terms.¹¹¹⁴

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

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

¹¹¹¹ *Id.*, 147.

¹¹¹² *Id.*, 146.

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

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

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

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

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

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

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

¹¹¹⁸ *Id.*, 56, 60, 64.

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

Express Constitutional Restrictions on Congress.—“[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas;” Justice Black said in a different context, “these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution.”¹¹²¹ The Supreme Court has had no occasion to deal with this principle in the context of Congress’ power over its jurisdiction and the jurisdiction of the inferior federal courts, but the passage of the Portal-to-Portal Act¹¹²² presented the lower courts such an opportunity. The Act extinguished back-pay claims growing out of several Supreme Court interpretations of the Fair Labor Standards Act; it also provided that no court should have jurisdiction to enforce any claim arising from these decisions. While some district courts sustained the Act on the basis of the withdrawal of jurisdiction, this action was disapproved by the Courts of Appeals which indicated that the withdrawal of jurisdiction would be ineffective if the extinguishment of the claims as a substantive matter was invalid. “We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due

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

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

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

¹¹²² 52 Stat. 1060, 29 U.S.C. § 201.

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

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

FEDERAL-STATE COURT RELATIONS

Problems Raised by Concurrence

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

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

¹¹²⁴ *Gibbons v. Ogden*. 9 Wheat. (22 U.S.) 1.204-205 (1824).

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

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

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

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

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

Sec 502; (B)

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

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

Sec 102; Sub Sec. C

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

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

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

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

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

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

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

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

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

For example, in 1985 69 percent of Americans supported school prayer,⁸² by 1991, that number had increased to 78 percent.⁸³ Similarly, in 1988, 68 per-

cent of Americans supported a constitutional amendment to reinstate school prayer;⁸⁴ by 1994, that number had risen to 73 percent,⁸⁵ and by 2001 (*before* the terrorist attacks) it had climbed to 78 percent.⁸⁶

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

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

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

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

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

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

THE WHITE HOUSE
WASHINGTON

February 7, 2003

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

Dear Bill,

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

Warmly,

A handwritten signature in black ink, appearing to be 'Tim Goeglein', written in a cursive style.

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

Time to End Judicial Tyranny

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

by John Eidsmoe

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

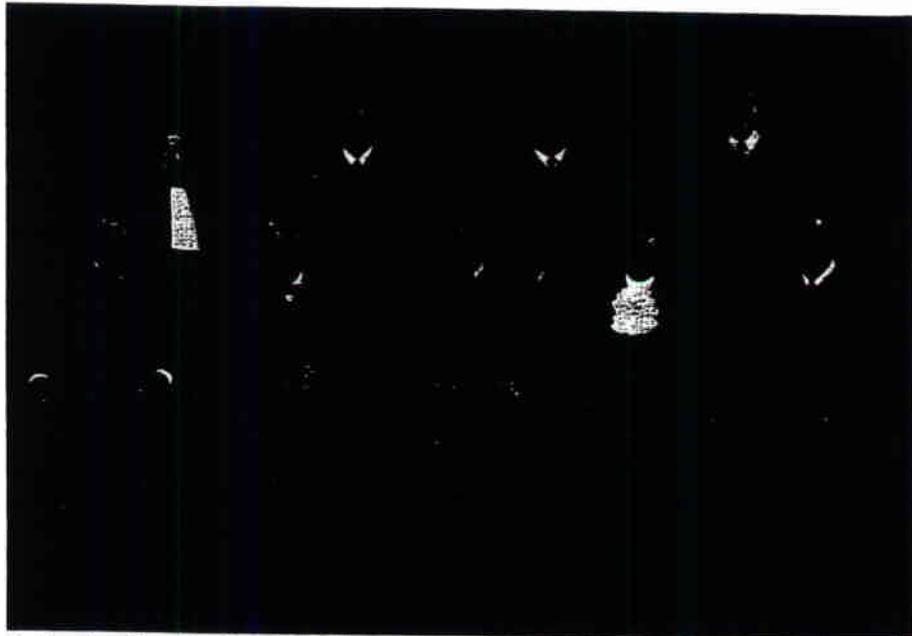
If a pollster were to ask this question, probably 99 percent of the public would answer with an emphatic “No!”

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

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

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

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



U.S. Supreme Court

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

cess either of the other two....”

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

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that

rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

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

The Framers wisely gave Congress a check on the Court: Congress can limit the Court's appellate jurisdiction. The concept could be used, for instance, to allow states to nullify abortion or local school boards to reinstitute school prayer without the federal courts being able to rule against them.

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

Steady Usurpation

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

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

And in 1823 he seemed to suggest that Hamilton’s view of the judiciary as the “least dangerous” branch had proven to be incorrect: “At the establishment of our con-

stitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions nevertheless become law by precedent, sapping by little and little the foundations of the Constitution, and working its change by construction, before any one has perceived that the invisible and helpless worm has been busily employed in consuming its substance.”

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

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

And President Theodore Roosevelt expressed a similar view: “It is the people, and not the judges, who are entitled to say what their constitution means, for the con-

stitution is theirs, it belongs to them and not to their servants in office — any other theory is incompatible with the foundation principles of our government.”

The Devious Dialectic

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

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

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

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

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

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

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

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

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

Included in those zones of privacy, Blackmun insisted, is the right to make decisions about oneself, including whether to have children, and the right to make that decision retroactively after conception by means of abortion. More recently in the

2003 *Lawrence vs. Texas* decision, the Supreme Court found that this penumbral right of privacy also includes the right to engage in homosexual sodomy.

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



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

Reining in the Courts

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

Article III, Section 2 of the Constitution, provides that the Supreme Court shall have original jurisdiction over a narrow range of cases, mostly involving foreign ambassadors. It then provides: “In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” The Framers wise-

ly gave Congress a check on the court: Congress can limit the court’s appellate jurisdiction.

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

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

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

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

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

S 1558 IS

108th CONGRESS

1st Session

S. 1558

To restore religious freedoms.

IN THE SENATE OF THE UNITED STATES

August 1 (legislative day, JULY 21), 2003

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

A BILL

To restore religious freedoms.

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

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS.

Congress finds the following:

- (1) The Declaration of Independence declares that governments are instituted to secure certain unalienable rights, including life, liberty, and the pursuit of happiness, with which all human beings are endowed by their Creator and to which they are entitled by the laws of nature and of nature's God.
- (2) The organic laws of the United States Code and the constitutions of every State, using various expressions, recognize God as the source of the blessings of liberty.
- (3) The first amendment to the Constitution secures rights against laws respecting an establishment of religion or prohibiting the free exercise thereof made by the Federal Government.
- (4) The rights secured under the first amendment have been interpreted by the Federal courts to be included among the provisions of the 14th amendment.

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

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

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

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

SEC. 3. RELIGIOUS LIBERTY RIGHTS DECLARED.

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

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

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

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

END

108TH CONGRESS
1ST SESSION

H. R. 3190

To safeguard our religious liberties.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 25, 2003

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

A BILL

To safeguard our religious liberties.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Safeguarding Our Reli-
5 gious Liberties Act".

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) The Declaration of Independence declares
9 that governments are instituted to secure certain
10 unalienable rights, including life, liberty, and the
11 pursuit of happiness, with which all human beings

1 are endowed by their Creator and to which they are
2 entitled by the laws of nature and of nature's God.

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

7 (3) The first amendment to the Constitution se-
8 cures rights against laws respecting an establish-
9 ment of religion or prohibiting the free exercise
10 thereof made by the Federal Government.

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

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

18 (6) Disputes and doubts have arisen with re-
19 spect to public displays of the Ten Commandments
20 and to other public expression of religious faith.

21 (7) Section 5 of the 14th amendment grants
22 Congress the power to enforce the provisions of the
23 14th amendment.

24 (8) Article III, section 2 of the Constitution
25 grants Congress the authority to except certain mat-

1 ters from the jurisdiction of the Federal courts infe-
2 rior to the Supreme Court.

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

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

9 (b) **WORD "GOD" IN PLEDGE OF ALLEGIANCE.**—The
10 power to recite the Pledge of Allegiance on or within prop-
11 erty owned or administered by the several States or polit-
12 ical subdivisions of such States is among the powers re-
13 served to the States, respectively. The Pledge of Allegiance
14 shall be, "I pledge allegiance to the Flag of the United
15 States of America, and to the Republic for which it stands,
16 one Nation under God, indivisible, with Liberty and justice
17 for all."

18 (c) **MOTTO "IN GOD WE TRUST".**—The power to re-
19 cite the national motto on or within property owned or
20 administered by the several States or political subdivisions
21 of such States is among the powers reserved to the States,
22 respectively. The national motto shall be, "In God we
23 trust".

24 (d) **EXERCISE OF CONGRESSIONAL POWER TO EX-**
25 **CEPT.**—The subject matter of subsections (a), (b), and (c)

- 1 are excepted from the jurisdiction of Federal courts infe-
- 2 rior to the Supreme Court.

○

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

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

108th CONGRESS
2d Session

S. 2323

To limit the jurisdiction of Federal courts in certain cases and promote federalism.
IN THE SENATE OF THE UNITED STATES

April 20, 2004

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

A BILL

To limit the jurisdiction of Federal courts in certain cases and promote federalism.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

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

TITLE I--JURISDICTION

SEC. 101. APPELLATE JURISDICTION.

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

'Sec. 1260. Matters not reviewable

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

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

'1260. Matters not reviewable.'

SEC. 102. LIMITATIONS ON JURISDICTION.

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

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

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

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

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

TITLE II--INTERPRETATION

SEC. 201. INTERPRETATION OF THE CONSTITUTION.

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

TITLE III--ENFORCEMENT

SEC. 301. EXTRAJURISDICTIONAL CASES NOT BINDING ON STATES.

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

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

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

- (1) an offense for which the judge may be removed upon impeachment and conviction; and
- (2) a breach of the standard of good behavior required by article III, section 1 of the Constitution.

END

COSPONSORS(6), ALPHABETICAL:

Sen Allard, A. Wayne - 4/20/2004 [CO]
Sen Graham, Lindsey O. - 4/20/2004 [SC]
Sen Lott, Trent - 4/20/2004 [MS]

Sen Brownback, Sam - 4/20/2004 [KS]
Sen Inhofe, Jim - 4/20/2004 [OK]
Sen Miller, Zell - 4/20/2004 [GA]

108th CONGRESS
2d Session

H. R. 3799

To limit the jurisdiction of Federal courts in certain cases and promote federalism.
IN THE HOUSE OF REPRESENTATIVES

February 11, 2004

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

A BILL

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

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

SECTION 1. SHORT TITLE.

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

TITLE I--JURISDICTION

SEC. 101. APPELLATE JURISDICTION.

(a) IN GENERAL-

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

'Sec. 1260. Matters not reviewable

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

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

'1260. Matters not reviewable.'

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

SEC. 102. LIMITATIONS ON JURISDICTION.

(a) IN GENERAL-

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

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

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

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

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

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

TITLE II--INTERPRETATION

SEC. 201. INTERPRETATION OF THE CONSTITUTION.

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

TITLE III--ENFORCEMENT

SEC. 301. EXTRAJURISDICTIONAL CASES NOT BINDING ON STATES.

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

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

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

- (1) an offense for which the judge may be removed upon impeachment and conviction; and
- (2) a breach of the standard of good behavior required by article III, section 1 of the Constitution.

END

COSPONSORS(20), ALPHABETICAL:

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

Pledge ruling touches parental-rights debate

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

ON PAGE 1

**RULING: 'Under God' phrase
stays in Pledge of Allegiance.**

whether the tradition of reciting the pledge in public schools amounts to the government promoting a particular faith in violation of the First Amendment.

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

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

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

vious version.

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

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

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

The girl's parents never have married.

The legal decision allowed the justices to avoid ruling on

FROM REGISTER NEWS SERVICES

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

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

The decision was issued on Flag Day and the 50th anniversary of the addition of the words "under God" to the pre-

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

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

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

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

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

Justice Antonin Scalia did not participate; he removed himself from the case after

Newdow complained that Scalia had publicly expressed his view that the issue should be decided by the legislative branch, not the courts.

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

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

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

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

'Under God' in pledge - for now

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

BY ANNE GEARAN
THE ASSOCIATED PRESS

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

The ruling overturned a lower-court decision that the religious reference made the pledge unconstitutional in public schools. But Monday's decision did so on technical grounds, ruling that Michael



Michael Newdow

Newdow, the man who brought the case on behalf of his 10-year-old daughter, could not legally represent her.

