

# Congress Gave and Congress Hath Taken Away:<sup>1</sup> Jurisdiction Withdrawal and the Constitution

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## *Table of Contents*

I. Introduction .....	1141
II. Current Legislation.....	1143
A. The Marriage Protection Act of 2005—H.R. 1100 .....	1144
B. The Constitution Restoration Act of 2005— H.R. 1070 & S. 520.....	1145
C. The Pledge Protection Act of 2005— H.R. 2389 & S. 1046.....	1146
III. Congress's Control of Federal Jurisdiction .....	1148
A. Constitutional Text—Article III .....	1148
1. The Judicial Power—Article III, § 1 .....	1149
2. The Recipients of the Judicial Power— Article III, § 1 .....	1149

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1. See Job 1:21 KJV ("[T]he LORD gave, and the LORD hath taken away; blessed be the name of the LORD. . ."); see also Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973) (paraphrasing and applying Job 1:21 to Congress's control over federal jurisdiction).

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3.	The Elements of the Judicial Power—	
	Article III, § 2, cl. 1.....	1150
4.	The Organization of the Judicial Power—	
	Article III, § 2, cl. 2.....	1150
B.	Foundational Principles.....	1152
1.	Separation of Powers & Checks and Balances.....	1153
2.	Majority Rule & Legislative Preeminence.....	1156
3.	Judicial Skepticism.....	1159
a.	Weaker than Congress.....	1159
b.	Weakest Branch.....	1161
c.	Distrust of Judicial Discretion.....	1163
d.	Neither Guardian of Rights Nor Ultimate Arbiter of Constitution.....	1167
C.	The Founding Fathers & The Exceptions Clause.....	1170
D.	Past Congressional Controls.....	1174
1.	The Judiciary Act of 1789 & Its Progeny.....	1174
2.	1930s.....	1178
3.	1940s.....	1179
4.	1960s.....	1180
5.	1990s–2000s.....	1181
E.	Federal Court Confirmation.....	1183
1.	Congress & The Supreme Court’s Appellate Jurisdiction.....	1184
2.	Congress & The Inferior Courts’ Jurisdiction.....	1189
3.	Federal Courts & Federal Claims.....	1191
4.	Federal Courts & Past Limitations.....	1192
IV.	Common Constitutional Objections to Congress’s Control.....	1195
A.	The Essential Function Theory.....	1195
B.	The Mandatory Jurisdiction Theory.....	1200
C.	Separation of Powers.....	1203
D.	Judicial Independence.....	1206
E.	The Bill of Rights.....	1208
F.	Due Process & Equal Protection.....	1211
G.	Unprecedented Action.....	1216
V.	Conclusion.....	1217

*I. Introduction*

In the space of roughly two centuries, the Supreme Court has moved from the basement of the Senate to the crossfire of today's culture war.<sup>2</sup> As judicial decisions address issues like "same-sex marriage," abortion, school prayer, affirmative action, pornography, illegal immigration, enemy combatants, the Ten Commandments, and the Pledge of Allegiance, both sides in these debates recognize that the courts have essentially become the last step in the legislative process.<sup>3</sup> Last year Chief Justice Rehnquist commented on the increased criticism of the federal courts, especially the Supreme Court.<sup>4</sup> The 2004 presidential campaign highlighted the deep divisions over the federal courts and their role.<sup>5</sup> Both sides of the ideological spectrum recognize the judiciary's tremendous power. Justice William J. Brennan once stated,

The Supreme Court has been, and is, called upon to solve many of the most fundamental issues confronting our democracy, including many upon which our society, consciously or unconsciously, is most deeply divided, and that arouse the deepest emotions. Their resolution, one way or the other, often rewrites our future history.<sup>6</sup>

Likewise, Justice Antonin Scalia observed,

What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and

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2. See Jonathan Rauch, *State of the Union: Bipolar Disorder*, THE ATLANTIC MONTHLY, Jan./Feb. 2005, at 102 (tracing the history and popular meaning of "culture war").

3. See, e.g., ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 57-59 (2003) (explaining the Court's influence on issues like free speech, public religious expression, radical feminism, and homosexuality); see also Paul Starr, *Winning Cases, Losing Voters*, N.Y. TIMES, Jan. 26, 2005, at A17 (attributing Democratic losses in 2004 to their strategy of pursuing their agenda in the courts).

4. See William Rehnquist, *2004 Year-End Report on the Federal Judiciary* 4 (2005) (noting that criticism of judges "has dramatically increased" recently), available at <http://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf>; David Davenport & Gordon Lloyd, *A Protest Too Far*, WASH. TIMES, Jan. 19, 2005, at A17 (linking criticism to fact that more people see that courts are "making policy on matters beyond their purview").

5. See, e.g., Charlie Savage, *Both Sides Say Court Future up to Voters*, BOSTON GLOBE, July 28, 2004, at A21 (noting that to both sides Supreme Court nominees are the "most far-reaching prize" of the election); Tara Ross, *Judicial Nominations*, THE AMERICAN ENTERPRISE ONLINE, at [http://www.taemag.com/printVersion/print\\_article.asp?articleID=18183](http://www.taemag.com/printVersion/print_article.asp?articleID=18183) (noting the importance of judicial nominees in the last election) (last visited May 10, 2005) (on file with the Washington and Lee Law Review).

6. PHYLLIS SCHLAFLY, THE SUPREMACISTS: THE TYRANNY OF JUDGES AND HOW TO STOP IT 9 (2004) (quoting Justice Brennan's speech at Park School, Baltimore, Md., on Nov. 21, 1982).

which our people have regarded as constitutional for 200 years, is in fact unconstitutional? . . . Day by day, case by case, [the Court] is busy designing a Constitution for a country I do not recognize.<sup>7</sup>

So is the federal judiciary still Hamilton's "least dangerous branch,"<sup>8</sup> one that is constantly subject to encroachment, intimidation, and retaliation from the majoritarian branches?<sup>9</sup> Or has it become Judge Roy Moore's "despotic branch,"<sup>10</sup> one that has usurped legislative authority to become "sovereign forces for permanent revolution"<sup>11</sup>

In order to address this issue, the 108th Congress revived a debate that remained dormant for almost a quarter century: jurisdiction-limiting legislation. To supporters, this legislation represents the essence of constitutional government as Congress restrains runaway federal judges from addressing issues like marriage and the Pledge. To opponents, this legislation undermines the foundation of our constitutional freedoms—the separation of powers and an independent judiciary.<sup>12</sup> This Note seeks to explain the pending legislation, show that the Constitution gives Congress plenary power to withdraw certain cases and controversies from the federal courts' jurisdiction, and address the common constitutional arguments against this proposition.

Though absent from the halls of Congress, the jurisdiction withdrawal debate in academic literature is "choking on redundancy."<sup>13</sup> However, this

7. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

8. THE FEDERALIST NO. 78, at 520 (Alexander Hamilton) (Carl Van Doren ed., 1973).

9. See James Podgers, *ABA Meeting Ends With Two Busy Days*, 4 ABA JOURNAL EREPORT 33, Aug. 12, 2005, <http://abanet.org/journal/redesign/aul12house.html> (quoting Justice Breyer's statement that "the greater concern for the judiciary . . . is a larger 'lack of support for the institution'" (on file with the Washington and Lee Law Review); Mandy Erickson, *In Discussion, Top Justices Voice Concerns About Threats to Judicial Independence*, STANFORD REPORT, Oct. 27, 2004, <http://news-service.stanford.edu/news/2004/october27/judicial-1027.html> (quoting Justice Breyer on the Court's budget limits and California Supreme Court Chief Justice George on the judiciary's vulnerability) (on file with the Washington and Lee Law Review); see also Rehnquist, *supra* note 4, at 2, 4 (noting increased criticism of federal judges).

10. *Constitution Restoration Act of 2004: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the Comm. on the Judiciary on H.R. 3799*, 108th Cong. 78 (2004) [hereinafter *Constitution Hearing*] (statement of Roy S. Moore).

11. ROBERT NISBET, *PREJUDICES: A PHILOSOPHICAL DICTIONARY* 210 (1982), quoted in BORK, *supra* note 3, at 10; see also, Davenport & Lloyd, *supra* note 4 (attributing criticism of courts to increasing role in policy matters).

12. See *infra* Part IV.C–D (examining separation of powers and judicial independence objections).

13. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 n.9 (1984); see also Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 742 n.3 (1984) (listing literature

subject has a renewed degree of timeliness as scholars like Erwin Chemerinsky worry that the Supreme Court could affirm Congress's power.<sup>14</sup> After twenty-five years of congressional silence, the 108th Congress handled four of these bills. More importantly, the House of Representatives passed two of them. Clearly, the issue is back before Congress.<sup>15</sup> With criticism of the judiciary rising, this legislation will continue to appear as an increasingly attractive restraint.<sup>16</sup> After the Republican gains in the 2004 election, the three primary bills are again pending before the 109th Congress. In addition, while many authors have addressed this subject, few delve into the writings and debates of the Founding era to show how the Exceptions Clause dovetails with the dominant political attitudes, principles, and statements of the time. This Note attempts to set the Exceptions Clause in its historical context and use the historical record to illuminate past congressional actions and court precedents that affect the current legislation.

To accomplish these goals, Part II surveys the jurisdiction withdrawal legislation proposed in the 108th Congress and pending before the 109th Congress. In so doing, it outlines the current state of the controversy and provides a backdrop for the rest of the Note. Part III lays out the affirmative case for Congress's plenary control of the federal courts' jurisdiction. It shows that the Constitution's text, its foundational principles, congressional practice, and court precedent confirm Congress's power. Part IV responds to some common constitutional objections.

## II. Current Legislation

Jurisdiction limiting bills are not new. During the 1970s and 1980s, several bills proposed stripping the federal courts of jurisdiction over school

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on subject to date); Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 671 n.1 (1997) (same).

14. See Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. MEM. L. REV. 295, 298-99 (1999) (expressing concern that judicial deference to Congress in immigration might cause the Court to affirm Congress's broad power over jurisdiction).

15. See Alexander K. Hooper, Recent Development, *Jurisdiction-Stripping: The Pledge Protection Act of 2004*, 42 HARV. J. ON LEGIS. 511, 513 ("This surge of court-stripping legislation is the strongest since the early 1980s. . .").

16. See sources cited *supra* note 9 (noting concerns about increased criticism of the courts); see also Davenport & Lloyd, *supra* note 4 (tracing censure of courts); see generally MARK LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005) (giving an example of the new rising criticism of the judiciary); SCHLAFLY, *supra* note 6 (same); BORK, *supra* note 3 (same).

prayer, abortion, and busing cases.<sup>17</sup> Between 1935 and 1981, at least sixty-four such bills were introduced in Congress.<sup>18</sup> However, most died in committee, and none gained widespread support.<sup>19</sup> The four bills from the 108th Congress are noteworthy because the House of Representatives passed two of them.<sup>20</sup> This Part examines the three that received substantial attention and their counterparts in the 109th Congress, and Part IV explains the objections to them.

#### A. *The Marriage Protection Act of 2005—H.R. 1100*

On July 22, 2004, the House of Representatives passed the Marriage Protection Act of 2004 (H.R. 3313)<sup>21</sup> to limit federal court jurisdiction over cases involving the Defense of Marriage Act (DOMA).<sup>22</sup> DOMA ensures that no state will be forced to recognize an out-of-state "same-sex marriage" license.<sup>23</sup> The Marriage Protection Act removes cases involving DOMA's interpretation and constitutionality from the jurisdiction of both the lower federal courts and the Supreme Court.<sup>24</sup> It does not dictate a decision on the

17. See H.R. REP. NO. 108-614, at 157 (2004) (referencing 1970s jurisdiction withdrawal bills).

18. See Clinton, *supra* note 13, at 744 nn.4-5 (listing bill numbers for these proposals).

19. See, e.g., S. 158, 97th Cong. (1981) (noting that a bill to strip federal courts of jurisdiction in abortion cases died in committee); H.R. 900, 97th Cong. (1981) (same); see also WILLIAM COHEN & JONATHAN VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 42 (11th ed. 2001) (giving text of Senator Helms's 1979 proposal to strip federal courts of jurisdiction over school prayer cases); PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 237 (5th ed. 2004) (outlining 1970s and 1980s proposals and noting that none passed).

20. See *infra* Part II.A & II.C (noting that two jurisdiction limiting bills passed the House).

21. See 150 CONG. REC. H6612 (daily ed. July 22, 2004) (stating that the Marriage Protection Act of 2004 passed the House 233-194). The Marriage Protection Act of 2005 (H.R. 1100) is identical to H.R. 3313, and it is currently pending before the House Judiciary Committee. See 151 CONG. REC. H982 (daily ed. Mar. 3, 2005) (introducing the Marriage Protection Act of 2005 and referring it to the House Judiciary Committee).

22. Defense of Marriage Act, 28 U.S.C. § 1738C (2000).

23. See H.R. REP. NO. 108-614, at 2 (2004) (summarizing provisions of DOMA).

24. See *id.* at 2 (quoting Marriage Protection Act, H.R. 3313, 108th Cong. § 2(a) (2004)). The relevant portion of the bill's text is as follows: "No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, [DOMA] or this section." *Id.*; see also *id.* at 22 (setting forth the Congressional Budget Office's statement that H.R. 3313 would preclude federal courts from reviewing DOMA and H.R. 3313).

merits; it simply prevents federal courts from "hear[ing] or decid[ing]" these cases.<sup>25</sup> It merely forces them to remain silent on the issue.

The House justified H.R. 3313 by reviewing the "same-sex marriage" controversy. Not only did DOMA pass overwhelmingly in both houses of Congress,<sup>26</sup> but most states have also relied on it either to limit marriage to one man and one woman<sup>27</sup> or to outlaw "same-sex marriage."<sup>28</sup> Nevertheless, the House feared that federal courts would rule that DOMA "violates either the Due Process Clause, the Equal Protection Clause, the Full Faith and Credit Clause, or some other constitutional provision."<sup>29</sup> Congress did not dictate results to the courts;<sup>30</sup> rather it sought to "ensure that the states, and not unelected Federal judges, have the final say on whether they must accept same-sex marriage licenses issued in other states."<sup>31</sup>

#### B. *The Constitution Restoration Act of 2005—H.R. 1070 & S. 520*

In February 2004, Senator Richard Shelby (Rep. Ala.) and Representative Robert Aderholt (Rep. Ala.) introduced companion legislation entitled the Constitution Restoration Act of 2004.<sup>32</sup> Among other things, this bill restricted the jurisdiction of both the federal district courts and the Supreme Court so that they could not review cases challenging a government official's "acknowledgement of God as the sovereign source of law, liberty, or government."<sup>33</sup> This bill would have prevented the federal courts from hearing

25. *See id.* at 2 (referencing the text of the bill).

26. *See id.* (showing that DOMA passed the House 342–67 and the Senate 85–14).

27. *See id.* at 3 (stating that forty-four states, constituting eighty-eight percent of the states and eighty-six percent of the population, have laws that define marriage to include only one man and one woman).

28. *See id.* (noting that thirty-eight states reject out-of-state "same-sex marriages").

29. *See id.* at 3–4 (recounting Congress's fears in light of *Lawrence v. Texas*, 539 U.S. 558 (2003)).

30. *See id.* at 2 ("H.R. 3313 does not attempt to dictate results: it only places final authority over whether states must accept same-sex marriage licenses granted in other states in the hands of the states themselves.").

31. *Id.* at 4.

32. *See* 150 CONG. REC. S1286 (daily ed. Feb. 12, 2004) (introducing S. 2082); 150 CONG. REC. H514 (daily ed. Feb. 11, 2004) (introducing H.R. 3799).

33. Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. §§ 101(a)(1), 102(a)(1) (2004); Constitution Restoration Act, S. 2082, 108th Cong. §§ 101(a)(1), 102(a)(1) (2004). The relevant portions of these bills state:

[T]he 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,

"legal challenges to such things as public displays of the Ten Commandments, our national motto 'In God We Trust,' 'One Nation Under God,' invocations of prayer at public functions by public officials, and the like."<sup>34</sup> These bills did not leave the House and Senate Judiciary Committees, but the House did hold hearings.<sup>35</sup> Senator Shelby and Representative Aderholt reintroduced this legislation in the 109th Congress, and it is now pending before the respective Judiciary Committees.<sup>36</sup>

*C. The Pledge Protection Act of 2005—H.R. 2389 & S. 1046*

On September 23, 2004, the House of Representatives passed the Pledge Protection Act of 2004.<sup>37</sup> Like the previous two bills, it prevented both the lower federal courts and the Supreme Court from "hear[ing] or decid[ing] any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance . . . or its recitation."<sup>38</sup> However, it exempted the District of Columbia courts from this limitation.<sup>39</sup> H.R. 2028 did not permit schools to coerce students into saying the Pledge,<sup>40</sup> but it prevented federal courts from invalidating the Pledge and "reserve[ed] to the

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State, or local government . . . by reason of that element's or officer's acknowledgement of God as the sovereign source of law, liberty, or government. . . . [T]he district court shall not have jurisdiction of a matter if the Supreme Court does not have jurisdiction to review that matter. . . ."

*Id.* §§ 101(a)(1), 102(a)(1). These bills also contain provisions regarding the use of international law and impeachment; however, those issues are outside the scope of this Note.

34. *Constitution Hearing*, *supra* note 10, at 85 (statement of Roy Moore).

35. See 150 CONG. REC. S1286 (daily ed. Feb. 12, 2004) (introducing S. 2082); 150 CONG. REC. H514 (daily ed. Feb. 11, 2004) (introducing H.R. 3799); see also *Constitution Hearing*, *supra* note 10 (indicating the hearing).

36. See 151 CONG. REC. H980, S2004 (daily ed. Mar. 3, 2005) (introducing the Constitution Restoration Act of 2005 in the House and Senate and referring it to the respective Judiciary Committees).

37. See 150 CONG. REC. H7478 (daily ed. Sept. 23, 2004) (noting H.R. 2028's passage 247-173 (Roll #467)).

38. Pledge Protection Act of 2004, H.R. 2028, 108th Cong. § 2(a). In its relevant portion, the bill reads: "No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance . . . or its recitation." *Id.*; see also H.R. REP. NO. 108-691, at 2 (2004) ("H.R. 2028 would prevent Federal courts from striking the words 'under God' from the Pledge of Allegiance.").

39. See H.R. 2028 § 2(a) (granting an exception to the District of Columbia courts).

40. See H.R. REP. NO. 108-691, at 10 n.10 (stating that H.R. 2028 would not allow "the coerced recitation of the Pledge of Allegiance" (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943))).



state courts the authority to decide whether the Pledge is valid as written within each state's boundaries."<sup>41</sup> Thus, it did not mandate results to the federal courts; it simply prevented them from deciding the issue one way or the other.

The House passed this bill in response to the recent challenges to the Pledge. Though the Supreme Court dismissed Newdow's constitutional claim,<sup>42</sup> the House was concerned as "[t]he Supreme Court's decision not to reach the merits of the case is apparently an effort to forestall a decision adverse to the Pledge."<sup>43</sup> Newdow has since confirmed the House's fears by filing new lawsuits over the Pledge on behalf of custodial parents in order to get a judgment on the merits.<sup>44</sup>

Representative Todd Akin (Rep. Ohio) and Senator Jon Kyl (Rep. Ariz.) introduced companion legislation in the 109th Congress that is similar to the legislation the House passed in 2004.<sup>45</sup> The Pledge Protection Act of 2005 is identical to its 2004 predecessor with one exception: it exempts territorial courts in addition to certain District of Columbia courts from the general bar against federal jurisdiction.<sup>46</sup> Thus, those courts would be allowed to hear cases involving the Pledge. These proposals are pending before the respective Judiciary Committees.<sup>47</sup>

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41. *Id.* at 10.

42. *See* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2312 (2004) (noting Newdow's lack of standing).

43. *Id.* at 2312 (Rehnquist, C.J., dissenting), *quoted in* H.R. REP. NO. 108-691, at 9-10.

44. *See Nation in Brief*, WASH. POST, Jan. 6, 2005, at A20 (stating that Newdow filed new suit on behalf of eight co-plaintiffs, all of whom are custodial parents or children); *see also* Newdow v. Congress, No. Civ. S-05-17 LKK/DAD, 2005 U.S. Dist. LEXIS 19887, at \*36 (E.D. Cal. Sept. 14, 2005) (stating that reciting the Pledge in school violates the Establishment Clause due to the phrase "under God").

45. Pledge Protection Act of 2005, H.R. 2389, S. 1046, 109th Cong.

46. *See id.* § 2(a) (creating an exception to the limitation on federal court jurisdiction). The relevant portion states:

The limitation in subsection (a) does not apply to—(1) any court established by Congress under its power to make needful rules or regulations respecting the territory of the United States; or (2) the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

*Id.*

47. *See* 151 CONG. REC. S5300, H3434 (daily ed. May 17, 2005) (introduction the Pledge Protection Act of 2005 in the House and Senate and referring it to the respective Judiciary Committees).

### III. Congress's Control of Federal Jurisdiction

Part III of this Note sets out the affirmative case for Congress's plenary control over the jurisdiction of the federal courts by examining five areas. First, it shows that the text of the Constitution gives Congress this power. Second, it demonstrates that Congress's power is consistent with the principles embodied in the Constitution. Third, it illustrates that the Founding Fathers intended for Congress to have this power. Fourth, it explains how Congress has used this power throughout history. Finally, it notes that the federal courts—including the Supreme Court—have repeatedly affirmed Congress's control over their jurisdiction.

#### A. Constitutional Text—Article III

The Constitution explicitly grants Congress the power to regulate the jurisdiction of the federal courts.<sup>48</sup> Section 1 of Article III lists the entities that are vested with the judicial power. Because Congress can choose whether to create lower courts, it also has the power to define the jurisdiction of those it creates.<sup>49</sup> Section 2 lists the cases and controversies that fall within the judicial power and divides that list into two subsets. Of these two, the Supreme Court's original jurisdiction is unalterable,<sup>50</sup> but the Constitution specifically allows Congress to adjust the other. For the purposes of this Note, Article III makes four important points.

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48. In its relevant parts, Article III states:

§ 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

§ 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; . . .—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States. . . .

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.

49. See *infra* Part III.E.2 (discussing Congress's control of lower court jurisdiction).

50. See *Marbury v. Madison*, 5 U.S. 137, 174–75 (1803) (rejecting arguments that Congress can expand the Court's original jurisdiction).

1. *The Judicial Power—Article III, § 1*

First, Article III confers "the judicial power of the United States" in Section 1 and the first clause of Section 2. But the second clause of Section 2 covers "jurisdiction." While the two terms could be synonyms,<sup>51</sup> the Constitution distinguishes them.<sup>52</sup> Jurisdiction is only a subset of the judicial power; the two are not the same.<sup>53</sup> Congress cannot control the judicial power because the Constitution gives it to the judiciary.<sup>54</sup> The Founders rejected a proposal that would have allowed Congress to control the judicial power.<sup>55</sup> Because the two are different, the judiciary always retains the judicial power regardless of its jurisdiction.<sup>56</sup>

2. *The Recipients of the Judicial Power—Article III, § 1*

Second, Article III vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>57</sup> Some argue that Congress must vest the entire judicial power in the federal judiciary as a whole.<sup>58</sup> However, by repeating the word "in," the Constitution does not require this.<sup>59</sup> Rather it vests "the judicial power, the entire judicial power, in the Supreme Court, and also in whatever inferior courts Congress creates. The whole judicial power is vested separately in each; it is not simply shared by the two."<sup>60</sup>

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51. See Velasco, *supra* note 13, at 709 n.187 (admitting that the two terms could be interchangeable).

52. See *Kendall v. United States*, 37 U.S. 524, 622–23 (1838) (distinguishing "judicial power" and "jurisdiction" in Article III); see also John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 214–20 (1997) (same).

53. See Velasco, *supra* note 13, at 709–13 (distinguishing between "judicial power" and "jurisdiction"); Harrison, *supra* note 52, at 214–20 (same).

54. See Velasco, *supra* note 13, at 711 ("Congress has no control over the judicial power.").

55. See *id.* at 711, 732 (examining the proposal that the Convention rejected).

56. See *id.* at 712 (arguing that limiting jurisdiction does not remove the judicial power).

57. U.S. CONST. art. III, § 1.

58. See *infra* Part IV.B (discussing various mandatory jurisdiction theories).

59. See Velasco, *supra* note 13, at 700 (noting that judicial power is not vested in federal judiciary as a whole).

60. *Id.*

### 3. *The Elements of the Judicial Power—Article III, § 2, cl. 1*

Third, the first clause of Section 2 lists the cases and controversies included in the judicial power. Some argue that Congress can remove "controversies" from the federal courts but not "cases."<sup>61</sup> This interpretation confuses these terms. "Cases" refers to both civil and criminal actions, while "controversies" includes only civil ones.<sup>62</sup> Both Justice Iredell and legal commentators of the time drew this distinction.<sup>63</sup> Controversies are a subset of cases, and so it is impossible for Congress to remove a controversy without also removing a case. The more natural interpretation is that this clause lists the items that comprise the judicial power.<sup>64</sup>

### 4. *The Organization of the Judicial Power—Article III, § 2, cl. 2*

Last, the second clause of Section 2 organizes these items into two subsets within the judicial power. The first—the Supreme Court's original jurisdiction—includes cases involving public ministers and cases involving a state.<sup>65</sup> The second—the Supreme Court's appellate jurisdiction—includes "all the other Cases" mentioned in the first clause.<sup>66</sup> As "controversies" are a type of "cases,"<sup>67</sup> everything in the first clause falls into either the appellate or original jurisdiction.<sup>68</sup> Then the second clause describes two features of the

61. See *infra* Part IV.B (discussing various mandatory jurisdiction theories).

62. See Velasco, *supra* note 13, at 707–08 (distinguishing "cases" and "controversies"); see also Harrison, *supra* note 52, at 220–29 (same); William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction*, 7 CONST. COMMENT. 89, 90 (1990) [hereinafter Casto, *Orthodox View*] (same).

63. See *Chisholm v. Georgia*, 2 U.S. 419, 430–32 (1793) (Iredell, J., dissenting) (distinguishing between "cases" and "controversies"); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 418–26 (South Hackensack, N.J., Rothman Reprints 1969) (1803) [hereinafter TUCKER, COMMENTARIES], reprinted in 4 THE FOUNDERS' CONSTITUTION 279 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS'] (same).

64. See *infra* note 235 and accompanying text (showing that Chief Justice Jay adopted this interpretation).

65. See U.S. CONST. art. III, § 2, cl. 2 (outlining the Supreme Court's original jurisdiction).

66. See *id.* (outlining the Supreme Court's appellate jurisdiction).

67. See *supra* Part III.A.3 (examining relationship between "cases" and "controversies").

68. See Velasco, *supra* note 13, at 719 (noting that the Supreme Court's original jurisdiction is not exclusive).

appellate jurisdiction. First, it extends to both law and fact.<sup>69</sup> Second, it is subject to Congress's exceptions and regulations.<sup>70</sup> At the time, "regulations" meant: "A rule or order prescribed by a superior for the management of some business, or for the government of a company or society."<sup>71</sup> This allows Congress to prescribe procedures for the Supreme Court's appellate jurisdiction. "Exceptions" had a broader definition: "The act of excepting, or excluding from a number designated, or from a description; exclusion."<sup>72</sup> This allows Congress to remove elements that would otherwise be within the Court's appellate jurisdiction.

Some argue that the Exceptions Clause modifies "both as to Law and Fact" rather than "appellate Jurisdiction."<sup>73</sup> But neither scholarly commentary nor the Supreme Court supports this position.<sup>74</sup> More importantly, the Founding Fathers contradicted this opinion in *The Federalist*,<sup>75</sup> the ratification debates,<sup>76</sup> and their other writings.<sup>77</sup>

In sum, the Constitution condones bills like those recently before the 108th Congress and now before the 109th Congress. As jurisdiction and judicial power differ, these bills do not erode anything the Constitution gives to the courts. The cases that the bills cover are in the Supreme Court's appellate jurisdiction. Thus, Article III explicitly allows Congress to make "exceptions" so that the Court cannot hear them.

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69. See *infra* Part III.C (surveying debates over the Exceptions Clause and showing concerns for jury trial).

70. See U.S. CONST. art. III, § 2, cl. 2 (setting forth the Exceptions Clause). As the Exceptions Clause applies to the appellate jurisdiction, it follows that Congress cannot make exceptions to the Court's original jurisdiction. See also *supra* note 50 and accompanying text (discussing nature of Supreme Court's original jurisdiction).

71. NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (3d ed., Foundation for American Christian Education 1983) (1828) (defining "regulation").

72. *Id.* (defining "exception").

73. U.S. CONST. art. III, § 2, cl. 2; see Velasco, *supra* note 13, at 720 (summarizing this argument); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 913 (1981–82) [hereinafter Redish, *Congressional Power*] (same).

74. See Velasco, *supra* note 13, at 720 n.242 (noting scholarly rejection of this argument); Redish, *Congressional Power*, *supra* note 73, at 914–15 (critiquing this argument historically using Supreme Court precedent and linguistically).

75. See, e.g., *infra* notes 213–17 and accompanying text (showing that *The Federalist* contradicts this).

76. See, e.g., *infra* notes 218–29 and accompanying text (showing that the ratification debates contradict this).

77. See, e.g., *infra* notes 230–38 and accompanying text (showing that the Founders' writings contradict this).

### B. Foundational Principles

Besides the Constitution's text, its foundational principles indicate that Congress controls the federal courts' jurisdiction. The Founding Fathers' writings and debates highlight the principles embodied in the Constitution, principles that are consistent with Congress limiting federal courts' jurisdiction through laws like those proposed in the 108th and 109th Congresses. Furthermore, their debates and writings clarify "the sense in which the Constitution was accepted and ratified by the nation."<sup>78</sup> According to Madison, *The Federalist* and the ratification debates play an essential role in interpreting ambiguous provisions of the Constitution.<sup>79</sup> They illustrate the mindset of the Founders and put the Constitution in its historical context.<sup>80</sup> The author concedes that examining the Constitution's "legislative history" can be like looking "over the cocktail party to identify your friends."<sup>81</sup> Thus, this subpart examines the Constitution's friends and foes in order to get a balanced perspective.<sup>82</sup> It surveys the Constitutional Convention, the ratification conventions, *The Federalist*, Anti-Federalist authors, and the Founders' private

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78. 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON 191 (Gaillard Hunt ed., 1910) [hereinafter MADISON, WRITINGS], quoted in DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 22.

79. See 9 MADISON, WRITINGS, *supra* note 78, at 72, reprinted in 1 FOUNDERS', *supra* note 63, at 74 (noting the value of ratification debates in constitutional interpretation); *Id.* at 219, quoted in BARTON, *supra* note 78, at 254 (calling *The Federalist* "the most authentic exposition of the heart of the federal Constitution"). Some may argue that *The Federalist* simply represents political propaganda rather than constitutional exposition. Even if this were true (and the "Father of the Constitution" therefore was wrong), *The Federalist* still represents the popular understanding of the Constitution. Hence, it shows what the people and ratifiers thought the Constitution meant when they ratified it. In order to demean *The Federalist* as partisan propaganda, one must argue that the Constitution had a secret meaning which none of the people or ratifiers recognized in the late 1700s and which modern courts can now conjure.

80. See 4 THOMAS JEFFERSON, MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 373 (Thomas Jefferson Randolph ed., Boston, Gray & Bowen 1830) [hereinafter JEFFERSON, MEMOIR], quoted in BARTON, *supra* note 78, at 22 (noting that the Constitution should be interpreted in the sense it was written).

81. Antonin Scalia & Stephen Breyer, *Constitutional Relevance of Foreign Court Decisions* (Jan. 13, 2005), <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> (quoting Justice Breyer) (on file with the Washington and Lee Law Review).

82. Compare *infra* Part III.B–D.1 (consulting debates in the Constitutional Convention, the ratification debates, *The Federalist*, Anti-Federalist authors, the private writings of the Founders, and legislation from the first Congress to discern the Founders' intent) with Theodore J. Weiman, Comment, *Jurisdiction Stripping, Constitutional Supremacy, and the Implications of Ex Parte Young*, 153 U. PA. L. REV. 1677, 1690–91 (2005) (trying to construe the Founders' intent after citing only four Founders).

writings to show that the Exceptions Clause naturally grows out of the Constitution's foundational principles.

### 1. *Separation of Powers & Checks and Balances*

The Founding Fathers believed that the principle of checks and balances tempered the separation of powers. Not content with dividing power, they balanced power against power to keep the government inside its limits. In this way, these principles compliment each other.

The private writings of the Founders illustrate this. They did not give any governmental body unlimited power. James Iredell stated that "unlimited power . . . was not to be trusted without the most imminent danger, to any man or body of men on earth,"<sup>83</sup> and Roger Sherman agreed.<sup>84</sup> Far from trusting men in power, Jefferson wanted to "bind [them] down from mischief by the chains of the Constitution."<sup>85</sup> To prevent any single branch from gaining unlimited power, the Founders divided power among the three branches.<sup>86</sup> As Madison noted, separating power was not enough; each branch had to keep the others from "overleap[ing] the great barrier which defends the rights of the people."<sup>87</sup> John Jay connected the two principles:

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83. 2 G.J. MCRREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 145–46 (New York, Appleton 1857–58), *quoted in* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 311 n.19 (2d ed. 1997) [hereinafter BERGER, *GOVERNMENT*].

84. Roger Sherman, *A Citizen of New Haven*, Letter II, *NEW HAVEN GAZETTE* (Dec. 25, 1788) [hereinafter Sherman, *Citizen II*], in *FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS, 1787–1788*, at 263, 270 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) [hereinafter *FRIENDS*] ("Every department and officer of the federal government will be subject to the regulation and control of the laws. . .").

85. 4 JONATHAN ELLIOTT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 543 (Philadelphia, J.B. Lippincott Company 1888).

86. See 6 JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 6–8, 429–31 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1850–56), *reprinted in* 1 *FOUNDERS'*, *supra* note 63, at 59, 137 (noting the need to separate powers and how the Constitution divides legislative power among the House, Senate, and President (not the judiciary)).

87. James Madison, *A Memorial and Remonstrance Presented to the General Assembly of the State of Virginia at Their Session in 1785 in Consequence of a Bill Brought into that Assembly for the Establishment of Religion* 4–5 (Massachusetts, Isaiah Thomas 1786), *quoted in* BARTON, *supra* note 78, at 272; see also 10 JAMES MADISON, *THE PAPERS OF JAMES MADISON* 207–15 (William T. Hutchinson et al. eds., 1962–77) [hereinafter *MADISON, PAPERS*], *reprinted in* 1 *FOUNDERS'*, *supra* note 63, at 647 (noting that the goal of government is to give it enough power to protect citizens but also to control that power so that the government does not invade citizen's rights).

To vest legislative, judicial, and executive powers in one and the same body of men, and that, too, in a body daily changing its members, can never be wise. In my opinion, these three great departments of sovereignty should be forever separated, and so distributed as to serve as checks on each other.<sup>88</sup>

Washington thought it wise to include "reciprocal checks" by "dividing and distributing [power] into different depositories."<sup>89</sup> Charles Carroll praised the Constitution for "so distribut[ing] powers among the parts composing it, that each may control the others."<sup>90</sup> Thus, the Founders viewed the separation of powers and checks and balances as opposite sides of the same coin.

*The Federalist* reinforces the connection between the principles of checks and balances and separation of powers. Calling it an "essential precaution in favor of liberty,"<sup>91</sup> Madison summarized Montesquieu's principle of separation of powers:

[Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.<sup>92</sup>

In other words, he and Montesquieu advocated a system of shared powers where each branch partially controlled the others but no branch completely controlled the actions of another.<sup>93</sup> Madison saw the folly of trusting "parchment barriers" to restrain power.<sup>94</sup> Like Jefferson, he envisioned a system where no branch could exceed its limits "without being effectually checked and restrained by the others."<sup>95</sup> Hence, "a mere demarcation on

88. 3 JOHN JAY, *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 210 (Henry P. Johnston ed., New York, Burt Franklin 1890) [hereinafter JAY, CORRESPONDENCE]; see also *id.* at 388–89 (noting that the Constitution combines both principles).

89. George Washington, Address of George Washington, President of the United States, and Late Commander in Chief of the American Army, to the People of the United States, Preparatory to His Declination 22 (Baltimore, George & Henry S. Keatinge 1796), quoted in BARTON, *supra* note 78, at 271.

90. 2 KATE MASON ROWLAND, *THE LIFE OF CHARLES CARROLL OF CARROLLTON 1737–1882 WITH HIS CORRESPONDENCE AND PUBLIC PAPERS* 210 (New York & London, G.P. Putnam's Sons 1898) [hereinafter ROWLAND, LIFE].

91. THE FEDERALIST NO. 47, *supra* note 8, at 321 (James Madison).

92. *Id.* at 323.

93. See THE FEDERALIST NO. 48, *supra* note 8, at 330 (James Madison) (showing that the branches are blended so that each checks the powers of the others).

94. *Id.* at 331.

95. *Id.* at 333.



parchment of the constitutional limits of the several departments, is not a sufficient guard" against the concentration of power.<sup>96</sup> The way to prevent such concentration "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."<sup>97</sup> Hamilton agreed that dividing power works only if combined with checks and balances; thus, the Constitution gave each branch "constitutional arms" for its "effectual power of self-defence."<sup>98</sup>

The Constitutional Convention also shows this commitment to the separation of powers as well as checks and balances. James Wilson, James Madison, and George Mason<sup>99</sup> favored the Council of Revision, which would have extended the veto to the Supreme Court.<sup>100</sup> They argued that this would allow the Court to strike down constitutional laws that were unwise.<sup>101</sup> Elbridge Gerry responded that judges sufficiently checked the legislature by deciding constitutional questions,<sup>102</sup> and he opposed making judges into legislators.<sup>103</sup> By voting down the Council four times, the Convention emphasized the difference between legislative and judicial power.<sup>104</sup>

The ratification conventions also illustrate how the Founders wove separation of powers together with checks and balances. In Pennsylvania, James Wilson observed the Constitution keeps the branches "nearly independent and distinct."<sup>105</sup> However, "in the very construction of this

96. *Id.* at 335.

97. THE FEDERALIST NO. 51, *supra* note 8, at 347 (James Madison); *see also id.* at 347–49 (noting that the Constitution made "ambition . . . counteract ambition" in order "to control the abuses of government" through the three branches and federalism).

98. *See* THE FEDERALIST NO. 73, *supra* note 8, at 492 (Alexander Hamilton) (remarking on the "insufficiency of a mere parchment delineation" and the need for each branch to have "constitutional and effectual power of self-defence").

99. *See* BARTON, *supra* note 78, at 269 (calling these men the Convention's three most influential members).

100. *See* 2 MADISON, PAPERS, *supra* note 87, at 1161–62, *quoted in* BARTON, *supra* note 78, at 268–69 (recounting Wilson's description of the Council).

101. *See infra* notes 132–34 and accompanying text (discussing further the Council of Revision).

102. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97 (Max Farrand ed., 1937) [hereinafter FARRAND 1937], *reprinted in* 1 FOUNDERS', *supra* note 63, at 320 (stating that Judiciary's constitutional review restrained Congress enough).

103. *See* 2 MADISON, PAPERS, *supra* note 87, at 1162–66, *quoted in* BARTON, *supra* note 78, at 269 (stating that such mixing should never happen and noting Strong's and Martin's agreement).

104. *See id.* at 791, 812, 1171, and 1331, *cited in* BARTON, *supra* note 78, at 269 (recording the Council's four defeats at the Constitutional Convention).

105. 2 ELLIOTT, *supra* note 85, at 479.

government, there are numerous checks," some expressly enumerated and some not.<sup>106</sup> In New York, Hamilton noted that the Constitution incorporates "mutual checks."<sup>107</sup> In Virginia, Patrick Henry strongly opposed any unrestrained power.<sup>108</sup> In North Carolina, Iredell praised the Constitution for melding the two principles because separating powers would be useless "if each power had no means to defend itself against the encroachment of the others."<sup>109</sup>

In sum, separation of powers means that one branch cannot take over all the functions of another, but checks and balances means that each branch must have tools of self-defense against the encroachments of the others. The Exceptions Clause exemplifies this principle because it gives Congress a way to limit judicial excess without completely controlling the courts. The courts have judicial review for their defense; the Exceptions Clause levels the field for Congress.

## 2. Majority Rule & Legislative Preeminence

The Founding Fathers also relied heavily on the foundational principle of majority rule, and thus, they envisioned the legislature as the preeminent branch.<sup>110</sup> The Constitutional Convention reflected this. Supporters of the ill-fated Council of Revision wanted the Court to judge the wisdom of laws, not just their constitutionality.<sup>111</sup> Gerry objected because "[i]t was *quite foreign* from the nature of [the] office to make them *judges of the policy* of public measures."<sup>112</sup> By rejecting the Council, the Founders restricted the judiciary's role and gave Congress the broader duty of weighing the wisdom of legislation.

*The Federalist* also highlights the Founders' belief in majority rule and legislative preeminence. Madison argued that requiring more than a majority for a quorum would reverse a "fundamental principle of free government"

106. James Wilson, Speech, Pennsylvania Convention, 4 December 1787, morning, in FRIENDS, *supra* note 84, 231, 233.

107. 2 ELLIOTT, *supra* note 85, at 347.

108. See 3 ELLIOTT, *supra* note 85, at 436 (opposing unrestrained power); see also *id.* at 563 (noting Grayson's agreement).

109. 4 ELLIOTT, *supra* note 85, at 74.

110. The author is not implying that Founders favored direct democracy. One must view this principle in light of the others. To the extent that they trusted government at all, the Founders viewed the legislature most favorably.

111. See *supra* note 101 and *infra* notes 132–34 and accompanying text (explaining supporters' positions).

112. 1 FARRAND 1937, *supra* note 102, at 97, reprinted in 1 FOUNDERS', *supra* note 63, at 320.

because "[i]t would be no longer the majority that would rule; the power would be transferred to the minority."<sup>113</sup> He observed that "[t]he legislative department derives a superiority in our governments" partly because its more ambiguous limits indicate that the Founders had greater trust in it than the other two branches.<sup>114</sup> Although this created the threat of a tyrannical majority, he saw only two antidotes. One was to set up an authority that was independent of the majority, but he dismissed this idea as dangerous to both the majority and the minority.<sup>115</sup> Instead, the Founders preferred to include so many interests and classes in society that they could not form a cohesive majority on a wide range of issues.<sup>116</sup> In short, "[i]n republican government, the legislative authority necessarily predominates."<sup>117</sup>

The ratification debates further illustrate the Founders' confidence in majority rule and legislative preeminence. In Massachusetts, Fisher Ames defended representative government by saying: "The people must govern by a majority, with whom all power resides."<sup>118</sup> In Connecticut, Ellsworth conceded that the courts restrained Congress on constitutional issues, but he concluded: "In republics, it is a fundamental principle that the majority govern, and that the minority comply with the general voice."<sup>119</sup> In Pennsylvania, James Wilson raised the specter of the tyranny of the majority but dismissed it as completely impossible.<sup>120</sup>

Many of the Constitution's foes argued that the judiciary removed too much power from Congress. Federal Farmer, an Anti-Federalist pseudonym, argued that despite the limits on courts, judges would thwart Congress and destroy liberty through "their interpretations."<sup>121</sup> Brutus, another pseudonym,

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113. THE FEDERALIST NO. 58, *supra* note 8, at 395 (James Madison); *see also* THE FEDERALIST NO. 22, *supra* note 8, at 137 (Alexander Hamilton) (calling majority rule the "fundamental maxim of republican government").

114. THE FEDERALIST NO. 48, *supra* note 8, at 332 (James Madison).

115. *See* THE FEDERALIST NO. 51, *supra* note 8, at 350 (James Madison) (calling this solution at best "a precarious security").

116. *See id.* (noting that the multiplicity of interests in the nation better prevented majoritarian abuses).

117. *Id.* at 348.

118. Fisher Ames, Speech, Massachusetts Convention, 15 January 1788, in FRIENDS, *supra* note 84, at 196, 197.

119. 2 ELLIOTT, *supra* note 85, at 196–97.

120. *See* 2 ELLIOTT, *supra* note 85, at 495 (recording Wilson's discussion of possible majoritarian abuses).

121. FEDERAL FARMER NO. 15, in 2 THE COMPLETE ANTI-FEDERALIST 185 (Herbert J. Storing ed., Univ. of Chi. Press 1981) [hereinafter STORING], *reprinted in* 4 FOUNDERS', *supra* note 63, at 232.

feared that the judiciary would control Congress by guiding it to expand congressional powers.<sup>122</sup> He argued that the Constitution placed the judiciary higher than Congress:

But the judges under this constitution will controul the legislature, for the supreme court are authorized in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment.<sup>123</sup>

That is, they thought the Constitution granted the judiciary supreme and unrestrained power, power which elevated it above Congress. Hence, even the Constitution's foes thought the legislature was the more trustworthy, and should be the more preeminent, branch.

The Founders' other writings confirm their faith in majority rule and legislative preeminence. James Wilson not only recounted the Revolutionary-era disdain for the executive and judicial powers,<sup>124</sup> but he also recollected that "our assemblies were chosen by ourselves: they were the guardians of our rights, the objects of our confidence, and the anchor of our political hopes."<sup>125</sup> To his chagrin, under the Constitution, the people still treated the executive and judiciary as "stepmothers" while throwing "every good and precious gift" into the lap of the legislature.<sup>126</sup> While he endorsed the Court's ability to invalidate unconstitutional laws, he declared that this did not elevate the Court above the Congress.<sup>127</sup> In 1788, Madison noted that the Founders neither intended to make the judiciary superior to Congress nor thought this was proper,<sup>128</sup> a sentiment even Hamilton shared.<sup>129</sup>

122. See BRUTUS, NO. 12, in 2 STORING, *supra* note 121, at 146–54, *reprinted in* 4 FOUNDERS', *supra* note 63, at 236 (arguing that the judiciary would allow Congress to expand its powers).

123. BRUTUS NO. 15, in 2 STORING, *supra* note 121, at 186–89, *reprinted in* 4 FOUNDERS', *supra* note 63, at 239.

124. See 1 JAMES WILSON, THE WORKS OF JAMES WILSON 292–93 (Robert Green McCloskey ed., 1967) [hereinafter WILSON, WORKS], *reprinted in* 1 FOUNDERS', *supra* note 63, at 71–72 (stating that the executive and judicial branches were the objects of "aversion and distrust").

125. *Id.*, *reprinted in* 1 FOUNDERS', *supra* note 63, at 71–72.

126. *Id.*, *reprinted in* 1 FOUNDERS', *supra* note 63, at 71–72.

127. See *id.* at 326–31, *reprinted in* 4 FOUNDERS', *supra* note 63, at 254 ("[Judicial review] does not confer upon the judicial department a power superior, in its general nature, to that of the legislature . . .").

128. See 11 MADISON, PAPERS, *supra* note 87, at 293, *reprinted in* 1 FOUNDERS', *supra* note 63, at 652 (noting that judicial review's timing can elevate the judiciary over Congress, "which was never intended, and can never be proper").

129. See THE FEDERALIST NO. 78, *supra* note 8, at 523 (Alexander Hamilton) ("Nor does

In sum, the Constitutional Convention, *The Federalist*, and the ratification debates indicate that the Founders created a government grounded on the principle of majority rule. Even their private writings and the Constitution's opponents confirm this. Because they relied so heavily on majority rule, almost all leaders during the Founding era viewed the legislature as the preeminent and predominant branch of government. This principle is consistent with Congress's Exceptions Clause power as illustrated in the current bills because the Clause gives Congress a way to assert itself when the judiciary goes too far. If Congress really is the preeminent branch, it must have some way to respond to the courts.<sup>130</sup>

### 3. Judicial Skepticism

While they believed that the judiciary must be independent and that it served as a check on legislative abuses,<sup>131</sup> the Founding Fathers did not place great trust in the third branch. They illustrated this third foundational principle, skepticism toward the judiciary, in four ways.

#### a. Weaker than Congress

First, the Founders emphasized that the judiciary was less powerful than Congress. In the Constitutional Convention, Mason and Wilson wanted courts to invalidate unwise laws, not just unconstitutional ones.<sup>132</sup> But even they realized that without the Council of Revision, federal courts had to execute Congress's will unless it was "plainly" unconstitutional.<sup>133</sup> Madison contended that "notwithstanding this co-operation of the two departments [executive and judiciary], the Legislature would still be an overmatch for them."<sup>134</sup> Hence, he

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[judicial review] by any means suppose a superiority of the judicial to the legislative power.").

130. Some may argue that this statement contradicts the separation of powers. But as it simply involves pitting power against power, it is entirely consistent with the twin principles of separation of powers and checks and balances. See *supra* Part III.B.1 (explaining how the principles of separation of powers and of checks and balances interact).

131. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 96 (Harvey Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2000) (1835) (observing that the judiciary's allegiance to the Constitution restrains the legislature).

132. See *infra* notes 158–59 and accompanying text (noting the limited nature of judicial review).

133. 2 FARRAND 1937, *supra* note 102, at 78, reprinted in 1 FOUNDERS', *supra* note 63, at 322.

134. *Id.* at 74, reprinted in 1 FOUNDERS', *supra* note 63, at 322.

clearly did not think the Supreme Court alone surpassed Congress. However, the Convention voted this plan down repeatedly, thus showing that they did not give the judiciary any legislative role.

The Anti-Federalists insisted that the judiciary would overwhelm Congress.<sup>135</sup> Martin and Gerry opposed the Constitution partly for this reason.<sup>136</sup> Brutus thought the independence of federal judges made them uncontrollable.<sup>137</sup> He later warned that judges would control Congress by defining the extent of its powers in constitutional decisions that no branch could set aside.<sup>138</sup>

*The Federalist* argued the opposite. Hamilton defended judicial review against "an imagination that the doctrine would imply a superiority of the judiciary to the legislative power."<sup>139</sup> He wrote that judicial review was necessary to restrain Congress, but it did not "by any means suppose a superiority of the judicial to the legislative power."<sup>140</sup> Though necessary, judicial review did not elevate the judiciary above Congress.

Other advocates of the Constitution confirmed this. Gouverneur Morris wrote that federal judges "will never be so wild, so absurd, so mad as to pretend that they are superior to the legislative power of America."<sup>141</sup> Madison later reflected that because laws come before the judiciary last, judicial review "makes the Judiciary [Department] paramount in fact to the Legislature, which was never intended, and can never be proper."<sup>142</sup> After explaining how the judiciary checks Congress, James Wilson observed:

This regulation is far from throwing any disparagement upon the legislative authority of the United States. It does not confer upon the judicial department a power superiour, in its general nature to that of the legislature;

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135. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1576 (Boston, Hilliard, Gray, and Co. 1833) [hereinafter STORY, COMMENTARIES], reprinted in 4 FOUNDERS', *supra* note 63, at 202 (summarizing arguments against the judiciary).

136. See 1 ELLIOTT, *supra* note 85, at 380 (warning that the federal courts would become the sole tribunal for constitutional questions); *id.* at 493 (warning that the federal courts would become oppressive).

137. See BRUTUS NO. 11, in 2 STORING, *supra* note 121, at 130–38, reprinted in 4 FOUNDERS', *supra* note 63, at 235 (stating that federal judges are rendered "totally independent" and uncorrectable).

138. See BRUTUS NO. 15, in 2 STORING, *supra* note 121, at 186–89, reprinted in 4 FOUNDERS', *supra* note 63, at 239 (arguing that the Court would eventually control Congress).

139. THE FEDERALIST NO. 78, *supra* note 8, at 522 (Alexander Hamilton).

140. *Id.* at 523.

141. HOWARD SWIGGETT, THE EXTRAORDINARY MR. MORRIS 362 (1952), quoted in BERGER, GOVERNMENT, *supra* note 83, at 383 n.22.

142. 11 MADISON, PAPERS, *supra* note 87, at 285–93, reprinted in 1 FOUNDERS', *supra* note 63, at 652.

but it confers upon it, in particular instances, and for particular purposes, the power of declaring and enforcing the superiour power of the constitution—the supreme law of the land.<sup>143</sup>

Whatever the nature of judicial review,<sup>144</sup> the Founders never placed the judiciary over Congress.

*b. Weakest Branch*

Second, the Founders thought that the judiciary should be the weakest branch. The Anti-Federalists objected to the Constitution because they thought the judiciary was too powerful. Brutus thought the judges were too independent:

[Rather than following the British concept of judicial independence, the authors of the Constitution] have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.<sup>145</sup>

He advised caution when setting the scope of judicial power because judicial errors were far less public than congressional ones and because the judges' independence rendered them far less accountable.<sup>146</sup> Clearly these opponents did not view the courts with a friendly eye.

In response, *The Federalist* highlighted the judiciary's weakness.<sup>147</sup> Madison insisted that the danger of judicial excess was extremely remote because the limits on the judiciary were so clear that "projects of usurpation . . .

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143. 1 WILSON, WORKS, *supra* note 124, at 326–31, *reprinted in* 4 FOUNDERS', *supra* note 63, at 254.

144. See CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY? 5–32 (1997) (distinguishing different types of judicial review throughout history).

145. BRUTUS NO. 15, *in* 2 STORING, *supra* note 121, at 189–92, *reprinted in* 4 FOUNDERS', *supra* note 63, at 141.

146. See FEDERAL FARMER NO. 15, *in* 2 STORING, *supra* note 121, at 185, *reprinted in* 4 FOUNDERS', *supra* note 63, at 233 (arguing that the individualized and specialized nature of the judiciary is a great danger).

147. See also 1 JAMES MONROE, THE WRITINGS OF JAMES MONROE 384–87 (Stanislaus Murray Hamilton ed., New York & London, G.P. Putnam's Sons 1898–1903) [hereinafter MONROE, WRITINGS], *reprinted in* 4 FOUNDERS', *supra* note 63, at 251 (disproving charges that the federal courts would be "the great instrument of tyranny" by showing that they were not as powerful as alleged).

would immediately betray and defeat themselves."<sup>148</sup> The judiciary was so weak that when he discussed the limits on Congress, he mentioned only its bicameral nature and the president's veto.<sup>149</sup> He refused to "creat[e] a will in the community independent of the majority" to prevent the tyranny of the majority because this "at best, is but a precarious security" that would endanger the rights of the majority and minority.<sup>150</sup> Hamilton also minimized the power of the "least dangerous branch":

The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>151</sup>

He agreed with Montesquieu that "the judiciary is beyond comparison the weakest of the three departments of power" and noted that "liberty can have nothing to fear from the judiciary alone."<sup>152</sup> Hence, even the Constitution's prime defenders did not view the judiciary favorably.

In the ratification conventions, the Constitution's opponents confirmed that the judiciary should be the weakest branch. They reiterated charges that the Constitution made the judiciary too powerful. For example, Luther Martin maintained that the federal courts had too much power because the constitutionality of all laws "rests only with the judges . . . to determine."<sup>153</sup> In New York, Thomas Treadwell argued that the Constitution "departed widely from the principles and political faith of '76" partly because "the powers of the judiciary may be extended to any degree short of almighty."<sup>154</sup> By objecting strongly to a judiciary they perceived as too powerful, they confirmed that it should be the weakest branch.

In response to these arguments at the ratification debates, the Constitution's supporters emphasized that the judiciary was the weakest branch of the three. Madison argued that the Anti-Federalists' fears were unfounded because the limits on Congress also limited the judiciary.<sup>155</sup> He summarized:

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148. THE FEDERALIST NO. 48, *supra* note 8, at 332 (James Madison).

149. See THE FEDERALIST NO. 51, *supra* note 8, at 348-49 (James Madison) (discussing the limits on Congress without mentioning the courts).

150. *Id.* at 350.

151. THE FEDERALIST NO. 78, *supra* note 8, at 520 (Alexander Hamilton).

152. *Id.* at 521.

153. 1 ELLIOTT, *supra* note 85, at 380.

154. 2 ELLIOTT, *supra* note 85, at 401.

155. See 3 ELLIOTT, *supra* note 85, at 530, 534 (saying that Madison's fears of an all-expansive judiciary were "groundless" and explaining how limits on Congress also limited the



"Were I to select a power which might be given with confidence, it would be judicial power. This power cannot be abused, without raising the indignation of all the people of the states."<sup>156</sup> That is, the judiciary was too weak to abuse its powers.

Even early observers of America noticed that the judiciary was the weakest branch. After he outlined how the federal courts might threaten state power, Alexis de Tocqueville acknowledged that this threat was not great: "Federal judges feel the relative weakness of the power in the name of which they act, and they are closer to abandoning a right of jurisdiction in cases where the law gives it to them than being inclined to claim it illegally."<sup>157</sup>

*c. Distrust of Judicial Discretion*

Third, the Founders indicated their skepticism through their distrust of judicial discretion. The Constitutional Convention debates over the Council of Revision illustrate this. Mason noted the strict limits on judges' discretion: "They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course."<sup>158</sup> James Wilson agreed: "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet be not so unconstitutional as to justify the Judge in refusing to give them effect."<sup>159</sup> The Convention declined to relax these limits with the Council of Revision. Rufus King declared: "[T]he judges must interpret the laws; they ought not to be legislators."<sup>160</sup> Sherman likewise "disapproved of Judges meddling in politics."<sup>161</sup> In sum, the Founders voted the Council down repeatedly in order to limit or eliminate judicial discretion.

The Anti-Federalist authors thought that federal judges had too much flexibility to "constitutionalize" their personal preferences. Justice Story summarized one main objection:

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courts).

156. *Id.* at 535.

157. DE TOCQUEVILLE, *supra* note 131, at 134–35.

158. 2 FARRAND 1937, *supra* note 102, at 78, *reprinted in* 1 FOUNDERS', *supra* note 63, at 323.

159. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., 1911) [hereinafter FARRAND 1911], *quoted in* BERGER, GOVERNMENT, *supra* note 83, at 323.

160. 1 FARRAND 1911, *supra* note 159, at 108, *quoted in* BARTON, *supra* note 78, at 259.

161. *Id.* at 299, *quoted in* 1 FOUNDERS', *supra* note 63, at 323.

The power of construing the laws according to the spirit of the constitution will enable that court to mould them into whatever shape, it may think proper; especially, as its decisions will not be in any manner subject to the revision and correction of the legislative body. This is as unprecedented, as it is dangerous.<sup>162</sup>

Federal Farmer feared that judges would abuse their interpretive powers "for changing the nature of the government."<sup>163</sup> Despite the limits on the courts, he thought the Constitution left a "vast deal to the discretion and interpretation—to the wisdom, integrity, and politics of the judges."<sup>164</sup> This discretion posed particular danger because, unlike legislative abuses, only the parties to a case, their neighbors, and a "few professional men" would detect judicial ones.<sup>165</sup> Brutus feared that as the federal courts could decide constitutional questions "in equity," they would "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."<sup>166</sup> This gave judges vast, unchecked discretion:

They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications.<sup>167</sup>

To discover the spirit of the Constitution, judges would use the vague phrases of the Preamble or the Necessary and Proper Clause to justify federal intrusion into local matters that the Constitution did not delegate to the federal government.<sup>168</sup> In sum, these critics thought judges had too much discretion to implement their preferences rather than the Constitution's text.

162. 3 STORY, COMMENTARIES, *supra* note 135, § 1576, *reprinted in* 4 FOUNDERS', *supra* note 63, at 202.

163. FEDERAL FARMER NO. 15, *in* 2 STORING, *supra* note 121, at 185, *reprinted in* 4 FOUNDERS', *supra* note 63, at 232.

164. *Id.*, *in* 2 STORING, *supra* note 121, at 185, *reprinted in* 4 FOUNDERS', *supra* note 63, at 232.

165. *See id.*, *in* 2 STORING, *supra* note 121, at 185, *reprinted in* 4 FOUNDERS', *supra* note 63, at 233 (contrasting the quick discovery and "general alarm" of legislative abuses with the private nature of judicial ones).

166. BRUTUS NO. 11, *in* 2 STORING, *supra* note 121, at 130–38, *reprinted in* 4 FOUNDERS', *supra* note 63, at 235.

167. *Id.*, *in* 2 STORING, *supra* note 121, at 130–38, *reprinted in* 4 FOUNDERS', *supra* note 63, at 236.

168. *See* BRUTUS NO. 12, *in* 2 STORING, *supra* note 121, at 146–54, *reprinted in* 1 FOUNDERS', *supra* note 63, at 237 (predicting that courts would expand federal power using the

*The Federalist* underscores the Founders' distrust for judicial discretion and their desire for a limited judiciary. While addressing the tyranny of the majority, Madison dismissed the idea of "creating a will . . . independent of the majority" as nothing more than "a precarious security" because it "may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties."<sup>169</sup> It is hardly likely that he would then give large amounts of discretion to unelected judges, judges who personify the "will . . . independent of the majority."<sup>170</sup> Hamilton rebutted charges that federal judges would have unfettered discretion by interpreting the Constitution according to its spirit: "In the first place, there is not a syllable in [the Constitution] which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State."<sup>171</sup> Such power would "enable the court to mold them [the laws] into whatever shape it may think proper" which was "as unprecedented as it was dangerous."<sup>172</sup> Later Hamilton noted that just as the Constitution limits the powers of Congress, it also sets the outer boundaries of the federal courts' powers. The courts have no discretion to hear cases outside those limits.<sup>173</sup>

The writings of other Founders confirm their skeptical attitude toward judicial discretion. Jefferson's distrust was especially vehement:

The germ of dissolution of our federal government is in . . . the federal judiciary; an irresponsible body (for impeachment is hardly a scare-crow) 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.<sup>174</sup>

At another time, he remarked that the lawgiver should be merciful, but the judge should be "a mere machine."<sup>175</sup> Justice Story referred to courts of

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Preamble and the Necessary and Proper Clause).

169. THE FEDERALIST NO. 51, *supra* note 8, at 350 (James Madison).

170. *Id.*

171. See THE FEDERALIST NO. 81, *supra* note 8, at 541 (Alexander Hamilton) (addressing fears that equity jurisdiction would place the judiciary over Congress).

172. See *id.* (summarizing objections to the federal courts' equity jurisdiction); see also *id.* at 544 (explaining that judicial encroachments on the legislature were a "phantom").

173. See THE FEDERALIST NO. 83, *supra* note 8, at 558 (Alexander Hamilton) (noting that the Constitution limits congressional and judicial power by enumerating the powers of each body).

174. 25 THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 331–32 (Albert E. Bergh ed., 1903–04) [hereinafter JEFFERSON, WRITINGS].

175. 1 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 505 (Charles T. Cullen ed., 1983).

unbounded jurisdiction as "the most formidable instrument of arbitrary power, that could well be devised."<sup>176</sup> He also disapproved of judicial innovations because the Constitution should "have a fixed, uniform, permanent construction"; it should be "not dependent upon the passions or parties of particular times, but the same yesterday, today, and forever."<sup>177</sup> James Wilson once instructed a judge to "remember, that his duty and his business is, not to make the law but to interpret and apply it."<sup>178</sup> This was a limited, non-discretionary role. Charles Carroll noted that giving judges "a discretionary power" was "incompatible with the spirit of our constitution."<sup>179</sup> If this was true when he referred to Britain's unwritten constitution, it is all the more true for a written one.<sup>180</sup> Later he remarked that "*a free constitution will not endure discretionary powers.*"<sup>181</sup>

The ratification debates further underscore this distrust of judicial discretion. Anti-Federalists argued that the Constitution gave judges too much discretion, while Federalists countered that the Anti-Federalists overstated reality. In Virginia, for example, Patrick Henry thought the federal courts were either impractical or "dangerous in the extreme."<sup>182</sup> Grayson protested because Supreme Court decisions were unreviewable.<sup>183</sup> He argued that equity and federal question jurisdiction gave the Supreme Court "more power than any court under heaven. One set of judges ought not to have this power."<sup>184</sup> John Marshall defended federal jurisdiction because the Constitution's limits on Congress's power also limited the courts' federal question jurisdiction.<sup>185</sup> The judiciary had no power to surpass these limits.<sup>186</sup> In sum, no one on either side or at any stage of the constitutional debate placed confidence in judicial discretion.

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176. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 9 (5th ed., Boston, Little, Brown & Co. 1905), *quoted in* BERGER, GOVERNMENT, *supra* note 83, at 304 (referring to jurisdiction "arising from natural law and justice").

177. *Id.* § 426, *quoted in* BERGER, GOVERNMENT, *supra* note 83, at 381.

178. 2 WILSON, WORKS, *supra* note 124, at 502, *quoted in* BERGER, GOVERNMENT, *supra* note 83, at 19 n.2.

179. *See* 1 ROWLAND, LIFE, *supra* note 90, at 344 (referring to the British constitution).

180. *See* William Cranch, 1 Cranch iii (1804), *quoted in* 4 FOUNDERS', *supra* note 63, at 188 (noting that a government of laws should leave "the least possible range" for judicial discretion).

181. 1 ROWLAND, LIFE, *supra* note 90, at 349.

182. 3 ELLIOTT, *supra* note 85, at 539.

183. *Id.* at 563 (objecting to judiciary because "recurrence can only be had to the sword").

184. *Id.* at 564-65.

185. *See id.* at 553 (explaining that limits on Congress also limit the courts).

186. *See id.* (arguing that neither the courts nor Congress can go beyond their limits).

*d. Neither Guardian of Rights Nor Ultimate Arbiter of Constitution*

Fourth, the Founders illustrated their distrust of the judiciary by not placing any confidence in judges' ability to act either as the guardian of individual rights or as the "ultimate interpreter of the Constitution."<sup>187</sup> Although the judiciary checked Congress, the Founders did not see it as the primary protection for minorities. Madison specifically rejected creating "a will in the community independent of the majority" because it endangered both the majority and minority.<sup>188</sup> Instead, he thought that the diversity of the nation, the "multiplicity of interests," and the "multiplicity of sects" would prevent a tyrannical majority.<sup>189</sup> To John Dickinson, the people were the ultimate check against constitutional abuses.<sup>190</sup> Roger Sherman wrote that federalism protected individual rights: "The immediate security of the civil and domestic rights of the people will be in the government of the particular states."<sup>191</sup> Gerry, who supported judicial review, opposed the Council of Revision because "[i]t was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people. He relied for his part on the Representatives of the people as the guardians of their Rights & interests."<sup>192</sup>

The Anti-Federalists feared that the Court would become the ultimate arbiter of the Constitution. The Federal Farmer criticized the Constitution because "the judges and juries, in their interpretations, . . . have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government."<sup>193</sup> Luther Martin objected because he thought that federal judges would become the exclusive mouthpiece of the Constitution.<sup>194</sup>

187. See, e.g., *Baker v. Carr*, 369 U.S. 186, 211 (1962) (referring to Supreme Court as "ultimate interpreter of the Constitution"); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (same); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that "the federal judiciary is supreme in the exposition of the law of the Constitution").

188. THE FEDERALIST NO. 51, *supra* note 8, at 350 (James Madison).

189. *Id.* at 350–51.

190. John Dickinson, *The Letters*, in FRIENDS, *supra* note 84, at 218 (noting that the people guard the Constitution).

191. Sherman, *Citizen II*, *supra* note 84, in FRIENDS, *supra* note 84, at 266–67. See *id.* at 268–69 (noting that states check the federal government).

192. 2 FARRAND 1937, *supra* note 102, at 74, *reprinted in* 1 FOUNDERS', *supra* note 63, at 322; see also BERGER, GOVERNMENT, *supra* note 83, at 323 n.8 (noting that Gerry represented the majority view); *id.* at 384 n.29 (noting John Marshall's agreement).

193. FEDERAL FARMER NO. 15, in 2 STORING, *supra* note 121, at 185, *reprinted in* 4 FOUNDERS', *supra* note 63, at 232.

194. See Luther Martin, *Genuine Information* (1788), in 2 STORING, *supra* note 121, at 89–92, *reprinted in* 4 FOUNDERS', *supra* note 63, at 234 (predicting that the federal courts' reach would expand greatly).

Hence, in order to conclude that the judiciary is the ultimate arbiter of the Constitution, one must adopt the interpretation of its foes, not the one of those who wrote and advocated it.

While the judiciary does interpret the law, the Founders did not see this as an exclusively judicial role. Madison refuted the notion that only the Court could interpret the Constitution:

I acknowledge, in the ordinary course of government, that the exposition of the laws and Constitution devolves upon the Judiciary. But I beg to know upon what principle it can be contended that any one department draws from the Constitution greater powers than another in marking out the limits of the powers of the several departments.<sup>195</sup>

Later he summarized this point: "Nothing has yet been offered to invalidate the doctrine that the meaning of the Constitution may as well be ascertained by the Legislative as by the Judicial authority."<sup>196</sup> John Randolph confirmed Madison's opinion,<sup>197</sup> as did Jefferson.<sup>198</sup> Jefferson spoke strongly against making the Supreme Court the voice of the Constitution: "You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. . . . The Constitution has erected no such single tribunal."<sup>199</sup> He rejected this role for the courts because it made the unelected branch supreme and transformed the Constitution into "a mere thing of wax in the hands of the Judiciary which they may twist and shape into any form they please."<sup>200</sup>

The Founders also did not place tremendous trust in a judge's insight, temperament, or wisdom. Nathaniel Gorham opposed the Council of Revision because he saw no "advantage of employing Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures."<sup>201</sup> Luther Martin declared: "A knowledge of

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195. 1 ANNALS OF CONG. 520 (Gales & Seaton eds., 1834), *quoted in* BARTON, *supra* note 78, at 264.

196. *Id.* at 568, *quoted in* BARTON, *supra* note 78, at 265.

197. 1 ANNALS OF CONG. 661 (Gales & Seaton ed., 1851), *quoted in* BARTON, *supra* note 78, at 265 (noting that Congress is equally qualified to interpret the Constitution as the Court).

198. 15 JEFFERSON, WRITINGS, *supra* note 174, at 215, *quoted in* BARTON, *supra* note 78, at 265 (stating that each branch "has equally the right to decide for itself what is its duty under the Constitution").

199. *Id.* at 277, *quoted in* BARTON, *supra* note 78, at 266.

200. 4 JEFFERSON, MEMOIR, *supra* note 80, at 215, *quoted in* BARTON, *supra* note 78, at 265-66.

201. 2 FARRAND 1911, *supra* note 159, at 73, *quoted in* BERGER, GOVERNMENT, *supra* note 83, at 323.

mankind and of legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature."<sup>202</sup> Jefferson observed that judges are subject to the same pressures and biases as other officials because they are merely "as honest as other men and not more so."<sup>203</sup> Even the Council's supporters, Mason and Wilson, recognized the limits on judicial review and stated that courts could not strike down legislation for policy reasons.<sup>204</sup>

In sum, the Founding generation viewed the judiciary with great skepticism. Not only did they view it as weaker than Congress, but they intended that it remain the weakest branch. Both friends and foes of the Constitution wanted to curtail or eliminate all judicial discretion, especially over constitutional issues. As a natural result, neither side entrusted the judiciary with the task of protecting individual liberties or of exclusively interpreting the Constitution.

These foundational principles all support Congress's power over federal court jurisdiction under the Exceptions Clause. First, checks and balances requires that each branch have a way to restrain the others. Thus, Congress must have a way to restrain the courts.<sup>205</sup> As the Founding Fathers saw the legislature as preeminent, they would not have subjected its decisions to the unfettered discretion of the least-trusted branch. Furthermore, because they vehemently opposed unlimited power, they would not have freed the weakest branch from all effective oversight. As they opposed judicial discretion and did not view the courts as the ultimate interpreter of the Constitution, they must have left the other branches weapons for their constitutional "self-defence."<sup>206</sup> Rather than trusting the "parchment barriers" of the Constitution to prevent judicial expansion, these principles show that the Founders must have given Congress another way to check the judiciary.<sup>207</sup> While not completely dispositive, these foundational principles indicate that Congress can limit the federal courts' jurisdiction as the 108th and 109th Congresses have proposed.<sup>208</sup>

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202. 2 JAMES MADISON, *THE PAPERS OF JAMES MADISON* 1166 (Henry D. Gilpin ed., Washington, D.C., Langtree & O'Sullivan 1840), *quoted in* BARTON, *supra* note 78, at 264.

203. 15 JEFFERSON, *WRITINGS*, *supra* note 174, at 277, *quoted in* BARTON, *supra* note 78, at 266.

204. *See supra* notes 158–59 and accompanying text (noting limits on judicial review).

205. *See infra* notes 522–26 and accompanying text (showing that appointments, amendments, and appellate reversal do not constitute this check).

206. THE FEDERALIST NO. 73, *supra* note 8, at 492 (Alexander Hamilton).

207. THE FEDERALIST NO. 48, *supra* note 8, at 331 (James Madison).

208. *See supra* Part II (outlining the recent and current legislation).

*C. The Founding Fathers & The Exceptions Clause*

Not only do the Constitution's text and foundational principles indicate that Congress can limit the federal courts' jurisdiction, but the Founders also explicitly stated that the Exceptions Clause gave Congress this power. Their statements confirm once again that the Constitution condones the proposals pending before Congress.<sup>209</sup>

The Anti-Federalist authors gave the Exceptions Clause mixed reviews. Brutus agreed that it allowed Congress to remove cases from the Supreme Court's appellate jurisdiction.<sup>210</sup> But he saw it as an "admission that the [judicial] power itself is improper without restraint."<sup>211</sup> The Federal Farmer commented that "it is impossible to say how far congress may, with propriety, extend their regulations in this respect."<sup>212</sup> They agreed that Congress could make exceptions, but they doubted that it actually would.

*The Federalist* displays the Founders' intent that Congress limit the Supreme Court's appellate jurisdiction via Article III, Section 2. Hamilton wrote that if parts of the judicial power ever caused problems, Congress had "ample authority to make such *exceptions*, and to prescribe such regulations" as would "remove these inconveniences."<sup>213</sup> Furthermore, if a case was not within the Court's narrow original jurisdiction, the Supreme Court had "nothing more than an appellate jurisdiction, 'with such *exceptions* and under such *regulations* as the Congress shall make.'<sup>214</sup> Thus, he argued that the Supreme Court did not threaten jury findings at all.<sup>215</sup> According to him, the Convention included the Exceptions Clause to "enable the government to modify [the appellate jurisdiction] in such a manner as will best answer the ends of public justice and security."<sup>216</sup> Clearly, Hamilton did not limit Congress's power to appellate

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209. See *supra* Part II (outlining the recent and current legislation).

210. See BRUTUS NO. 14, in 2 STORING, *supra* note 121, at 168–85, reprinted in 4 FOUNDERS', *supra* note 63, at 376 (noting Exceptions Clause's "natural meaning" allows Congress to exempt cases from appellate jurisdiction).

211. *Id.*, in 2 STORING, *supra* note 121, at 168–85, reprinted in 4 FOUNDERS', *supra* note 63, at 377.

212. FEDERAL FARMER NO. 15, in 2 STORING, *supra* note 121, at 189, 194, reprinted in 4 FOUNDERS', *supra* note 63, at 374.

213. THE FEDERALIST NO. 81, *supra* note 8, at 539 (Alexander Hamilton).

214. *Id.* at 547–48.

215. *Id.* at 550 (noting that the appellate jurisdiction is subject to any exceptions or regulations from Congress).

216. *Id.*



review of facts.<sup>217</sup> Instead, Congress could use its power to limit the Courts' appellate jurisdiction however it chose.

In the ratification debates, the Constitution's foes agreed that Congress could limit the Court's jurisdiction under the Exceptions Clause, but they saw this protection as inadequate and insecure. When Richard Henry Lee voiced concerns about the jury trial, he belittled the Exceptions Clause because Congress could repeal anything it passed.<sup>218</sup> Grayson likewise found it little comfort because Congress could choose not to make exceptions and regulations, which meant that "trial by jury is given up to the discretion of Congress."<sup>219</sup> Mason similarly remarked that "mere hope is not a sufficient security."<sup>220</sup> Among other things, Patrick Henry predicted that the Court would overturn any exceptions, thus rendering the Clause moot.<sup>221</sup> He also criticized the Exceptions Clause for "conced[ing] everything to the virtue of Congress."<sup>222</sup> These men did not contest that Congress could limit the Court, but they doubted that it would.

In the ratification debates, the Constitution's friends defended Article III by underscoring the Exceptions Clause. In Pennsylvania, Wilson summarized the Supreme Court's jurisdiction: "In two cases the Supreme Court has original jurisdiction—that affecting ambassadors, and when a state shall be a party. It is true it has appellate jurisdiction in more, but it will have it under such restrictions as Congress shall ordain."<sup>223</sup> In Virginia, Pendleton clarified that the Exceptions Clause allowed Congress to "make such regulations as they may think conducive to the public convenience."<sup>224</sup> Madison also highlighted Congress's power: "Where [Article III] speaks of appellate jurisdiction, it expressly provides that such regulations will be made as will accommodate every citizen, so far as practicable in any government."<sup>225</sup> He argued that this clause allowed Congress to fix whatever "inconveniences" might arise from

217. See *supra* notes 73–77 and accompanying text (discussing the effect of the Exceptions Clause).

218. See 1 ELLIOTT, *supra* note 85, at 504 (objecting that legislation would not fix a constitutional problem).

219. 3 ELLIOTT, *supra* note 85, at 568.

220. *Id.* at 524; see also *id.* at 528 (noting Mason's concern that Congress may or may not regulate).

221. See *id.* at 541 (predicting that the Court would invalidate any exceptions and regulations).

222. *Id.* at 544.

223. 2 ELLIOTT, *supra* note 85, at 493.

224. 3 ELLIOTT, *supra* note 85, at 519.

225. *Id.* at 534.

diversity jurisdiction.<sup>226</sup> Thus, he concluded that the judicial power could be given with confidence.<sup>227</sup> Later, he noted that Congress could use its power to limit "vexatious appeals."<sup>228</sup> John Marshall addressed Henry's critique of the Exceptions Clause:

What is the meaning of the term *exception*? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.<sup>229</sup>

Marshall, like the others, took a broad view of Congress's power under the Exceptions Clause.

Other Founders confirm Congress's expansive power. Noah Webster responded to objections to federal appellate powers: "But the truth is, the creation of all inferior courts is in the power of Congress; and the constitution provides that Congress may make such exceptions from the right of appeals as they shall judge proper."<sup>230</sup> Roger Sherman noted that Congress had "full power to regulate [the judiciary] by law" and could "vary the regulations at different times as circumstances may differ."<sup>231</sup> Later he described the federal judicial power:

It was thought necessary . . . to extend the judicial powers of the United States to the enumerated cases, *under such regulations and with such exceptions as shall be provided by law*, which will doubtless reduce them to cases of such magnitude and importance as cannot safely be trusted to the final decision of the courts of particular states . . .<sup>232</sup> [emphasis added]

Hugh Williamson replied to charges that federal courts would harm the poor by noting that:

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226. *Id.* at 535.

227. *See id.* ("Were I to select a power which might be given with confidence, it would be judicial power.")

228. *Id.* at 538.

229. *Id.* at 560; *see also* 1 MONROE, WRITINGS, *supra* note 147, at 384–87, reprinted in 4 FOUNDERS', *supra* note 63, at 252 (noting that Congress will use its Exceptions Clause power to secure the jury trial in civil cases).

230. Noah Webster, *An Examination into the Leading Principles of the Federal Constitution, Philadelphia, 17 October 1787* [hereinafter Webster, *Examination*], in FRIENDS, *supra* note 84, at 373, 395.

231. Sherman, *A Citizen of New Haven*, Letter I, NEW HAVEN GAZETTE (Dec. 18, 1788), in FRIENDS, *supra* note 84, at 263, 265.

232. Sherman, *Citizen II*, *supra* note 84, in FRIENDS, *supra* note 84, at 266, 270.

the appeals being *with such exceptions*, and *under such regulations* as Congress shall make, will never be permitted for trifling sums, or under trivial pretenses, unless we can suppose that the national Legislature shall be composed of knaves and fools. . . . The powers of Judiciary naturally arise from those of the Legislature.<sup>233</sup>

Similarly, Fisher Ames remarked that jurisdiction flowed "to the courts as the Legislature may positively enact."<sup>234</sup> In a letter to Washington, Chief Justice Jay clarified the Exceptions Clause:

The 2d Section [of Article III] enumerates the cases to which the Judicial power shall extend. It gives to the Supreme Court original jurisdiction in only *two* cases, but in all others vests it with *appellate* jurisdiction, and that with such exceptions, and under such regulations as Congress shall make.<sup>235</sup>

These Founders understood that the Exceptions Clause gave Congress control over jurisdiction.

Early observers of the United States realized that Congress controlled the federal courts' jurisdiction. According to de Tocqueville, "[a]fter having recognized the means of fixing federal competence, the legislators of the Union determined the cases of jurisdiction in which it would be exercised."<sup>236</sup> That is, Congress defined federal court jurisdiction. Justice Story noted two possibilities under the Exceptions Clause: (1) the Supreme Court has complete appellate jurisdiction unless Congress acts to repeal part of it, or (2) the Court has no appellate jurisdiction unless Congress confers some.<sup>237</sup> Story held to the former, thus recognizing that Congress can limit the Supreme Court's appellate jurisdiction.<sup>238</sup>

These debates and statements regarding the Exceptions Clause show that both sides agreed that Congress could limit federal jurisdiction. Critics feared that Congress would not use this power enough, while supporters said Congress

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233. Hugh Williamson, *Remarks on the New Plan of Government*, DAILY ADVERTISER (Feb. 25–27, 1788), in FRIENDS, *supra* note 84, at 272, 275–76. Williamson represented North Carolina in the Constitutional Convention.

234. 1 ANNALS OF CONG. 786–830 (Gales & Seaton eds., 1834), reprinted in 4 FOUNDERS', *supra* note 63, at 150.

235. John Jay, *Draft of Letter from Justices of the Supreme Court to George Washington* (Sept. 15, 1790), in 2 MCREE, *supra* note 83, at 293–96, reprinted in 4 FOUNDERS', *supra* note 63, at 161.

236. DE TOCQUEVILLE, *supra* note 131, at 135.

237. See 3 STORY, COMMENTARIES, *supra* note 135, § 1767, reprinted in 4 FOUNDERS', *supra* note 63, at 388–89 (noting two possibilities under Exceptions Clause).

238. See *id.*, reprinted in 4 FOUNDERS', *supra* note 63, at 388–89 (arguing that if Congress does not act, the Court has full appellate jurisdiction). But see *infra* Part III.E.1 (showing that the case law does not support Story on this point).

could limit jurisdiction for any reason. Thus, the pending legislation clearly complies with the Founders' understanding of the Exceptions Clause.

#### D. Past Congressional Controls

Throughout its history, Congress has exercised its power over federal court jurisdiction. It has done so in different ways at different times, but these laws confirm what the Constitution, its foundational principles, and the Founders have made clear: Congress has the plenary power to limit federal jurisdiction. This subpart surveys some of this past legislation to show that Congress has often passed bills similar to those in the 108th and 109th Congresses.

##### 1. The Judiciary Act of 1789 & Its Progeny

The Judiciary Act of 1789 embodies the Founders' intent for Article III.<sup>239</sup> Fifty-four members of the first Congress were delegates either to the Constitutional Convention or to their state ratification convention.<sup>240</sup> Oliver Ellsworth, William Patterson, and Caleb Strong—all delegates to the Constitutional Convention—served on the committee that drafted the Act.<sup>241</sup> Ellsworth and Patterson<sup>242</sup> were the primary forces behind it.<sup>243</sup> Madison argued for it in the House<sup>244</sup> and endorsed it before the vote.<sup>245</sup> In the Senate,

239. See *Martin v. Hunter's Lessee*, 14 U.S. 304, 351–52 (1816) (noting role of those who framed, supported, and opposed the Constitution in first Congress); see also RICHARD H. FALLON ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 28 (4th ed. 1996), quoted in H. REP. NO. 108-691, at 13 (2004) (noting that Judiciary Act is "widely viewed as an indicator of the original understanding of Article III" and federal jurisdiction).

240. See *ENCYCLOPEDIA OF AMERICAN HISTORY* 145 (R. Morris 6th ed., 1982), quoted in H. REP. NO. 108-614, at 8 (2004) (noting that fifty-four members of the first Congress attended Constitutional or state ratification conventions).

241. See William R. Casto, *The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101, 1105 [hereinafter Casto, *First Congress*] (1985) (noting Ellsworth's, Patterson's, and Strong's role in drafting the Act).

242. See COHEN & VARAT, *supra* note 19, at 1680 (noting that both later served as justices on the Supreme Court).

243. See Casto, *First Congress*, *supra* note 241, at 1105 ("Ellsworth was the father of the legislation and its moving force. Patterson acted as his principal lieutenant.").

244. See 1 ANNALS OF CONG. 812–13 (J. Gales ed., 1789), cited in H. REP. NO. 108-614, at 8 (noting Madison's arguments).

245. See *Gazette of the United States* (Sept. 19, 1789) at 3, col. 2, cited in H. REP. NO. 108-614, at 9 (noting Madison's endorsement).

"eight of the ten former delegates to the Constitutional Convention vot[ed] for it."<sup>246</sup>

In the Judiciary Act of 1789, Congress restricted the federal courts' jurisdiction in several important ways. First, it did not give inferior courts federal question jurisdiction over civil cases.<sup>247</sup> It allowed them to hear federal crimes but not civil claims arising under the Constitution or federal law.<sup>248</sup> Though at least two proposals would have conferred federal question jurisdiction, Congress gave the lower courts jurisdiction based on "the nature of the parties rather than the nature of the dispute."<sup>249</sup> The district courts had civil jurisdiction over admiralty and maritime cases, some alien tort claims, some common law cases involving more than \$100, and suits against consuls or vice-consuls.<sup>250</sup> If the United States filed a claim or appeal that exceeded \$500, the circuit courts had original jurisdiction.<sup>251</sup> But if it brought a small civil action, a copyright action, or a patent action, it had to do so in state court.<sup>252</sup>

Except for a short time during 1801, the lower federal courts had no federal question jurisdiction until after the Civil War.<sup>253</sup> In 1875, the lower courts could hear for the first time "all suits of a civil nature . . . arising under the Constitution" or federal laws and treaties.<sup>254</sup> But Congress quickly restricted this jurisdiction with a \$2,000 jurisdictional minimum.<sup>255</sup> By 1958, the inferior courts could only hear federal question cases involving at least

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246. 1 ANNALS OF CONG. 52 (July 17, 1789), cited in H. REP. 108-614, at 9 (2004).

247. See Casto, *First Congress*, supra note 241, at 1116 (calling the lack of this jurisdiction "the most remarkable limitation" on jurisdiction); see also FALLON ET AL., supra note 239, at 29, quoted in H. REP. NO. 108-614, at 8 n.30 (noting that the Judiciary Act gave no general federal question jurisdiction to the lower courts).

248. See Casto, *First Congress*, supra note 241, at 1116 (noting general grant of jurisdiction for federal crimes).

249. *Id.*

250. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76 (establishing civil jurisdiction of the district courts).

251. See *id.* § 11, 1 Stat. at 78-79 (establishing circuit courts' original jurisdiction in non-diversity cases).

252. Casto, *First Congress*, supra note 241, at 1117 (noting limits on federal jurisdiction under the Copyright Act of 1790, ch. 15, § 6, 1 Stat. 124, 125-26 (1790), and the Patent Act of 1790, ch. 7, 1 Stat. 109 (1790)).

253. See FALLON ET AL., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 827 (5th ed.) (stating that unless there was diversity, most cases had to go through state courts).

254. *Id.*

255. See *id.* at 829 (noting limits on federal question jurisdiction in Act of March 3, 1887, 20 Stat. 552).

\$10,000.<sup>256</sup> It was not until 1980 that Congress abolished the amount in controversy requirement so that the lower courts can now hear "all civil actions arising under the Constitution, laws, or treaties of the United States."<sup>257</sup> Even so, this statutory jurisdiction includes only a portion of the full Article III grant.<sup>258</sup>

Second, the Judiciary Act of 1789 limited the federal courts' diversity jurisdiction. The federal courts could hear civil cases between citizens of different states or between a foreigner and a citizen, but only if at least \$500 were at stake.<sup>259</sup> Yet, Article III does not impose this requirement.<sup>260</sup> This was no random figure, for it "effectively precluded a significant group of British creditors from having a federal court vindicate rights secured by the most important treaty in United States history."<sup>261</sup> It also forced nearly all common law tort actions into state court.<sup>262</sup>

Under the Assignee Clause, if people from different states sued over a promissory note that had been assigned, the federal courts had no jurisdiction unless they would have had it if the assignor was a party.<sup>263</sup> This prevented people from artificially creating diversity jurisdiction, but it also "had an undesirable impact upon interstate commerce."<sup>264</sup> Hence, federal courts could not hear certain diversity cases even though the Constitution granted them this jurisdiction.<sup>265</sup>

256. *See id.* at 830 (noting increased amount in controversy requirement in Act of July 25, 1958, 72 Stat. 415).

257. *Id.* (quoting 28 U.S.C. § 1331 (2000)).

258. *See* ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 286-91 (2003) (noting difference between constitutional and statutory arising under jurisdiction).

259. *See* Judiciary Act of 1789, ch. 20 §§ 11-12, 1 Stat. 73, 78-80 (imposing amount in controversy requirements).

260. *See* U.S. CONST., art. III, § 2 (setting out the elements of the judicial power).

261. *Compare* Clinton, *supra* note 13, at 850 (dismissing \$500 amount as trivial) *with* Casto, *First Congress*, *supra* note 241, at 1112 (citing British Foreign Office Records for individual debts to the British).

262. *See* Casto, *First Congress*, *supra* note 241, at 1113 (noting effect of § 11 with respect to common law tort actions).

263. *See* Judiciary Act of 1789 § 11, 1 Stat. at 78-79 (limiting jurisdiction for suits involving assigned promissory notes); *see also* Casto, *First Congress*, *supra* note 241, at 1114 ("If a note had been assigned, there would be no jurisdiction unless the court would have had jurisdiction of a suit commenced by the payee.").

264. Casto, *First Congress*, *supra* note 241, at 1114.

265. *See* U.S. CONST. art. III, § 2 (granting diversity jurisdiction).

Third, the Judiciary Act limited the Supreme Court's ability to review state decisions on federal and constitutional law.<sup>266</sup> For the Supreme Court to review a state court decision, the case had to question the constitutionality of (1) a treaty or federal statute, (2) a state statute, or (3) the interpretation of the Constitution or a federal statute, and the state court had to rule against the federal claim.<sup>267</sup> Thus, the Court could not review cases where the state court upheld a federal right, even if it misinterpreted the Constitution to reach this decision.<sup>268</sup> So neither the Supreme Court nor inferior courts had jurisdiction over some cases "arising under this Constitution," federal law, and federal treaties,<sup>269</sup> even though they clearly fell within the judicial power of the United States.<sup>270</sup> Section 25 also limited the Supreme Court's alienage jurisdiction over state cases; it could only review state decisions that "invalidated or misconstrued treaties."<sup>271</sup> Also, the Supreme Court could not review state cases based on diversity.<sup>272</sup> These restrictions had the potential to undermine a uniform interpretation of the Constitution and federal law, to hamper international relations, and to obstruct national unity, but Congress still prevented the Supreme Court from reviewing these cases.<sup>273</sup>

Fourth, the Judiciary Act of 1789 limited mandamus jurisdiction. It did not give federal courts the authority to issue writs of mandamus against federal officers, even though this is within the judicial power.<sup>274</sup> Congress did not grant the courts this power until 1962.<sup>275</sup>

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266. See FALLON ET AL., *supra* note 239, at 29, *quoted in* H. REP. NO 108-614, at 8 n.31 (explaining limits on Supreme Court's jurisdiction under Section 25 of the Judiciary Act).

267. See Judiciary Act of 1789, ch. 20 § 25, 1 Stat. 73, 85-87 (limiting Supreme Court review of state court decisions).

268. See Casto, *First Congress*, *supra* note 241, at 1118 (noting when Court could not review state decision).

269. See U.S. CONST. art III, § 2, cl. 1 (setting out the elements of the judicial power).

270. See Casto, *First Congress*, *supra* note 241, at 1118 (noting that cases clearly within the judicial power could arise "that were excluded from the combined appellate and original jurisdiction of the federal courts").

271. See *id.* at 1118-19 (noting the lack of alienage jurisdiction).

272. See *id.* at 1119 (noting that the Court lacked jurisdiction over diversity cases from state courts).

273. See *id.* at 1119-20 (stating that the Supreme Court's inability to review alienage cases could affect claims of British citizens and its inability to review diversity cases could discourage interstate commerce).

274. See *McClung v. Silliman*, 19 U.S. 598, 604 (1821) (noting the "United States have not thought it proper to delegate that power [mandamus against a federal officer] to their own courts").

275. See 28 U.S.C. § 1361 (2000) (originally enacted as Pub. L. No. 87-748, § 1(a), 76 Stat. 744, 744 (1962)) (granting the federal district courts mandamus jurisdiction for federal officers).

Fifth, the Judiciary Act of 1789 restricted the federal courts' habeas corpus jurisdiction. Under Section 14, federal courts could only grant writs of habeas corpus to individuals who were in federal custody, held under federal law, or were defendants or witnesses in federal court.<sup>276</sup> A prisoner in state custody could not raise a habeas claim in federal court, even if his constitutional rights were at stake.<sup>277</sup>

After the Judiciary Act passed, Attorney General Randolph<sup>278</sup> suggested that Congress remove even more cases from the Supreme Court's appellate jurisdiction.<sup>279</sup> He observed that though the Constitution created the Supreme Court, Congress gave it its "first motion," and that the lower courts would not exist unless Congress wanted them.<sup>280</sup> He argued that Congress should use this authority to the point that "some cases within the judicial power of the United States could not be filed in federal court, could not be removed to a federal court, and could not be appealed to a federal court."<sup>281</sup>

Thus, the first Congress, which included many of those who wrote and ratified Article III, not only thought that it had the power to restrict the federal courts' jurisdiction, but it also did so. Despite the effect on national uniformity, international relations, and personal rights, Congress prevented the courts from exercising part of the judicial power.

## 2. 1930s

The Norris-LaGuardia Act limited the federal courts' ability to enjoin labor disputes.<sup>282</sup> Congress passed it in a second wave of reforms after the

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276. See Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 73, 81–82 (allowing only federal prisoners habeas relief).

277. See LOW & JEFFRIES, *supra* note 19, at 243 (noting that in 1867 Congress expanded the writ of habeas corpus to include people in state custody).

278. See 2 FARRAND 1937, *supra* note 102, at 123–27, *quoted in* Casto, *First Congress*, *supra* note 241, at 1121 n.136 (explaining that he did not sign Constitution partly due to lack of limits on judiciary); see also 3 ELLIOTT, *supra* note 85, at 572, *cited in* Casto, *First Congress*, *supra* note 241, at 1121 n.136 (defending Congress's broad power over Court's appellate jurisdiction).

279. See Casto, *First Congress*, *supra* note 241, at 1121 (recounting Randolph's preference for a pre-trial removal system rather than appellate review of state court cases).

280. AM. STATE PAPERS, Misc. No. 17 (Dec. 31, 1790), *quoted in* Casto, *First Congress*, *supra* note 242, at 1122.

281. Casto, *First Congress*, *supra* note 241, at 1122.

282. Norris-LaGuardia Act, Pub. L. No. 72-65, § 1, 47 Stat. 70, 70 (1932) (*codified at* 29 U.S.C. § 101 (2000)).



judicial abuses surrounding the Pullman Strike of 1894.<sup>283</sup> It prevented any federal court<sup>284</sup> from issuing any temporary restraining order, temporary injunction, or permanent injunction in any case involving a labor dispute<sup>285</sup> by removing the courts' jurisdiction unless the cases fell into narrow statutory exceptions and the courts followed carefully defined procedures.<sup>286</sup> Hence, Congress used its power to limit federal court jurisdiction in order to dictate procedure and limit the available remedies.

In 1934, Congress passed the Hiram Johnson Acts to limit inferior court jurisdiction.<sup>287</sup> It withdrew their jurisdiction to review certain administrative orders regarding public utility rates. Even if the parties had diverse citizenship or a constitutional claim, the district courts could not hear these cases.<sup>288</sup> Once again, Congress used its power to regulate federal court jurisdiction to remove cases that would otherwise have been within the judicial power of the United States.

### 3. 1940s

Congress passed the Emergency Price Controls Act of 1942 to regulate and stabilize prices and rents during World War II.<sup>289</sup> The Act laid out an administrative review process for any regulations or price schedules set by the Price Administrator.<sup>290</sup> Congress created the Emergency Court of Appeals and gave it exclusive jurisdiction over the Administrator's decisions.<sup>291</sup> Its rulings were subject to Supreme Court review,<sup>292</sup> but it had no power to issue

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283. See OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 17 (2d. ed. 1984) (stating that the Norris-LaGuardia Act was a second wave of reforms in response to *In re Debs*, 158 U.S. 564 (1895)).

284. Norris-LaGuardia Act § 13(d), 47 Stat. at 73 (defining "court of the United States").

285. *Id.* § 1, 47 Stat. at 70.

286. See *id.* §§ 4, 7, 47 Stat. at 70–71 (codified at 29 U.S.C. §§ 104, 107) (setting out limits and exceptions for labor injunctions).

287. See The Johnson Acts, Pub. L. No. 73-222, ch. 283, 48 Stat. 775 (1934) (codified at 28 U.S.C. § 1331, et seq. (2000)) (limiting the federal district courts' jurisdiction to enjoin or suspend certain public utilities decisions).

288. See *id.* (stating that the given diversity and federal question cases were outside of federal jurisdiction).

289. See Emergency Price Control Act of 1942, Pub. L. No. 77-421, ch. 26, § 1, 56 Stat. 23, 23–24 (repealed 1946) (stating purposes of the Act).

290. See *id.* § 203, 56 Stat. at 31 (creating an administrative review process for regulations and price schedules).

291. See *id.* § 204(a), 56 Stat. at 31–32 (creating the Emergency Court of Appeals).

292. See *id.* § 204(d), 56 Stat. at 32–33 (allowing a writ of certiorari from the Emergency

temporary restraining orders or interlocutory decrees.<sup>293</sup> No other district or circuit court had jurisdiction over these orders, even though they clearly arose under federal law.<sup>294</sup>

Congress passed the Portal-to-Portal Act of 1947 to correct the Supreme Court's misinterpretation of the Fair Labor Standards Act of 1938.<sup>295</sup> This Act deprived all courts—federal and state—of jurisdiction over certain cases against employers for failure to pay minimum or overtime wages under three federal laws.<sup>296</sup> Hence, Congress used its power to limit the jurisdiction of the federal courts to correct what it considered a judicial mistake, and it removed a certain class of cases arising under federal law from all courts in the nation.

#### 4. 1960s

The Voting Rights Act of 1965<sup>297</sup> dictated how certain states could change their voter qualifications and procedures.<sup>298</sup> If the Attorney General did not object to the change, the state could file in the District Court for the District of Columbia for a declaratory judgment that the change would not abridge the right to vote based on color or race.<sup>299</sup> A three-judge panel would hear the case

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Court of Appeals to the Supreme Court).

293. See *id.* § 204(c), 56 Stat. at 32 (limiting Emergency Court's jurisdiction to issue injunctions and interlocutory decrees).

294. See *id.* § 204(a), 56 Stat. at 31–32 (giving the Emergency Court exclusive jurisdiction).

295. See Portal-to-Portal Act, ch. 52, § 1(a), 61 Stat. 84, 84–85 (1947) (codified at 29 U.S.C. § 252(d) (2000)) (objecting to judicial interpretations of Fair Labor Standards Act of 1938); see also *Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary, House of Representatives*, 108th Cong. 12–13 (2004) [hereinafter *Marriage Hearing*] (statement of Phyllis Schlafly) (stating that Portal-to-Portal Act prevented Court from enforcing liability under *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)); CONG. RESEARCH SERV., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* (Johnny H. Killian & George A. Costello eds., 1992), S. DOC. NO. 103-6, at 791, quoted in *Marriage Hearing*, *supra* at 54 (noting that Portal-to-Portal Act extinguished back pay claims that arose from Court interpretations of the Fair Labor Standards Act).

296. See Portal-to-Portal Act § 2(d), 61 Stat. at 86 (removing jurisdiction from state and federal courts over claims for employer's failure to pay minimum or overtime wages under Fair Labor Standards Act of 1938).

297. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 439 (codified in part at 42 U.S.C. § 1973c (2000)).

298. See 42 U.S.C. § 1973c (explaining how to change voter qualifications and procedures).

299. See *id.* (setting out declaratory judgment procedure).

subject to Supreme Court review.<sup>300</sup> Thus, Congress used its power over federal jurisdiction to favor certain federal rights.

In the Medicare Act,<sup>301</sup> Congress used its power over federal court jurisdiction to insulate certain findings from both administrative and judicial review.<sup>302</sup> All of these determinations were based on federal law, and hence, they were within "the judicial Power of the United States."<sup>303</sup> But by law, Congress exempted them from the jurisdiction of the courts.

### 5. 1990s–2000s

The Anti-Terrorism and Effective Death Penalty Act of 1996 limits federal jurisdiction in several ways.<sup>304</sup> First, it restricts federal courts' ability to hear second or successive habeas corpus applications.<sup>305</sup> Second, it deprives all courts of jurisdiction to review final deportation orders against aliens who have committed certain criminal offenses.<sup>306</sup> Third, it insulates the Attorney General's decision to hold an alien awaiting deportation from judicial review, including habeas corpus.<sup>307</sup> "The law thus appears to foreclose all judicial review of deportation orders."<sup>308</sup>

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>309</sup> also limits federal court jurisdiction. It repeals a provision that "authorized judicial review in the circuit courts of appeals and guaranteed

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300. *See id.* (mandating that a panel from the District Court for the District of Columbia hear the case).

301. Health Insurance for the Aged Act (Medicare Act), Pub. L. No. 89-97, §§ 101–22, 79 Stat. 290, 353 (1965).

302. *See* 42 U.S.C. § 1395w-4(i)(1) (protecting specified findings from judicial review).

303. U.S. CONST. art. III, §§ 1–2.

304. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

305. *See id.* § 106, 110 Stat. at 1220 (amending 28 U.S.C. § 2254(b) to limit successive and second habeas applications).

306. *See* 8 U.S.C. § 1252(a)(2)(C) (2000) (removing jurisdiction from all courts over deportation orders for criminals); *see also* Chemerinsky, *supra* note 14, at 297 (discussing same).

307. *See* Chemerinsky, *supra* note 14, at 297 n.9 (explaining how 8 U.S.C. §§ 1228(c) and 1252(e)(2)(A) combine to repeal 8 U.S.C. § 1535(e)(2), thus limiting an alien's habeas possibilities).

308. *Id.* at 297.

309. Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

habeas corpus upon detention."<sup>310</sup> It limits judicial review to review of a final order for "all questions of law and fact," including constitutional questions, surrounding a deportation.<sup>311</sup> It insulates some of the Attorney General's discretionary decisions regarding deportation from judicial review because it withdraws jurisdiction over those matters from the courts.<sup>312</sup> It also limits the remedies federal courts may grant in deportation cases.<sup>313</sup>

The 107th Congress passed a flurry of limits on federal courts' jurisdiction. It protected the Attorney General's decisions regarding rewards from judicial review.<sup>314</sup> It insulated the plans and special use permit for the World War II Memorial from all judicial review.<sup>315</sup> It prevented federal courts from reviewing certain estimates and decisions of the Under Secretary of Transportation<sup>316</sup> and Federal Aviation Administrator.<sup>317</sup> Another law<sup>318</sup> prohibits courts from reviewing certain determinations of the President.<sup>319</sup> The Trade Act of 2002 prevents federal courts from reviewing duties on wool.<sup>320</sup> Under the USA PATRIOT Act of 2001,<sup>321</sup> if the Attorney General detains an alien or certifies that an alien is a national security risk, the federal courts can review these decisions only through the habeas corpus proceedings delineated in that Act.<sup>322</sup> Senator Daschle sponsored a law that authorized the Secretary of

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310. Chemerinsky, *supra* note 14, at 297.

311. See 8 U.S.C. § 1252(b)(9) (2000), *quoted in* Chemerinsky, *supra* note 14, at 297 (restricting all judicial review of a deportation proceeding to review of the final order).

312. See 8 U.S.C. § 1252(a)(2)(A)–(B) (2000) (listing decisions not subject to judicial review); *see also* Chemerinsky, *supra* note 14, at 297 (focusing on 8 U.S.C. § 1252(a)(2)(B)).

313. See 8 U.S.C. § 1252(e) (limiting remedies available for orders brought under § 1225(b)(1)).

314. See 21st Century Dept. of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 201(a), 116 Stat. 1758, 1767–71 (2002) (*codified at* 28 U.S.C. § 530C(b)(L)(v)) (shielding decisions regarding rewards from judicial review).

315. Act of May 28, 2001, Pub. L. No. 107-11, § 3, 115 Stat. 19, 19 (removing memorial's location, special use permit, and actions of two federal commissions from judicial review).

316. See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 118(a), 115 Stat. 597, 625 (2001) (*codified at* 49 U.S.C. § 44940) (protecting Under Secretary's decisions in this chapter).

317. *Id.* § 119(d)(3), 115 Stat. at 629 (*codified at* 49 U.S.C. § 45301(b)(1)(B)) (shielding Administrator's cost determinations).

318. Small Business Liability Relief & Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

319. See *id.* § 102, 115 Stat. at 2356–60 (insulating certain presidential decisions from judicial review).

320. See Trade Act of 2002, Pub. L. No. 107-210, § 5101(c)(1)(D), 116 Stat. 933, 1042–46 (prohibiting judicial or administrative review of amount of duties).

321. The USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272.

322. See *id.* § 412(b), 115 Stat. at 350–52 (restricting review of the Attorney General's

Agriculture to "address promptly the risk of fire and insect infestation" in several South Dakota forests.<sup>323</sup> Besides limiting administrative review, the law stated that "any action authorized by this section shall not be subject to judicial review by any court of the United States."<sup>324</sup> Congress has also prevented courts from reviewing the decision to activate the National Disaster Medical System.<sup>325</sup> It also limited a court's ability to review documents from the National Reconnaissance Office and the possible remedies that a court can issue.<sup>326</sup> Also, federal courts cannot review the decision of whether or not to certify an act as an act of terrorism.<sup>327</sup>

In sum, these laws show that Congress has exercised its power over federal court jurisdiction in the past. It has done so on everything from administrative to constitutional issues, and it has used this power to address judicial abuses and misinterpretations. Thus, these past congressional controls further bolster the case for bills like those in the 108th and 109th Congresses.

#### *E. Federal Court Confirmation*

In addition to the text of the Constitution, its principles, the statements of the Founding Fathers, and past congressional controls, federal case law confirms Congress's power to restrict federal court jurisdiction. Four categories of principles arise from the case law to illustrate this. The first involves the Supreme Court's appellate jurisdiction, the second covers the lower courts' jurisdiction, the third looks at whether federal claims must be heard in federal court, and the fourth examines judicial treatment of past limitations.

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decisions).

323. 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 706(b)(1)–(2), 116 Stat. 820, 865.

324. *Id.* § 706(j), 116 Stat. at 868–69.

325. The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, § 102(a), 116 Stat. 594, 599–603.

326. *See* Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 502(a), 116 Stat. 2383, 2405–07 (2002) (limiting the availability of judicial review and possible remedies).

327. *See* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 102(1)(C), 116 Stat. 2322, 2324 (stating that determination of whether something is an act of terrorism is not subject to judicial review).

### 1. Congress & The Supreme Court's Appellate Jurisdiction

One set of principles confirms that Congress can control the Supreme Court's appellate jurisdiction. First, the case law shows that the Constitution defines the maximum limits for the Court's appellate jurisdiction, but Congress does not have to confer all of it. As Chief Justice Ellsworth noted, while the Constitution vests original and appellate jurisdiction in the Supreme Court,<sup>328</sup> the latter is "qualified; inasmuch as it is given 'with such exceptions and under such regulations, as the Congress shall make.'<sup>329</sup> Many have argued that because the Constitution gives the Supreme Court jurisdiction, Congress cannot limit the appellate jurisdiction.<sup>330</sup> Ellsworth ridiculed this argument,<sup>331</sup> and Justice Chase explained its errors:

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.<sup>332</sup>

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328. See *Wiscart v. Dauchy*, 3 U.S. 321, 327 (1796) (reciting that the Constitution gives the Court jurisdiction).

329. *Id.*; see also *Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838) (noting Congress's power to define the Court's powers for its original jurisdiction and "to distribute the residue of the judicial power between this and the inferior courts"); *Ex parte McCordle*, 74 U.S. 506, 512–13 (1868) (noting that Constitution grants jurisdiction to the Court subject to Congress); *The Francis Wright*, 105 U.S. 381, 385 (1882) (same).

330. See *Turner v. Bank of N. Am.*, 4 U.S. 8, 9–10 (1799) (arguing that Congress could not limit the power that the Constitution gave to the judiciary); see also *Cary v. Curtis*, 44 U.S. 236, 244–45 (1845) (same); *Ex parte McCordle*, 74 U.S. 506, 509 (1868) (same); see also *Durousseau v. United States*, 10 U.S. 307, 313–14 (1810) (arguing that the Court has jurisdiction unless Congress makes an exception); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 513–20 (1898) (same).

331. See *Turner v. Bank of N. Am.*, 4 U.S. 8, 10 n.1 (1799) (pointing out that this argument leads to the false idea that the Court can distribute and regulate its own power without the legislature).

332. *Id.*; see also *Cary v. Curtis*, 44 U.S. 236, 245 (1845) (reiterating that Congress distributes and organizes the Court's power); *Ex parte McCordle*, 74 U.S. 506, 512–13 (1868) (noting that Congress controls the appellate jurisdiction); *United States v. Young*, 94 U.S. 258, 259 (1877) (same); *Am. Constr. Co. v. Jacksonville, Tampa, & Key West Ry. Co.*, 148 U.S. 372, 378 (1893) (same); *United States v. Bitty*, 208 U.S. 393, 399–400 (1908) (same).

Chief Justice Marshall conceded that the Constitution would give the Court jurisdiction if Congress had not defined the appellate jurisdiction in the Judiciary Act of 1789.<sup>333</sup> But he noted that while Article III gives appellate powers, those powers "are limited and regulated by the Judicial Act, and by such other acts as have been passed on the subject."<sup>334</sup> Thus, the Court has rejected the argument that its appellate jurisdiction comes directly from the Constitution.<sup>335</sup> Instead, Article III:

delineated only the great outlines of the judicial power; leaving the details to congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own. The distribution and appropriate exercise of the judicial power, must therefore be made by the laws passed by congress. . . .<sup>336</sup>

Thus, the Constitution sets the maximum extent of the Court's appellate and original jurisdiction; Congress cannot expand either one. But, aside from the original jurisdiction, Congress can allow the Court to exercise only a small part of its appellate jurisdiction.<sup>337</sup> If Congress does not confer appellate jurisdiction, then the Court does not have it.<sup>338</sup>

333. See *Durousseau v. United States*, 10 U.S. 307, 313–14 (1810) (observing that if the Congress had not defined the Court's appellate jurisdiction, it would have the full jurisdiction listed in the Constitution).

334. *Id.* at 314; see also *id.* (stating that Congress's affirmative description of the Court's jurisdiction implies "a negative on the exercise of such appellate power" not included in the statute); *Cary v. Curtis*, 44 U.S. 236, 245 (1845) (noting that Congress defines and distributes the Court's appellate jurisdiction); *Ex parte McCardle*, 74 U.S. 506, 512–13 (1868) (same); *United States v. Young*, 94 U.S. 258, 259 (1877) (same); *Am. Constr. Co. v. Jacksonville, Tampa, & Key West Ry. Co.*, 148 U.S. 372, 378 (1893) (same); *Palmore v. United States*, 411 U.S. 389, 401 (1973) (same).

335. See *Turner*, 4 U.S. at 10 n.1 (rejecting argument that the Court's jurisdiction comes directly from the Constitution); *Cary v. Curtis*, 44 U.S. 236, 244–45 (1845) (same); *Durousseau*, 10 U.S. at 313–14 (same); *Ex parte McCardle*, 74 U.S. 506, 513 (1868) (same).

336. *Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838).

337. See, e.g., *Turner v. Bank of N. Am.*, 4 U.S. 8, 10 n.1 (1799) ("[C]ongress is not bound . . . to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant."); *Cary v. Curtis*, 44 U.S. 236, 245 (1845) (same); *Daniels v. R.R. Co.*, 70 U.S. 250, 254 (1866) (same); *United States v. Young*, 94 U.S. 258, 259 (1877) (same); *The Francis Wright*, 105 U.S. 381, 385–86 (1882) (same); *Am. Constr. Co. v. Jacksonville, Tampa, & Key West Ry. Co.*, 148 U.S. 372, 378 (1893) (same); *Palmore v. United States*, 411 U.S. 389, 401 (1973) (same).

338. See *Wiscart v. Dauchy*, 3 U.S. 321, 327 (1796) ("If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction. . . ."); *Durousseau*, 10 U.S. at 318 (stating that Congress's exceptions "are implied from the intent manifested by the affirmative description of its powers"); *Barry v. Mercein*, 46 U.S. 103, 119 (1847) (noting that Congress defines the scope of the Court's appellate jurisdiction); *United States v. Young*, 94 U.S. 258, 259 (1877) (same); *The Francis Wright*, 105 U.S. at 385 (same); *Am. Constr. Co. v.*

Second, the case law indicates that the Supreme Court interprets jurisdictional statutes narrowly. On one hand, if the statute grants jurisdiction, then the Court presumes that it lacks all jurisdiction beyond the terms of the statute. For example, Ellsworth and Marshall noted that if Congress does not confer appellate jurisdiction, then the Court does not have it.<sup>339</sup> Nevertheless, some have argued that the Court has appellate jurisdiction unless Congress makes an exception.<sup>340</sup> Marshall agreed that this would be true "if the supreme court had been created by law, without describing its jurisdiction."<sup>341</sup> He continued: "But as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described."<sup>342</sup> Hence, he disclaimed "all jurisdiction not given by the constitution, or by the laws of the United States," and refused to hear a case unless a statute gave the Court jurisdiction.<sup>343</sup> The Court has consistently held to Marshall's and Ellsworth's position,<sup>344</sup> even after the Civil War.<sup>345</sup>

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Jacksonville, Tampa, & Key West Ry. Co., 148 U.S. 372, 378 (1893) (same); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517 (1898) (same); *United States v. Bitty*, 208 U.S. 393, 399–400 (1908) (same).

339. See *Wiscart v. Dauchy*, 3 U.S. 321, 327 (1796) (noting that the Court could not exercise appellate jurisdiction without a congressional statute); *United States v. More*, 7 U.S. 159, 173 (1805) (dismissing because by affirmatively granting appellate jurisdiction, Congress implicitly prohibited the Court from exercising other powers).

340. See, e.g., *More*, 7 U.S. at 172–73 (summarizing the Attorney General's argument).

341. *Id.* at 173; see also *Ex parte Bollman*, 8 U.S. 75, 93 (1807) (noting that the jurisdiction of common law courts depends on the common law, but "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction"); *Durousseau v. United States*, 10 U.S. 307, 313–14 (1810) (observing that if the Congress had not defined and limited the Court's appellate jurisdiction with the Judiciary Act, it would have had the full jurisdiction listed in the Constitution).

342. *More*, 7 U.S. at 173; see also *Durousseau*, 10 U.S. at 314, 318 (noting that the first Congress's affirmative description of the Court's appellate jurisdiction prohibits it from exercising powers not given).

343. *Ex parte Bollman*, 8 U.S. at 93; see also *id.* at 94–100 (casting issue as whether any statute gave the Court "the power to award a writ of habeas corpus" in this case); *Rhode Island v. Massachusetts*, 37 U.S. 657, 722–24 (1838) (examining the Judiciary Act of 1789 to determine if it had jurisdiction over this case).

344. See *Barry v. Mercein*, 46 U.S. 103, 119 (1847) (noting that Congress controls the appellate jurisdiction).

345. See *Ex parte McCardle*, 74 U.S. 506, 513 (1868) (stating that the Court has no appellate jurisdiction unless given by Congress); *United States v. Young*, 94 U.S. 258, 259 (1877) (same); *The Francis Wright*, 105 U.S. 381, 385 (1882) (same); *Am. Constr. Co. v. Jacksonville, Tampa, & Key West Ry. Co.*, 148 U.S. 372, 378 (1893) (same); *United States v. Bitty*, 208 U.S. 393, 399–400 (1908) (same).



On the other hand, if a statute withdraws previously granted jurisdiction, then the Court presumes that it can still hear cases not mentioned in the terms of the statute. Thus, Congress can remove jurisdiction that it has previously given the Court,<sup>346</sup> and the Court must respect that decision.<sup>347</sup> Yet it can still exercise jurisdiction that Congress previously gave and has not taken away.<sup>348</sup> This does not undermine Congress's power over jurisdiction; rather, these decisions affirm that power.<sup>349</sup> It simply means that in a given instance, Congress did not use its power.<sup>350</sup>

Third, the case law sets out the criteria for the Court to hear a case.<sup>351</sup> It must be within the judicial power of the United States as outlined by the Constitution.<sup>352</sup> It must be within the Court's appellate jurisdiction, as set in Congress's statutes.<sup>353</sup> The case must not fall inside any constitutional or congressional exceptions to that jurisdiction.<sup>354</sup> Last, the case must be brought to the Court according to the procedure set by Congress.<sup>355</sup> These four criteria

346. See William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 238–39 (1973) (noting that Congress repealed the 1867 law to prevent the Court from invalidating the Military Reconstruction Act).

347. See *Ex parte McCordle*, 74 U.S. at 513–15 (dismissing case due to Congress's explicit exception).

348. See *id.* at 515 (stating that the 1868 law repealed only jurisdiction given in the 1867 law and nothing else); *Ex parte Yerger*, 75 U.S. 85, 106 (1868) (same).

349. See *Ex parte Yerger*, 75 U.S. at 98, 102–03 (affirming that the Court's appellate jurisdiction was subject to Congress's control); *Felker v. Turpin*, 518 U.S. 651, 658–61 (1996) (tracing past limits on federal court jurisdiction); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (stating that Congress must clearly state its intent to remove a constitutional issue from judicial review).

350. See *Ex parte Yerger*, 75 U.S. at 102, 105 (noting that no act of Congress affected Court's jurisdiction); *Felker*, 518 U.S. at 661 (same for AEDPA); *Webster*, 486 U.S. at 603 (same for National Security Act).

351. See *Clarke v. Bazadone*, 5 U.S. 212, 214 (1803) (developing criteria for appeals); *Ex parte Bollman*, 8 U.S. 75, 93 (1807) (disclaiming "all jurisdiction not given by the constitution, or by the laws of the United States").

352. See *Clarke*, 5 U.S. at 214 (stating that case must be within "the judicial authority of the United States"); *Ex parte Bollman*, 8 U.S. at 93 (disclaiming "all jurisdiction not given by the constitution").

353. See *Clarke*, 5 U.S. at 214 (stating that the Court must have "appellate jurisdiction in all such cases"); see also *supra* notes 328–38 and accompanying text (discussing congressional control of appellate jurisdiction).

354. See *Clarke*, 5 U.S. at 214 (stating that case cannot be "within any exception made by the constitution or by any act of congress"); *Barry v. Mercein*, 46 U.S. 103, 120 (1847) (dismissing habeas claim due to amount-in-controversy); *Ex parte McCordle*, 74 U.S. 506, 514 (1868) (dismissing the case due to Congress's explicit exception).

355. See *Clarke*, 5 U.S. at 214 (dismissing the case because Congress had "not authorized an appeal or writ of error"); see also *Wiscart v. Dauchy*, 3 U.S. 321, 327 (1796) (stating that Court must follow Congress's procedures); *Barry*, 46 U.S. at 119 (same); *United States v.*

essentially form two principles: the Constitution must allow the Court to hear the appeal, and Congress must do so as well.<sup>356</sup>

Fourth, the case law shows that Congress's reason for limiting the Supreme Court's jurisdiction is irrelevant. When faced with a Congress that withdrew its jurisdiction to prevent it from striking down a law,<sup>357</sup> the Court responded: "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."<sup>358</sup> When Congress passed laws to correct Supreme Court misinterpretation<sup>359</sup> or to curb judicial abuses,<sup>360</sup> the Court has upheld them.<sup>361</sup> In sum, for constitutional purposes, Congress's motive is meaningless.<sup>362</sup>

Fifth, the case law shows that Congress can make exceptions to the Court's jurisdiction, but it cannot dictate decisions. The Court has struck down only one law that purported to restrict the Court's jurisdiction,<sup>363</sup> and it did so because Congress tried to dictate how the Court should treat evidence.<sup>364</sup> Congress can either let the Court speak or force it to be quiet,<sup>365</sup> but it cannot tell the Court what to say.<sup>366</sup>

Young, 94 U.S. 258, 259 (1877) (same).

356. See *Daniels v. R.R. Co.*, 70 U.S. 250, 254 (1866) (stating that for the Court to hear appeal, both Constitution and an act of Congress must allow it); see, e.g., *Ex parte Bollman*, 8 U.S. at 94–100 (interpreting Judiciary Act of 1789 to find jurisdiction before proceeding to merits); *Rhode Island v. Massachusetts*, 37 U.S. 657, 722–24 (1838) (same); *Clarke*, 5 U.S. at 214 (dismissing case because Congress had not allowed appeals or writs of error from the Northwestern territory's general court).

357. See *Van Alstyne*, *supra* note 346, at 238–39 (noting that Congress repealed the law allowing the Court to hear habeas appeals to prevent the Court from striking down the Military Reconstruction Act).

358. *Ex parte McCardle*, 74 U.S. 506, 514 (1868).

359. See *supra* notes 295–96 and accompanying text (noting that the Portal-to-Portal Act corrected the Court).

360. See *supra* notes 282–86 and accompanying text (noting how the Norris-LaGuardia Act responded to judicial excess).

361. See *infra* note 417 and accompanying text (upholding the Norris-LaGuardia Act).

362. See, e.g., *United States v. Bitty*, 208 U.S. 393, 400 (1908) (upholding asymmetrical appeals without examining Congress's reasons).

363. See *United States v. Klein*, 80 U.S. 128, 146–47 (1871) (noting that Congress had exceeded its authority).

364. See *id.* at 147 (saying that the law directs the court as to what effect a pardon must have).

365. See *id.* at 145 (stating that Congress could have validly denied the right to appeal for a class of cases).

366. See *id.* at 146–47 (stating that the law was not an exception but "passed the limit which separates the legislative from the judicial power"). *But see* *Robertson v. Seattle Audubon*

## 2. Congress & The Inferior Courts' Jurisdiction

The next set of case law principles deals with Congress's control over jurisdiction of inferior federal courts. First, the case law shows that Congress can limit the lower federal courts' jurisdiction to any degree at all. Because it did not have to create them,<sup>367</sup> "Congress is not bound . . . to enlarge the jurisdiction of the [inferior] federal courts to every subject, in every form, which the constitution might warrant."<sup>368</sup> Chief Justice Ellsworth and others agreed.<sup>369</sup> Because Congress created the inferior courts by statute, they cannot exercise power beyond what the statute allows.<sup>370</sup> They also must exercise that power according to the procedures that Congress laid out.<sup>371</sup> Furthermore, "the power which congress possess[es] to create courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects."<sup>372</sup> Congress can exercise this power "so

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Soc'y, 503 U.S. 429, 440–41 (1992) (concluding that Congress did not violate *Klein* by amending the law underlying two pending cases). Congress passed a law declaring that compliance with new standards would satisfy the statutory requirements at issue in two pending cases, which it named. *Id.* at 435. The Ninth Circuit concluded that Congress had violated *Klein*. *Id.* at 436. The Supreme Court concluded that Congress simply used the named cases to identify the provisions it was amending, and thus, did not violate *Klein*. *Id.* at 437–41.

367. See, e.g., *Lockerty v. Philips*, 319 U.S. 182, 187 (1943) (confirming that Congress could have chosen not to create inferior courts); *Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962) (same).

368. *Turner v. Bank of N. Am.*, 4 U.S. 8, 10 n.1 (1799); see also *Stevenson v. Fain*, 195 U.S. 165, 167 (1904) (stating that "the jurisdiction of the Circuit Courts depends upon some act of Congress"); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 55 (D.D.C. 1973) (stating that "Congress may impart as much or as little of the judicial power as it deems appropriate").

369. See, e.g., *Turner*, 4 U.S. at 10 (noting that the federal trial courts had only a small part of their possible jurisdiction); *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) (same); *Mayor v. Cooper*, 73 U.S. 247, 252 (1868) (noting that if Congress does not grant full constitutional jurisdiction, "the power lies dormant").

370. See *Cary v. Curtis*, 44 U.S. 236, 245 (1845) (noting that authority of "courts created by statute" depends on the statute); see also *United States v. Hudson & Goodwin*, 11 U.S. 32, 33 (1812) (noting that Congress's statutes limit lower court jurisdiction); *Cooper*, 73 U.S. at 252 (saying if Congress does not grant full constitutional jurisdiction, "the power lies dormant"); *Kentucky v. Powers*, 201 U.S. 1, 24 (1906) (stating that lower courts can only exercise jurisdiction given by statute); *Ladew v. Tenn. Copper Co.*, 218 U.S. 357, 368 (1910) (same); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 232–34 (1922) (same); *Senate Select Comm.*, 366 F. Supp. at 55 (same).

371. See *Cary v. Curtis*, 44 U.S. 236, 245 (1845) (noting that Congress controls federal court procedures); *Cooper*, 73 U.S. at 251–52 (same); *Venner v. Great N. Ry. Co.*, 209 U.S. 24, 35 (1908) (same).

372. *United States v. Hudson & Goodwin*, 11 U.S. 32, 33 (1812); see also *Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838) (stating that Congress defines scope of lower courts' jurisdiction); *Sheldon*, 49 U.S. at 449 (same); *Venner*, 209 U.S. at 35 (same); *Kline v. Burke*

far as they [think] necessary and proper,"<sup>373</sup> even if this means that the inferior courts have no federal question jurisdiction.<sup>374</sup> Any other position would "elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely."<sup>375</sup> Congress also determines whether inferior courts have exclusive or concurrent jurisdiction with the state courts.<sup>376</sup> It can also limit the remedies lower courts can use by restricting their ability to issue certain injunctions<sup>377</sup> or by prohibiting all courts except one from issuing certain injunctions.<sup>378</sup>

Second, the case law outlines the necessary criteria for the lower courts to hear a case. Both the Constitution and an act of Congress must give the court authority to hear the case.<sup>379</sup> That is, the case must be within the judicial power and within the court's statutory jurisdiction. Congress cannot give the inferior courts more power than the Constitution allows, but it can give them less.<sup>380</sup> But if the case does not satisfy both criteria, then the court cannot hear it.<sup>381</sup>

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Constr. Co., 260 U.S. 226, 234 (1922) (same).

373. *Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838).

374. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 561 (1962) (noting that Congress conferred very little federal question jurisdiction until 1875).

375. *Cary*, 44 U.S. at 245.

376. *See Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517 (1898) (noting that Congress determines whether the inferior courts have exclusive or concurrent jurisdiction).

377. *See Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (upholding the Norris-LaGuardia Act).

378. *See Lockerty v. Philips*, 319 U.S. 182, 188 (1943) (upholding the Emergency Price Control Act); *see also supra* notes 289–94 and accompanying text (discussing the Emergency Price Control Act).

379. *Mayor v. Cooper*, 73 U.S. 247, 252 (1868) (stating that both the Constitution and Congress must give jurisdiction); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233 (1922) (same); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 55 (D.D.C. 1973) (same).

380. *See Cooper*, 73 U.S. at 252 (1868) (stating that Congress cannot give lower courts more jurisdiction than the Constitution allows); *see also supra* notes 367–78 and accompanying text (showing that Congress can limit lower court jurisdiction).

381. *See, e.g., Turner v. Bank of N. Am.*, 4 U.S. 8, 10 (1799) (dismissing case because Congress had not granted jurisdiction); *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812) (same); *Stevenson v. Fain*, 195 U.S. 165, 170 (1904) (same); *Kentucky v. Powers*, 201 U.S. 1, 35–40 (1906) (same); *Ladew v. Tenn. Copper Co.*, 218 U.S. 357, 368–69 (1910) (same); *Senate Select Comm.*, 366 F. Supp. at 61 (same); *see also Sheldon v. Sill*, 49 U.S. 441, 450 (1850) (reversing lower court for the same reason).

### 3. Federal Courts & Federal Claims

The third set of case law principles shows that the Constitution does not require that a federal judge hear every federal claim. Many parties have claimed a constitutional right to have their case heard in federal court,<sup>382</sup> but these claims have uniformly failed.<sup>383</sup> Even if the parties satisfy the constitutional requirements for diversity<sup>384</sup> or state a federal claim,<sup>385</sup> a federal court cannot hear the case unless it meets the statutory requirements.<sup>386</sup> The Court has upheld this rule in cases with due process,<sup>387</sup> habeas corpus,<sup>388</sup> and First Amendment implications,<sup>389</sup> as well as for criminal cases.<sup>390</sup> Though all of these parties asserted federal or constitutional claims, the Court could not hear the case absent a statutory permit from Congress. Hence, the Constitution does not require that federal courts hear all federal claims.

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382. See *supra* note 330 and accompanying text (summarizing past arguments).

383. See *supra* notes 331–38 and accompanying text (showing that the Court has rejected these arguments); see also *Lockerty*, 319 U.S. at 187 (noting that Congress could have left all plaintiffs to state courts with appeal to the Supreme Court); *Palmore v. United States*, 411 U.S. 389, 401 (1973) (noting that until 1875 state courts were the only forum for most federal law questions); *Stone v. Powell*, 428 U.S. 465, 476–80 (1976) (showing that Congress has restricted habeas jurisdiction and can change those limits).

384. See *infra* notes 395–99, 405 and accompanying text (summarizing judicial treatment of diversity limits).

385. See *supra* notes 331–38 and *infra* notes 408–18 and accompanying text (noting judicial treatment of federal question limits).

386. See *supra* notes 351–56, 379–81 and accompanying text (setting forth criteria for a court to hear a case).

387. See *Barry v. Mercein*, 46 U.S. 103, 119–20 (1847) (dismissing habeas claim in child custody dispute due to amount in controversy); *United States v. Bitty*, 208 U.S. 393, 399–400 (1908) (dismissing defendant’s claim that asymmetrical appeals are unconstitutional).

388. See *Barry*, 46 U.S. at 119–20 (1847) (dismissing habeas claim due to amount in controversy); *Ex parte McCardle*, 74 U.S. 506, 514–15 (1868) (dismissing appeal for lack of jurisdiction); *Kentucky v. Powers*, 201 U.S. 1, 35–36, 40 (1906) (reversing for lack of jurisdiction); *Powell*, 428 U.S. at 476–80 (tracing Congress’s limits on federal habeas jurisdiction).

389. See *Ex parte McCardle*, 74 U.S. at 507–08, 514–15 (stating facts and dismissing for lack of jurisdiction); see also *Van Alstyne*, *supra* note 346, at 236 (stating facts).

390. See *United States v. More*, 7 U.S. 159, 173–74 (1805) (noting that Congress had not given the Court criminal appellate jurisdiction for the District of Columbia); *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812) (noting lack of criminal jurisdiction for federal courts).

#### 4. Federal Courts & Past Limitations

The last set of case law principles shows how the federal courts have upheld and implemented Congress's restrictions on their jurisdiction. First, the Supreme Court has applied the restrictions on its own appellate jurisdiction. Chief Justice Marshall<sup>391</sup> and others<sup>392</sup> dismissed appeals from state courts due to Section 25 of the Judiciary Act of 1789. After the Civil War, Chief Justice Chase dismissed a habeas appeal after Congress specifically withdrew the Court's jurisdiction.<sup>393</sup> The Court later upheld a statute that limited the scope of its appellate jurisdiction over admiralty cases and the means of invoking it.<sup>394</sup>

The Court has also upheld limits on the federal courts' diversity jurisdiction. Ellsworth and Chase both upheld the Assignee Clause of the Judiciary Act of 1789<sup>395</sup> against arguments that it unconstitutionally limited the courts' jurisdiction.<sup>396</sup> Although the amount in controversy provisions limited diversity jurisdiction,<sup>397</sup> the Court dismissed an alien's habeas corpus petition due to this restriction.<sup>398</sup> It also upheld other requirements for diversity cases.<sup>399</sup>

Even with constitutional rights at stake, the Court has applied Congress's limits on jurisdiction. It respected restrictions on habeas appeals, even with First Amendment rights in question.<sup>400</sup> In order to protect executive

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391. See *Gordon v. Caldcleugh*, 7 U.S. 268, 270 (1806) (dismissing case after state court granted federal claim).

392. See *Walker v. Taylor*, 46 U.S. 64, 68 (1847) (dismissing appeal after state court granted the federal claim).

393. See *Ex parte McCardle*, 74 U.S. 506, 515 (1868) (dismissing appeal after Congress removed jurisdiction).

394. See *The Francis Wright*, 105 U.S. 381, 386–87 (1882) (upholding restriction on admiralty appeals to questions of law presented in a bill of exceptions).

395. See *supra* notes 263–65 and accompanying text (explaining the Assignee Clause).

396. See *Turner v. Bank of N. Am.*, 4 U.S. 8, 10 n.1 (1799) (upholding the Assignee Clause).

397. See *supra* notes 259–62 and accompanying text (explaining the amount in controversy requirement).

398. See *Barry v. Mercein*, 46 U.S. 103, 120–21 (1847) (dismissing petition due to amount in controversy).

399. See *Ladew v. Tenn. Copper Co.*, 218 U.S. 357, 367–69 (1910) (dismissing diversity case that was not brought in the district where one party resided); *Stevenson v. Fain*, 195 U.S. 165, 170 (1904) (dismissing diversity case over land grants as Congress had not granted jurisdiction).

400. See *Ex parte McCardle*, 74 U.S. 506, 508, 515 (1868) (explaining libel charges and dismissing case); see also *Van Alstyne*, *supra* note 346, at 236, 245–48 (noting facts and how the Court could have heard the case).

discretion,<sup>401</sup> Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>402</sup> Even so, the Court upheld the Act's limits on judicial review and effectively vacated lower court rulings,<sup>403</sup> a decision lower courts have followed.<sup>404</sup>

Second, federal courts have upheld and implemented restrictions on lower court jurisdiction. Like *Ellsworth* and *Chase*, Justice Grier upheld the Assignee Clause for the lower courts.<sup>405</sup> The Court dismissed habeas corpus petitions that did not satisfy the amount in controversy, thus applying the Judiciary Act of 1789 to the lower courts.<sup>406</sup> It also denied all claims that lower courts can have implied rights of jurisdiction.<sup>407</sup>

Federal courts have also upheld Congress's limits on the lower courts' ability to hear federal law questions. The lower courts upheld the Medicare Act's limits on judicial review<sup>408</sup> in the face of due process and separation of powers challenges.<sup>409</sup> The Seventh Circuit upheld the Selective Training and Service Act's restrictions on judicial review of draft board decisions.<sup>410</sup> Despite possible First Amendment and due process claims,<sup>411</sup> Congress limited the courts, and thus, the court could not review the board's decision.<sup>412</sup> The

401. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (stating that protecting executive discretion from the court "can fairly be said to be the theme of the [IIRIRA]").

402. See *supra* notes 309–13 and accompanying text (explaining the IIRIRA).

403. See *Reno*, 525 U.S. at 492 (vacating Ninth Circuit's judgment with instructions to vacate the district court's decision due to 8 U.S.C. § 1252(g)).

404. See, e.g., *Mapoy v. Carroll*, 185 F.3d 224, 230 (4th Cir. 1999) (concluding that § 1252(g) deprived district court of jurisdiction over habeas petition); *Hatami v. Ridge*, 270 F. Supp. 2d 763, 767 (E.D. Va. 2003) (same).

405. See *Sheldon v. Sill*, 49 U.S. 441, 449–50 (1850) (reversing lower court due to Assignee Clause).

406. See *Barry v. Mercein*, 46 U.S. 103, 120 (1847) (dismissing due to amount in controversy requirement).

407. See *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812) (concluding that criminal jurisdiction is not within the lower courts' implied powers).

408. See *supra* notes 301–03 and accompanying text (explaining the limits on judicial review contained in the Medicare Act).

409. See *Am. Soc'y of Dermatology v. Shalala*, 962 F. Supp. 141, 145–46 (D.D.C. 1996) (outlining arguments that barring judicial review is unconstitutional, rejecting them, and concluding that court lacked jurisdiction).

410. See *United States v. Messersmith*, 138 F.2d 599, 600 (7th Cir. 1943) (noting that the Act (then 50 U.S.C. § 310(a)) limited review of local draft board decisions regarding conscientious objectors).

411. See *id.* at 600–01 (summarizing defendant's ministerial and "arbitrary and capricious" claims).

412. See *id.* at 601–02 (upholding the limit on judicial review and refusing to review

Supreme Court sustained the Voting Rights Act provisions that funneled issues exclusively to the District Court for the District of Columbia despite due process objections.<sup>413</sup> According to Chief Justice Warren, Congress exercised part of its power to "ordain and establish" inferior federal tribunals through this law.<sup>414</sup> The lower courts have followed the Supreme Court<sup>415</sup> in upholding the Illegal Immigration and Immigrant Responsibility Act.<sup>416</sup> The Supreme Court also upheld limits on the remedies a lower court can issue,<sup>417</sup> even when the laws show dissatisfaction with the courts.<sup>418</sup>

Hence, the case law supports Congress's authority to limit the jurisdiction of the federal courts. It shows that Congress can restrict the Supreme Court's appellate jurisdiction and the lower courts' entire jurisdiction. Congress cannot direct the results of a case, but it can limit jurisdiction for any reason. Also, federal claims do not have to be brought in federal courts. Last, the case law demonstrates how the courts have recognized Congress's Exceptions Clause power.

In sum, Part III explains why laws that limit the jurisdiction of the federal courts, laws like those before Congress,<sup>419</sup> are fully constitutional. First, these laws comply with a plain reading of Article III because they simply remove a certain class of cases from the court's jurisdiction.<sup>420</sup> Second, they are consistent with the principles that produced and were incorporated into the Constitution, principles like checks and balances, legislative preeminence, and skepticism of judicial power.<sup>421</sup> Third, these laws are consistent with the Founders' intent that Congress use the Exceptions Clause to limit judicial

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evidence).

413. See *supra* notes 297–300 and accompanying text (explaining the Voting Rights Act of 1965); *South Carolina v. Katzenbach*, 383 U.S. 301, 318 (1966) (same); see also *id.* at 301 (summarizing due process argument); *id.* at 332 (stating that Congress did not exceed its power with this law).

414. *Katzenbach*, 383 U.S. at 331.

415. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 492 (1999) (upholding IIRIRA).

416. See *Mapoy v. Carroll*, 185 F.3d 224, 230 (4th Cir. 1999) (deciding that district court lacked subject matter jurisdiction due to 8 U.S.C. § 1252(g)); *Hatami v. Ridge*, 270 F. Supp. 2d 763, 767 (E.D. Va. 2003) (same).

417. See *Lockerty v. Philips*, 319 U.S. 182, 188 (1943) (upholding Emergency Price Control Act of 1942); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (upholding the Norris-LaGuardia Act).

418. See *supra* notes 282–86, 290–94, and accompanying text (explaining the Norris-LaGuardia Act and the Emergency Price Control Act).

419. See *supra* Part II (outlining the recent and pending legislation).

420. See *supra* Part III.A (interpreting Article III).

421. See *supra* Part III.B (surveying foundational principles).



power.<sup>422</sup> Fourth, these laws are consistent with Congress's consistent understanding of its power, an understanding it has translated into action in varying degrees many times.<sup>423</sup> Fifth, these laws are consistent with federal case law, which recognizes, upholds, and implements Congress's restrictions on the jurisdiction of the lower courts and the appellate jurisdiction of the Supreme Court.<sup>424</sup> The consistent voices of the Constitution, the Founders, the foundational principles, congressional practice, and court precedent all validate Congress's power to limit the jurisdiction of the federal courts in the ways proposed by the 108th and 109th Congresses.

#### IV. Common Constitutional Objections to Congress's Control

Part IV analyzes many of the common arguments against the constitutionality of these proposals. While academic debate has produced a plethora of theories and critiques,<sup>425</sup> this Part focuses on the objections lodged against the bills proposed during the 108th and 109th Congresses.<sup>426</sup>

##### A. The Essential Function Theory

One of the earliest theoretical limits on Congress's power over federal jurisdiction, the essential functions theory, alleges that Congress cannot use its Exceptions Clause power to "destroy the essential role of the Supreme Court."<sup>427</sup> While Henry Hart left the "essential role" undefined, others have filled the void.<sup>428</sup> Leonard Ratner argued that the Court must resolve "inconsistent or conflicting interpretations of federal law by state and federal courts," and "maintain the supremacy of federal law" against state challenges.<sup>429</sup>

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422. See *supra* Part III.C (outlining the Founding Fathers' debates regarding the Exceptions Clause).

423. See *supra* Part III.D (explaining Congress's past limits on the federal courts' jurisdiction).

424. See *supra* Part III.E (surveying the case law on Congress's power over federal jurisdiction).

425. See Clinton, *supra* note 13, at 742 n.3 (listing academic literature on point); Velasco, *supra* note 13, at 671 n.1 (same).

426. See Part II (explaining the recent and pending bills).

427. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

428. See *id.* (noting the impossibility of defining the essential functions).

429. Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960).

He reflected Holmes's belief that the Court must enforce the Supremacy Clause.<sup>430</sup> Critics of the recent bills posed several other essential functions: to "uphold[] the Constitution,"<sup>431</sup> to protect the rule of law,<sup>432</sup> to bring uniformity and supremacy to federal law,<sup>433</sup> to protect personal freedoms,<sup>434</sup> to protect minorities,<sup>435</sup> and to serve as the ultimate interpreter of the Constitution.<sup>436</sup> Each of the pending bills would destroy all of these functions. They give each state supreme court the final word on marriage, the Pledge of Allegiance, and public religious expression, and states would clearly respond differently. Hence, these bills would violate this theory of the Constitution.

However, some have described the essential function theory as a "textual phantom" and an example of "constitutional wishful thinking."<sup>437</sup> First, the Constitution does not mention "essential functions," and neither did the Founders when they discussed the Exceptions Clause.<sup>438</sup> Neither Congress nor the federal courts have recognized the theory when using or interpreting that Clause.<sup>439</sup> Hence, this theory lacks "textual and subsequent judicial support."<sup>440</sup>

430. See OLIVER WENDELL HOLMES, COLLECTED PAPERS 295–96 (1920), *quoted in Constitution Hearing, supra* note 10, at 10 (stating that nation would be in peril if judges could not invalidate state laws).

431. THE CENTURY FOUNDATION, UNCERTAIN JUSTICE: POLITICS IN AMERICA'S COURTS 206, 217 (2002), *quoted in* H. REP. NO. 108-691, at 96 (2004).

432. See, e.g., *Marriage Hearing, supra* note 295, at 14 (arguing that the Court's essential function is to protect the rule of law).

433. See, e.g., H. REP. NO. 108-614, at 54, 121, 139 (2004) (arguing that the Court's essential function is ensuring uniformity and finality of federal law); *Marriage Hearing, supra* note 295, at 14, 17 (statement of Michael Gerhardt) (same).

434. See, e.g., H. REP. NO. 108-691, at 92 (arguing that courts are "the very protector of those freedoms").

435. See, e.g., *id.* at 61–62, 71 (arguing that the judiciary protects minorities).

436. See, e.g., *Marriage Hearing, supra* note 295, at 16 (statement from Michael Gerhardt) (arguing that one of the Court's essential functions is "to declare what the Constitution means").

437. *Marriage Hearing, supra* note 295, at 21, 24 (statements of Martin H. Redish).

438. See *supra* Parts III.A–C (noting neither Constitution nor Founders discussed this idea); see also Redish, *Congressional Power, supra* note 73, at 910–11 (noting Ratner's lack of historical support); Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 410 (1983) (calling concept "wholly extraconstitutional").

439. See *supra* Part III.D–E (noting that Congress and courts do not recognize the theory); see also Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611, 626 (1983) [hereinafter Berger, *Judicial Usurpation*] (noting that Congress's refusal to give federal question jurisdiction and its restrictions on the Supreme Court's habeas jurisdiction undermine the essential functions theory).

440. S. DOC. 103-6, at 787, *quoted in Marriage Hearing, supra* note 295, at 50; see also Redish, *Congressional Power, supra* note 73, at 908 (stating that the historical basis for the

Second, the essential function theory is vague. For example, what is the Court's essential function? The three early advocates of this theory provided different answers, none of which match the congressional variants.<sup>441</sup> Some functions are inherently vague,<sup>442</sup> while others are less so.<sup>443</sup> But if there is no "judicially discoverable" standard for choosing a definition, then the theory is a nonjusticiable political question and places no constraint on Congress.<sup>444</sup> The sheer multiplicity of standards strongly indicates that no definition is "constitutionally discernible."<sup>445</sup>

Third, this theory poses a choice between futility and contradiction. For example, who determines whether a function is essential or non-essential? If Congress decides, then the theory is useless. If the Court decides, then it is the judge of its own power and essentially has unlimited power.<sup>446</sup> This would contradict the Founders' devotion to checks and balances and would give unlimited power, which they feared the most, to the branch they trusted the least.<sup>447</sup>

Furthermore, the idea that the federal courts, and ultimately the Supreme Court, serve as the ultimate arbiter of the Constitution and protector of individual rights is both relatively novel<sup>448</sup> and flawed.<sup>449</sup> As the ultimate

essential functions test is "[a]t best . . . speculative and at worst . . . simply useless").

441. See Rossum, *supra* note 438, at 410–11 (noting Irving Brant's definition, preventing "the destruction or infringement of any of the mandatory requirements of the Constitution"; Archibald Cox's definition, protecting "human rights"; and Paul Brest's definition, promoting "individual rights and decision making through democratic processes").

442. See Hart, *supra* note 427, at 1365 (noting impossibility of defining essential functions).

443. See *supra* notes 429, 441 (giving Ratner's, Cox's, Brant's, and Brest's definitions of essential functions).

444. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (setting out the factors for a nonjusticiable political question); see also Velasco, *supra* note 13, at 679 (noting that Hart's indeterminate definition would be nonjusticiable).

445. See *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (noting that multiplicity of standards indicates none are "constitutionally discernible").

446. See *Marriage Hearing*, *supra* note 295, at 93 (written statement of Charles Rice) (noting that this theory makes Court "final arbiter" of its power, making it "virtually unlimited"); Rossum, *supra* note 438, at 410 (same).

447. See *supra* Part III.B.1 & III.B.3 (noting Founders' belief in checks and balances and distrust of judiciary); see also *Marriage Hearing*, *supra* note 295, at 93 (written statement of Charles Rice) (noting that if Founders intended to contradict checks and balances, they would have made their intent explicit); Rossum, *supra* note 438, at 410 (same).

448. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7–8, 58 (2004), quoted in H. REP. NO. 108-691, at 26 (2004) (pointing out that the modern view of the judiciary as the final arbiter of the Constitution is of "relative recent vintage"); LOUIS FISHER, CONG. RESEARCH SERV., *CONGRESSIONAL CHECKS ON THE JUDICIARY* 8–12 (1997), quoted in H. REP. NO. 108-614, at 125 (2004) (same).

expositor,<sup>450</sup> the Court would have supreme power over the other branches.<sup>451</sup> This would contradict all of the foundational principles.<sup>452</sup> Principles aside, the Founders clearly indicated that the courts were neither the voice of the Constitution nor the guarantor of liberty.<sup>453</sup> While the Supreme Court does interpret the Constitution, it does so to resolve cases within its jurisdiction, not to fulfill some special constitutional role.<sup>454</sup>

Setting aside the law, making the Court the Delphic oracle of the Constitution is dangerous policy.<sup>455</sup> While critics of the recent bills point to school desegregation and interracial marriage cases,<sup>456</sup> they forget that the same

449. One might argue that *Marbury v. Madison*, 5 U.S. 137 (1803), gives the Court this function. However, *Marbury* deals with the Supreme Court's role after it has jurisdiction over a case. It does not apply to the question at hand—whether the Court has (or must have) jurisdiction over certain cases. Furthermore, Marshall did not view the Court as creating law through its decisions. Instead, he "assumed that 'law' was a universal body of principles" and viewed judges as "merely stating 'what the law was.'" See G. Edward White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and Lessons of History*, 63 JUDICATURE 162, 163 (1979), quoted in Virginia Armstrong, *The Inevitability of Inseparability: Religion, Ethics, and Federal Judicial Politics*, 43 S. TEX. L. REV. 35, 58 (2001). In short, this was a task of identifying the law, not creating it.

450. See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (referring to the Supreme Court as "ultimate interpreter of the Constitution"); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (same); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating "the federal judiciary is supreme in the exposition of the law of the Constitution").

451. But see *supra* Part III.B.2 & III.B.3.a–b (noting the Founders' belief in legislative preeminence and their belief that judiciary was weaker than Congress and the weakest of the three branches).

452. See *supra* Part III.B.2–3 (outlining the principles of legislative preeminence and judicial skepticism); see also Berger, *Judicial Usurpation*, *supra* note 439, at 645–46 (same).

453. See *supra* Part III.B.3.d (noting Founders' insistence that judiciary was not ultimate arbiter or enforcer of rights); see also Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) ("Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction.").

454. See Wechsler, *supra* note 453, at 1006 (noting that federal courts handle constitutional questions as part of resolving cases in their jurisdiction, not because of a special function); see also *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89–90 (1947) (stating that the Court interprets the Constitution only in contests between litigants); *Younger v. Harris*, 401 U.S. 37, 52 (1971) (same).

455. See KRAMER, *supra* note 448, at 228–29, cited in H. REP. NO. 108-691, at 29 (2004) (recounting negative examples of judicial action). See generally STEPHEN P. POWERS & STANLEY ROTHMAN, *THE LEAST DANGEROUS BRANCH?: CONSEQUENCES OF JUDICIAL ACTIVISM* (2002) (using social science evidence to show how "judicial intervention in public policy has often brought undesirable consequences," even for the groups that the courts intended to benefit).

456. See, e.g., H. REP. NO. 108-691, at 70 (using *Loving v. Virginia* and *Brown v. Bd. of Ed.* to argue against H.R. 2028); H. REP. NO. 108-614, at 122 (2004) (arguing the same for H.R. 3313).

Court blocked abolition efforts,<sup>457</sup> blessed segregation,<sup>458</sup> impeded social welfare legislation,<sup>459</sup> and allowed Japanese internment.<sup>460</sup> Many people—including some conservatives<sup>461</sup>—applauded when Attorney General Bill Pryor enforced the federal court order against Roy Moore, thus equating court decisions with the Constitution and disobedience to the courts with disregard for the law.<sup>462</sup> But when Stephen Douglas voices the same ideas to defend the Supreme Court on slavery, they assume a less attractive hue.<sup>463</sup> Hence, one must remember that the Constitution and the Supreme Court are distinct, and the latter neither defines nor outranks the former.<sup>464</sup>

Moreover, producing uniformity is not the federal courts' "essential function" under the Constitution. First, this is a policy argument at best, not a constitutional one. Though the federal courts can provide uniform federal law, this unwritten consequence does not trump the text of Article III.<sup>465</sup> Uniformity is a by-product of resolving cases within the Court's jurisdiction, not an inherent function.<sup>466</sup> Most likely, even Justice Story viewed uniformity as

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457. See *Dred Scott v. Sandford*, 60 U.S. 393, 451–52 (1856) (affirming slavery as constitutional).

458. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (upholding racial segregation in railroad cars).

459. See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905) (invalidating limits on bakery workday length).

460. See *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (affirming Japanese internment).

461. See, e.g., R. Albert Mohler, Jr., *The Battle of Montgomery: Where Should Christians Stand?*, [http://www.lifeway.com/lwc/article\\_main\\_page/0,1703,A%253D154838%2526M%253D150019,00.html](http://www.lifeway.com/lwc/article_main_page/0,1703,A%253D154838%2526M%253D150019,00.html) (noting disapproval of Moore's actions from Dr. Richard Land and Dr. Albert Mohler of the Southern Baptist Convention and from Jay Sekulow of the American Center for Law and Justice) (last visited May 10, 2005) (on file with the Washington and Lee Law Review).

462. See David Mattingly, *Judge Suspended over Ten Commandments*, Aug. 23, 2003, at <http://www.cnn.com/2003/LAW/08/22/ten.commandments/index.html> (noting the controversy surrounding Judge Roy Moore's actions) (on file with the Washington and Lee Law Review).

463. See 3 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 9 (Roy Basler ed., 1953) (quoting Douglas on how Supreme Court determines the law). *But see id.* at 268 (noting Lincoln's view that a judicial decision is final for a given case, but stating that Supreme Court does not irrevocably fix policy).

464. See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 630–33 (1981) (stating that supremacy of federal law does not always require that federal courts be supreme).

465. See Rossum, *supra* note 438, at 389 (pointing out that those who oppose Congress's power to make exceptions must deny an explicit textual provision in favor of the implied power of judicial review).

466. See Wechsler, *supra* note 453, at 1006 (noting Court's primary role of deciding cases in its jurisdiction).

"desirable policy" rather than "constitutional command" because he wanted Congress to expand the Judiciary Act.<sup>467</sup> Federal courts do not have to hear all federal cases.<sup>468</sup> The Founders regarded uniformity as dispensable,<sup>469</sup> especially if the alternative was unrestrained power.<sup>470</sup> This may not often be wise policy, but unwise policy is not always unconstitutional.<sup>471</sup>

Second, even as policy, the uniformity argument is flawed. Leaving issues in the federal court system does not automatically unify the law. It merely reduces the number of patches in the quilt until the Supreme Court speaks because the lower courts decisions have a limited scope.<sup>472</sup> Also limiting jurisdiction does not completely defeat the interest in uniformity because Congress can always reinstate it. Holmes's uniformity argument<sup>473</sup> simply requires that "Congress have the *power* to check the states," not that Congress be required to use it.<sup>474</sup>

In sum, the essential functions theory lacks support, violates the Constitution's foundational principles, and may be uselessly vague. Also, the proposed essential functions contradict the Founders and their guiding principles, as well as confuse policy with constitutionality. Therefore, this "textual phantom" does not endanger the proposed legislation.<sup>475</sup>

### B. The Mandatory Jurisdiction Theory

Despite its several mutations, the mandatory jurisdiction theory insists that Article III requires that Congress vest the entire judicial power somewhere in the federal court system. Story first articulated the theory,<sup>476</sup> but it remained

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467. Gunther, *supra* note 13, at 903.

468. See *supra* Part III.E.3 (noting that federal courts do not have to hear all federal claims).

469. See Berger, *Judicial Usurpation*, *supra* note 439, at 628 (arguing that Judiciary Act, habeas limits, and *The Federalist* show that the Founders viewed uniformity as dispensable).

470. See *id.* at 644 (arguing that the Framers departed from uniformity and that "nothing exceeded [their] dread of unrestrained power").

471. See *supra* notes 158–59 and accompanying text (noting the difference between policy and the Constitution).

472. See H. REP. NO. 108-614, at 34 (2004) (noting that federal courts do not automatically establish uniformity).

473. See *supra* note 430 (noting Holmes's view).

474. Redish, *Congressional Power*, *supra* note 73, at 909.

475. *Marriage Hearing*, *supra* note 295, at 21, 24 (statements of Martin Redish).

476. See *Martin v. Hunter's Lessee*, 14 U.S. 304, 331 (1816) (stating that "whole judicial power . . . should be . . . vested either in an original or appellate form" in federal courts); 3 STORY, COMMENTARIES, *supra* note 135, § 1696 (arguing that Article III at least requires that

rejected for almost two centuries.<sup>477</sup> Some argue that federal review must be available for all constitutional claims.<sup>478</sup> Thus, Congress could remove a case from either the Supreme Court's appellate jurisdiction or the lower courts' jurisdiction, but not both.<sup>479</sup> Others argue that the Constitution requires Congress to give federal courts jurisdiction over almost every type of case or controversy listed in Article III.<sup>480</sup> Either way, the three major bills before the 108th and 109th Congresses would fail this test because they remove constitutional issues from the federal court system.<sup>481</sup> Professor Amar argues that federal courts must have jurisdiction over federal question, admiralty, and public ambassador cases (first-tier cases), but may also hear the other types of cases and controversies (second-tier cases).<sup>482</sup> This version allows Congress to limit federal appeals for the second-tier cases, but it prevents Congress from excluding first-tier cases from the federal system.<sup>483</sup> Amar's variation gives Congress more leeway, but critics of the recent bills combined his and Story's theories.<sup>484</sup> Even under Amar, the three recent bills would fail because they remove first-tier constitutional cases completely from the federal court system.<sup>485</sup>

However, this mandatory jurisdiction theory lacks historical support. The debates over the Exceptions Clause do not reveal any support for this two-tiered notion, and neither Congress nor the Supreme Court has utilized it.<sup>486</sup> Neither

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federal courts hear the cases preceded by "all" in Article III).

477. See Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1035 (1982), quoted in Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 270–71 (1985) [hereinafter Amar, *Neo-Federalist*] (noting that Story's theory "no longer deserves to be taken seriously").

478. See Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 144 (1982) [hereinafter Redish, *Constitutional Limitations*] (summarizing Sager's position).

479. See *id.* at 145 (summarizing consequences of Sager's argument).

480. See Clinton, *supra* note 13, at 749–50 (summarizing the thesis of this article).

481. See Part II (showing that all bills remove constitutional claims from all federal courts).

482. See Amar, *Neo-Federalist*, *supra* note 477, at 208–10 (summarizing two-tier thesis).

483. See *id.* at 255 (summarizing the effect of two-tier theory on Congress's use of its exceptions power).

484. See, e.g., H. REP. NO. 108-614, at 149–51 (2004) (citing Story and Amar against H.R. 3313); *Marriage Hearing*, *supra* note 295, at 141 (letter from Michael Gerhardt) (same).

485. See Part II (showing that all bills remove constitutional claims from all federal courts).

486. See Berger, *Judicial Usurpation*, *supra* note 439, at 632–33 (noting that neither Article III's legislative history, the Judiciary Act of 1789, nor 175 years of Supreme Court rulings support Sager's (and by extension Amar's) theory); see also *supra* Part III.C–E (same).

Sager<sup>487</sup> nor Amar<sup>488</sup> points to any concrete evidence that undermines Congress's power or shows that the Founders believed this theory. Even Story forms a weak foundation for the theory because many of his statements were tentative.<sup>489</sup> Yet, Amar argues that the Judiciary Act of 1789 supports his two-tiered theory.<sup>490</sup> He alleges that the purported limits on Supreme Court review in Section 25 formed an "optical illusion" that fooled the Court.<sup>491</sup> Yet Chief Justice Marshall and others dismissed cases due to Section 25, and Congress ultimately repealed this limit.<sup>492</sup> The contrast between this thin support<sup>493</sup> and the consistent view of the Founders, Congress, and the Supreme Court erodes an already weak theory.<sup>494</sup>

Moreover, the mandatory theory poses several textual problems. Under this theory, the Vesting and Extending Clauses of Article III command Congress to give the federal courts jurisdiction over "all cases" and some of the "controversies" listed in Section 2.<sup>495</sup> As a result, Amar argues that if Congress makes an exception for a first-tier case, it must create another court to hear that case.<sup>496</sup> First, this argument overlooks the fact that other constitutional provisions use the same language as the Vesting Clause in a non-mandatory

487. See Redish, *Constitutional Limitations*, *supra* note 478, at 146 (showing that Sager's historical evidence does not undermine Congress's power); Gunther, *supra* note 13, at 915 (same).

488. See Casto, *Orthodox View*, *supra* note 62, at 91 (noting the lack of direct evidence that anyone associated with "the framing, ratification, or initial implementation of the Constitution" followed the two-tier thesis).

489. See Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 59 (1975-76) (noting lack of support for Story); Casto, *Orthodox View*, *supra* note 62, at 92 (showing that Story's statements were tentative).

490. See Amar, *Neo-Federalist*, *supra* note 477, at 259-65 (applying two-tier thesis to Judiciary Act of 1789).

491. See Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1531 (1990) (noting that Supreme Court failed to see the "optical illusion" in Section 25).

492. See *supra* notes 391-92 and accompanying text (noting how Supreme Court upheld and used Section 25).

493. See Harrison, *supra* note 52, at 247 ("If [Amar] is correct, the text waited almost two hundred years for its true interpreter."); see also Casto, *Orthodox View*, *supra* note 62, at 94 (stating that only two people in 200 years have given Amar's theory any credence).

494. See *supra* Part III (noting consistency of Constitution, its principles, Founders, Congress, and courts).

495. See Clinton, *supra* note 13, at 749-50 (arguing that "shall" in Article III is a mandatory term); Amar, *Neo-Federalist*, *supra* note 477, at 231-35 (same).

496. See Amar, *Neo-Federalist*, *supra* note 477, at 255 (arguing that Congress can make an exception from the Court's appellate jurisdiction for a first-tier case only if it creates another Article III body to hear that case).



fashion.<sup>497</sup> Second, this theory fails to distinguish between "jurisdiction" and "the judicial power."<sup>498</sup> Even if the Vesting and Extending Clauses were commands, they deal with the judicial power. When Article III says the Court "shall have appellate jurisdiction," that jurisdiction is subject to Congress's exceptions.<sup>499</sup> Third, Amar argues that Congress can remove controversies from the federal system, but not cases.<sup>500</sup> Yet the Exceptions Clause contradicts this view by using the term "cases."<sup>501</sup> Also, anytime Congress removes a controversy, it has also removed a case because controversies are merely types of cases.<sup>502</sup> Fourth, under this theory, Congress could not exercise its Exceptions Clause power unless it first created the lower courts, even though the language of the Exceptions Clause contains no such condition.<sup>503</sup> In sum, because this theory focuses so much on a few words, it fails to give a coherent picture of Article III.<sup>504</sup> Given these problems, this theory poses no serious threat to bills like those considered in the 108th and 109th Congresses.

### C. Separation of Powers

Critics of the recent bills argue that limiting federal jurisdiction violates the separation of powers. First, they allege that the bills allow Congress to undermine federal courts by infringing on their historical role as the ultimate expositor of the Constitution and the defender of personal liberties.<sup>505</sup> By preventing the Court from invalidating a potentially unconstitutional law,

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497. See Velasco, *supra* note 13, at 697–700, 702–04 (showing that other provisions use "shall" as a self-executing term); Harrison, *supra* note 52, at 211–12, 216–17 (same).

498. See *supra* notes 51–56 and accompanying text (distinguishing "judicial power" and "jurisdiction").

499. U.S. CONST. art. III, § 2.

500. See *supra* note 482 and accompanying text (arguing that Congress may treat cases and controversies differently).

501. U.S. CONST., art. III, § 2, cl. 2.

502. See *supra* notes 62–63 and accompanying text (distinguishing "cases" and "controversies").

503. See Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637–38 (1990) (noting that Amar's theory contradicts a "holistic" view of Article III, which allows Congress not to create lower courts and still make exceptions to Supreme Court's appellate jurisdiction).

504. See *id.* at 1636 (arguing that Amar is guilty of selective literalism, focusing too much on certain words to the exclusion of the rest of the provision).

505. See, e.g., H. REP. NO. 108-614, at 30, 103, 121, 136 (2004) (arguing that H.R. 3313 violates the separation of powers by undermining courts' role as the Constitution's ultimate interpreter); *Marriage Hearing*, *supra* note 295, at 142 (letter from Michael Gerhardt) (stating that separation of powers prevents Congress from using its power to undermine courts).

Congress undermines its constitutional function.<sup>506</sup> Second, they insist that the bills allow Congress to expand its power by influencing decisions.<sup>507</sup> Third, they argue that the bills allow Congress to bypass the proper mechanisms for constitutional change: constitutional amendments, appointing new judges, and appellate review.<sup>508</sup>

Though this objection sounds constitutional, it suffers from four flaws. First, it rests on suspect assumptions. It falsely assumes that the Court serves as the ultimate arbiter of the Constitution's meaning and as the protector of individual rights.<sup>509</sup> Yet Chief Justice Marshall knew that he did not undermine the Court's role when he dismissed cases because Congress had not granted jurisdiction.<sup>510</sup> This objection also assumes that these bills expand Congress's power. But they neither allow Congress to decide cases nor mandate that the courts reach particular outcomes.<sup>511</sup> They simply prevent federal courts from hearing certain cases.<sup>512</sup>

Second, the separation of powers objection relies on a "superficial understanding" of this principle.<sup>513</sup> The Founders did not isolate each branch from the others.<sup>514</sup> Instead, they set up a government of "separated institutions sharing powers."<sup>515</sup> Hence, interaction between Congress and the judiciary

506. See, e.g., *Marriage Hearing*, *supra* note 295, at 14, 74 (noting Gerhardt's statement that using a power to undermine the effectiveness of another branch violates separation of powers).

507. See *Constitution Hearing*, *supra* note 10, at 11 (statement of Michael Gerhardt) (arguing that H.R. 3799 opens the door to allowing Congress to direct results in cases); H. REP. NO. 108-614, at 150-51 (same).

508. See *Constitution Hearing*, *supra* note 10, at 8-9 (statement of Michael Gerhardt) (arguing that H.R. 3799 does not satisfy proper means of constitutional change); H. REP. NO. 108-614, at 136 (noting that constitutional change only occurs via amendments or judicial decisions); *Marriage Hearing*, *supra* note 295, at 15 (same).

509. See *supra* Part III.B.3.d (discussing the role of the Court).

510. See *supra* notes 391-92 and accompanying text (showing that Marshall and others implemented limits on the Court's jurisdiction); see also H. REP. NO. 108-614, at 16 (noting that this happened after *Marbury v. Madison*).

511. See, e.g., H. REP. NO. 108-614, at 18, 37, 47 (2004) (noting that H.R. 3313 does not dictate results or transfer judicial power to the Congress); H. REP. NO. 108-691, at 24 (2004) (same); Redish, *Congressional Power*, *supra* note 73, at 923 (noting that Congress cannot give the Court jurisdiction and direct it to rule in a given way).

512. See *supra* notes 363-66 and accompanying text (noting that Congress can prevent the courts from speaking but cannot tell them how to speak).

513. Rossum, *supra* note 438, at 414.

514. See *supra* Parts III.B.1 (showing the interaction between separation of powers and checks and balances).

515. Rossum, *supra* note 438, at 414 (quoting R. NEUSTADT, *PRESIDENTIAL POWER* 33 (1960)).

poses a problem only if Congress were "to exclude federal court jurisdiction and itself attempt to adjudicate individual cases."<sup>516</sup> Because these bills do not overturn decisions, adjudicate cases, or mandate results, they do not violate the separation of powers.<sup>517</sup>

Third, this objection disregards the twin principle of separation of powers—checks and balances. The Founders implemented this principle to restrain governmental power by giving each branch weapons for its constitutional self-defense.<sup>518</sup> This principle alone indicates that Congress must have a means of combating the judiciary's power of judicial review, something that the other foundational principles also emphasize.<sup>519</sup> Not only do the Founders' statements confirm that the Exceptions Clause fills this role,<sup>520</sup> but so does Herbert Wechsler, a noted scholar of federal jurisdiction.<sup>521</sup>

Fourth, this separation of powers objection assumes that only judicial appointments, amendments, and appellate review check the judiciary. While constitutional amendments can accomplish this, they are not Congress's check; they belong to the people for use against the whole government.<sup>522</sup> Likewise, appellate review does not check judicial power. It allows the courts to exercise self-restraint, but the Founders did not rely on the "parchment barriers" of self-restraint.<sup>523</sup> To qualify as a legitimate restraint, one entity must apply the mechanism against another.<sup>524</sup> While judicial appointments are a way for

516. *Marriage Hearing*, *supra* note 295, at 25 (statement of Martin Redish); *see also id.* at 22 (noting that separation of powers prevents Congress from hearing cases, directing results, or overturning cases).

517. *See id.* at 22, 25, 77 (noting that separation of powers problems are unlikely if Congress completely excludes federal court jurisdiction over a category of cases).

518. THE FEDERALIST NO. 73, *supra* note 8, at 492 (Alexander Hamilton); *see also supra* Part III.B.1 (showing need for checks and balances).

519. *See supra* Part III.B (explaining how the foundational principles affect Congress's dealings with the courts).

520. *See supra* Part III.C (noting the Founders' statements on the purpose and effect of the Exceptions Clause).

521. *See Wechsler*, *supra* note 453, at 1005 (noting that that under the Exceptions Clause, "Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction").

522. *See also Berger*, *Judicial Usurpation*, *supra* note 439, at 625 (criticizing the amendment argument because it seeks to trump the text of Article III, § 2, with the implied power of "activist judicial review").

523. THE FEDERALIST NO. 48, *supra* note 8, at 331 (James Madison).

524. *See* THE FEDERALIST NO. 51, *supra* note 8, at 346–47 (James Madison) (discussing the need for each branch to restrain the others); *see also id.* at 347–49 (noting that the Constitution made ambition counteract ambition "to control the abuses of government" through the three branches and federalism); THE FEDERALIST NO. 73, *supra* note 8, at 492 (Alexander Hamilton)

Congress to limit the judiciary, they are a very indirect control. In light of the Founders' fear of unlimited power, skepticism toward the judiciary, and belief in legislative preeminence,<sup>525</sup> it is hard to believe that they would have left Congress only one very attenuated means of "self-defence."<sup>526</sup>

#### D. Judicial Independence

Opponents of these jurisdiction limiting bills criticize the legislation for eroding judicial independence.<sup>527</sup> Like some academics,<sup>528</sup> congressional critics argue that these bills undermine federal judges' independence from Congress, which is essential if the courts are to check Congress and protect the freedoms of minorities.<sup>529</sup> They point out that the Founders insisted upon an independent judiciary<sup>530</sup> and warned against a dependent one.<sup>531</sup>

This theory, however, poses constitutional problems. First, it essentially equates judicial independence with unrestrained autonomy, which is a suspect definition of the concept. During the Founding era, independence applied only to decisions, not jurisdiction.<sup>532</sup> The Founders used the term to indicate that

(remarking on the "insufficiency of a mere parchment delineation" and the need for each branch to have "constitutional and effectual power of self-defence").

525. See *supra* Part III.B (explaining these foundational principles).

526. THE FEDERALIST NO. 73, *supra* note 8, at 492 (Alexander Hamilton); Berger, *Judicial Usurpation*, *supra* note 439, at 645. Critics might argue that this "unchecked powers" argument works both ways because the Exceptions Clause leaves Congress with unrestrained power. But this oversimplifies the matter. To limit the Court, Congress must clear the hurdles of the legislative process, with all the compromise that entails. Then the President must sign the law. Furthermore, the people check Congress's Exceptions Clause power through elections. Thus, although the Court cannot check this power, Congress is by no means unrestrained.

527. See H. REP. NO. 108-614, at 155 (2004) (arguing that H.R. 3313 undermines the independence of the federal judiciary); H. REP. NO. 108-691, at 73, 100-05 (2004) (same for H.R. 2028).

528. See, e.g., Redish, *Constitutional Limitations*, *supra* note 478, at 149 (tracing Sager's use the salary and tenure protections of Article III to argue against the Exceptions Clause); Amar, *Neo-Federalist*, *supra* note 477, at 235 (incorporating the "structural superiority of federal judges" into his two-tier theory).

529. See H. REP. NO. 108-691, at 70, 101, 103 (arguing that judicial independence protects minorities); H. REP. NO. 108-614, at 36 (arguing that judicial independence checks Congress).

530. See, e.g., H. REP. NO. 108-614, at 156-57 (citing Madison and Hamilton for judicial independence).

531. See H. REP. NO. 108-614, at 50 (quoting John Marshall on the dangers of a dependent judiciary).

532. See Berger, *Judicial Usurpation*, *supra* note 439, at 627 ("Independence requires that judges be left free to *decide* causes committed to them; it has no relevance to what jurisdiction must be conferred upon them.").

other branches could not control or influence a judge's decisions,<sup>533</sup> and thus, independence referred to salary and tenure protection, not a guaranteed scope of jurisdiction.<sup>534</sup> In fact, the Constitution's opponents feared that it gave the courts unfettered autonomy, a charge its supporters vigorously denied.<sup>535</sup> To both sides, though, a dependent judiciary meant that another branch controlled or influenced its decisions.<sup>536</sup> In addition, the Founders used the term "independence" to describe the executive branch,<sup>537</sup> and yet Congress and the courts clearly limit the president's powers.<sup>538</sup> Hence, Congress can also limit judges without rendering them dependent. Judicial independence simply underscores the difference between removing jurisdiction and influencing decisions. Congress does not violate a judge's independence as long as it forbids him from speaking to a given issue at all.<sup>539</sup> As the 109th Congress's bills satisfy this requirement, they do not compromise judicial independence.

Second, judicial independence advocates forget to balance this principle with the foundational principle of checks and balances. Judicial independence cannot mean unfettered autonomy because the Constitution recognizes no

533. See, e.g., THE FEDERALIST NO. 78, *supra* note 8, at 521 (Alexander Hamilton) (defining judicial dependence as "being overpowered, awed, or influenced" by the other branches); 2 ELLIOTT, *supra* note 85, at 480 (showing that James Wilson defined judicial dependence as a judge altering his rulings to please the legislature so as to retain office).

534. See FARRAND 1937, *supra* note 102, reprinted in 4 FOUNDERS', *supra* note 63, at 133–39 (tracing debate over Article III and showing that salary and tenure protection secure judicial independence); 2 ELLIOTT, *supra* note 85, at 480 (noting that tenure protection promotes independence); Webster, *Examination*, *supra* note 230, in FRIENDS, *supra* note 84, at 380 (same); THE FEDERALIST NO. 78, *supra* note 8, at 521 (Alexander Hamilton) (same); 3 ELLIOTT, *supra* note 85, at 517 (showing that tenure and salary protection promote independence); 1 WILSON, WORKS, *supra* note 124, at, at 326–31, quoted in 4 FOUNDERS', *supra* note 63, at 252 (same); DE TOCQUEVILLE, *supra* note 131, at 133 (same); THE FEDERALIST NO. 79, *supra* note 8, at 528 (Alexander Hamilton) (noting that salary protection promotes independence); DE TOCQUEVILLE, *supra* note 131, at 133 (same).

535. See *supra* Part III.B (outlining the opponents' arguments against the judiciary).

536. See *supra* note 534 and accompanying text (defining judicial independence); see also FEDERAL FARMER, NO. 15, in 2 STORING, *supra* note 121, at 188, quoted in 4 FOUNDERS', *supra* note 63, at 140 (arguing that the Constitution's salary protections were not sufficient to protect judicial independence).

537. See THE FEDERALIST NO. 73, *supra* note 8, at 491 (Alexander Hamilton) (discussing the president's independence from Congress in terms of his salary protections).

538. See, e.g., U.S. CONST. art. I, § 7, cl. 3 (stating that veto power is subject to override); U.S. CONST. art. II, § 2, cl. 2 (stating that treaty and appointment powers are subject to the advice and consent of the Senate); see also *United States v. Nixon*, 418 U.S. 683, 706–07 (1974) (noting that the judiciary limits executive privilege); *Clinton v. Jones*, 520 U.S. 681, 700–03 (1997) (same).

539. See *supra* notes 363–66 and accompanying text (showing that Congress can force the courts to remain silent, but it cannot tell them what to say).

unchecked powers.<sup>540</sup> Hence, it also recognizes no self-checked powers.<sup>541</sup> Instead, the Founders gave each branch the tools for constitutional "self-defence."<sup>542</sup> While the courts limit Congress with judicial review, this would give the judiciary more power than Congress if it remained unchecked.<sup>543</sup> Thus, they gave Congress power over the limits of jurisdiction.<sup>544</sup>

By way of analogy, the federal courts are like a horse in a pasture. As the horse cannot roam the prairies like a wild mustang,<sup>545</sup> the pasture must be fenced, and the Constitution determines the outer and inner boundaries of this fence.<sup>546</sup> The horse is independent in that he can roam anywhere inside the fence. The rancher cannot dictate where the horse will eat, either by command,<sup>547</sup> threat,<sup>548</sup> or promise of reward.<sup>549</sup> But the rancher can move the fence, thereby restricting the horse's access to an area he once enjoyed. When this happens, the horse has lost his independence only if independence means the ability to eat in the now off-limits territory. This would be a particularly strange definition, especially as the rancher has allowed the horse to roam and graze on vast tracts that had remained off limits for over a century.<sup>550</sup> Now he simply wants to reclaim a few acres of this new territory.<sup>551</sup>

### E. The Bill of Rights

Many people also argue that the Bill of Rights limits Congress's power to limit federal court jurisdiction. They insist that the Bill of Rights removes

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540. See *supra* Part III.B.1 (discussing checks and balances).

541. See *supra* notes 94–98 and accompanying text (showing that the Founders structured each branch to restrain the others).

542. See *supra* notes 94–98 and accompanying text (showing that the Founders structured each branch to restrain the others).

543. *But see supra* Part III.B (noting foundational principles).

544. See *supra* Part III.C (noting Founders' statements regarding the Exceptions Clause).

545. See *supra* Part III.B.1 (showing that the Constitution allows no unchecked powers).

546. See *supra* notes 328–37, 367–78 and accompanying text (showing that the outer boundary is the constitutional maximum for the Supreme Court's original and appellate jurisdiction and that the inner boundary is the original jurisdiction of the Supreme Court, which Congress cannot take away).

547. See, e.g., *United States v. Klein*, 80 U.S. 128, 147 (1871) (noting that Congress could not direct the Court as to how it should treat a presidential pardon).

548. See U.S. CONST. art. III., § 1 (giving judges tenure during their good behavior).

549. See *id.* (giving judges salary protection).

550. See *supra* Part III.D.1 (chronicling past limits on federal question jurisdiction).

551. See Part II (listing the recent and pending legislation).

issues from the political process entirely so as to protect minorities.<sup>552</sup> Yet the recent bills prevent federal courts from enforcing the rights of some citizens.<sup>553</sup> The Bill of Rights forms an external limit on Congress's power over jurisdiction,<sup>554</sup> but these bills would allow Congress to sidestep it through ordinary legislation.<sup>555</sup> As Professor Gerhardt noted, "Congress cannot exercise any of its powers under the Constitution . . . in a manner that violates the Constitution."<sup>556</sup> And if Congress can prevent a person from vindicating his First Amendment rights, it might insulate other legislation from review and place a host of rights in jeopardy.<sup>557</sup>

However, this argument depends on several shaky assumptions. First, it assumes that unless a federal court hears a case, then those rights remain unprotected. But the federal courts are not the guarantors of personal freedoms.<sup>558</sup> If they were, then they should have full constitutional jurisdiction, but this has never been true.<sup>559</sup> The Founders primarily relied on competing interests in society and on federalism to protect freedoms.<sup>560</sup> State courts are not only fully capable of protecting individual liberties,<sup>561</sup> they may also be their primary guarantors.<sup>562</sup>

Second, by equating constitutional decisions with the Constitution, the Bill of Rights objection presumes that "the Constitution is what the judges say it is."<sup>563</sup> The Founders did not agree with this,<sup>564</sup> and neither did most of this

552. See, e.g., H. REP. NO. 108-691, at 61–62 (2004) (arguing that Bill of Rights removed subjects from the majority).

553. See, e.g., *id.* at 97 (arguing that H.R. 2028 prevents courts from hearing any claim that government's use of Pledge violates First Amendment).

554. See H. REP. NO. 108-614, at 35, 147 (2004) (arguing that the Bill of Rights limits Congress's Exceptions Clause power); see also Hart, *supra* note 427, at 1372 (arguing that the rest of the Constitution limits Congress's power).

555. See *Marriage Hearing*, *supra* note 295, at 5, 13 (arguing that Congress is evading the Bill of Rights).

556. *Id.* at 94.

557. See, e.g., H. REP. NO. 108-691, at 60, 66, 68, 79, 83, 102–03 (making abuse of power argument).

558. See *supra* Part III.B.3.d (noting that the courts are not the guarantors of freedom).

559. See *IDES & MAY*, *supra* note 258 (noting that Congress has never given the federal judiciary the full jurisdiction described in Article III, § 2).

560. THE FEDERALIST NO. 51, *supra* note 8, at 350 (James Madison) (noting that a multiplicity of interests prevents majoritarian abuses).

561. See Rossum, *supra* note 438, at 420 (noting that state courts satisfy due process requirements).

562. See Hart, *supra* note 427, at 1401 (noting that state courts are "primary guarantors of constitutional rights").

563. CHARLES EVANS HUGHES, THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 144 (David J. Danelski & Joseph S. Tulchin eds., 1973), *quoted in* BARTON, *supra* note 78, at

nation's leaders through history.<sup>565</sup> This would elevate the Court above Congress and the Constitution, contrary to that document's foundational principles.<sup>566</sup> Ironically, proponents of this argument attempt to trump Congress's explicit, textual power to make exceptions with the implied doctrine of judicial review.<sup>567</sup> But the Constitution and federal courts are not the same, and only the former is supreme.<sup>568</sup>

Third, when advocates of this objection argue that Congress might abuse its exceptions power, they prove nothing. During the Founding era, many objected to federal power for this reason, but the Founders dismissed the argument because it applied equally to any constitution.<sup>569</sup> The argument applies equally to the President's executive privilege or commander in chief duties. Congress arguably came close to abusing its impeachment power with President Andrew Johnson,<sup>570</sup> but its power is still constitutional. The Supreme Court might occasionally abuse its power of judicial review,<sup>571</sup> but these abuses

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564. See *supra* Part III.B.3 (showing Founders' distrust of the judiciary and of judicial discretion).

565. See H. REP. NO. 108-691, at 29–30 (2004) (citing presidents, such as F. Roosevelt, who, throughout history, questioned judiciary's role as ultimate interpreter); LOUIS FISHER, CONG. RESEARCH SERV., CONGRESSIONAL CHECKS ON THE JUDICIARY 8–12 (1997), in H. REP. NO. 108-614, at 125 (2004) (noting Supreme Court claimed the role of ultimate arbiter in twentieth century and quoting various justices, including Warren and Ginsburg, who question this role).

566. See *supra* Part III.B.2–3 (noting the principles of legislative preeminence and judicial skepticism).

567. See also Berger, *Judicial Usurpation*, *supra* note 439, at 625 (criticizing other arguments that seek to trump Article III, § 2, with the implied power of "activist judicial review"); Rossum, *supra* note 438, at 389 (same).

568. See Bator, *supra* note 464, at 633 (noting that the Constitution, not federal courts, are supreme).

569. See James Iredell, Marcus, *Answers to Mr. Mason's Objections to the New Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–88 at 342–44 (Paul Leicester Ford ed., 1968), *quoted in* 4 FOUNDERS', *supra* note 63, at 233 (noting the meaninglessness of the abuse argument); 3 ELLIOTT, *supra* note 85, at 536 (noting Madison's similar comments).

570. See, e.g., SIDNEY M. MILKIS & MICHAEL NELSON, AMERICAN PRESIDENCY: ORIGIN AND DEVELOPMENT 1776–2004, at 171–74 (4th ed., 2004) (chronicling the Radical Republicans' attack on executive authority and summarizing the severe consequences that President Johnson's conviction would have had on the "power and prestige of the presidency" and the checks and balances of the Constitution); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 250, 269–70, 278 (1992) (observing how the conviction of President Johnson would have significantly undermined the independence of the presidency).

571. See, e.g., Berger, *Judicial Usurpation*, *supra* note 439, at 632–42 (arguing that the



do not nullify the power.<sup>572</sup> While this abuse argument may create good sound bites, it is a tautology that proves nothing.

#### F. Due Process & Equal Protection

Critics of the proposed legislation also argue that due process and equal protection restrict Congress's power to limit federal court jurisdiction.<sup>573</sup> Allegedly, procedural due process requires that a federal court be available to hear federal claims either originally or on appeal.<sup>574</sup> Because state courts are neither as sympathetic to federal claims nor as independent as federal courts, they insufficiently protect constitutional rights.<sup>575</sup> Furthermore, critics insist that these laws violate equal protection by placing an undue burden on a specific class of litigants without a rational basis.<sup>576</sup> The pending bills hinder homosexuals or religious minorities from seeking constitutional protection, which "is itself a denial of equal protection of the laws in the most literal sense."<sup>577</sup> That is, these laws violate equal protection because they are based either on a suspect classification or impinge a fundamental right, and Congress had no neutral motive for doing so.<sup>578</sup> Similarly, they allege that although Congress can regulate the judiciary for neutral reasons, it violates substantive due process if its measures lack a neutral justification.<sup>579</sup> Of course, "[n]either

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Court has abused its power of judicial review); BARTON, *supra* note 78, at 262 (same); SCHLAFLY, *supra* note 6, at 5 (same).

572. See, e.g., BERGER, GOVERNMENT, *supra* note 83, at 372–74 (defending the original understanding of judicial review); BARTON, *supra* note 78, at 257–58 (same).

573. See *Marriage Hearing*, *supra* note 295, at 73, 87, 144 (arguing that equal protection and due process limit Congress's power to pass H.R. 3313).

574. See, e.g., H. REP. NO. 108-691, at 68, 71–72 (2004) (arguing that a federal court must be available to hear federal claims); *Constitution Hearing*, *supra* note 10, at 13–14 (statement of Michael Gerhardt) (same).

575. See, e.g., H. REP. NO. 108-691, at 99 (arguing that state courts are inadequate for defending constitutional rights); *Constitution Hearing*, *supra* note 10, at 10, 13–14 (statement of Michael Gerhardt) (same).

576. See H. REP. NO. 108-691, at 98–99 (arguing that H.R. 2028 violates equal protection); *Constitution Hearing*, *supra* note 10, at 13 (statement of Michael Gerhardt) (same for H.R. 3799); H. REP. NO. 108-614, at 46, 115–16 (2004) (same for H.R. 3313); *Marriage Hearing*, *supra* note 295, at 14, 18 (same).

577. *Romer v. Evans*, 517 U.S. 620, 633 (1996), *quoted in* H. REP. NO. 108-614, at 152.

578. See *Marriage Hearing*, *supra* note 295, at 14, 19–20, 71–72, 75, 77, 83 (arguing that Congress must have a neutral justification for its restriction and that distrust of a class or of judges is not neutral).

579. See *Constitution Hearing*, *supra* note 10, at 13 (statement of Michael Gerhardt) (arguing that Congress's lack of a neutral justification may violate Fifth Amendment due

mistrust of the federal judiciary nor hostility to particular substantive judicial decisions" satisfies this requirement.<sup>580</sup>

However, a due process or equal protection limit would contradict checks and balances. Both friends and foes of the Marriage Protection Act recognized that a proposed due process and equal protection exception would have gutted the bill and given the Court unfettered discretion over whether the limit was proper.<sup>581</sup> This is because the concept is so vague that it covers anything and is essentially a judicial "wildcard."<sup>582</sup> Justice Frankfurter explained that it requires judges to make "a judgment that reflects deep, even if inarticulate, feelings of our society."<sup>583</sup> If this were not nebulous enough to give the Court unfettered discretion, descriptions of substantive due process such as "penumbras formed by emanations,"<sup>584</sup> "emerging awareness,"<sup>585</sup> "evolving paradigm,"<sup>586</sup> and "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"<sup>587</sup> amply fill in the void. As such autonomy would make the Court the judge of its own power, a due process or equal protection limit violates the principle of checks and balances.<sup>588</sup>

In addition, the proposed due process limitation erroneously assumes that due process requires a federal trial or appeal,<sup>589</sup> an argument that even Herbert Wechsler rejected as "antithetical to the plan of the Constitution for the courts."<sup>590</sup> Due process may require an independent judicial hearing, but a state

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process); *see also* H. REP. NO. 108-691, at 98-99 (noting need for a neutral justification); H. REP. NO. 108-614, at 152-54 (same).

580. *Constitution Hearing, supra* note 10, at 13 (statement of Michael Gerhardt); *see also* H. REP. NO. 108-691, at 98-99 (2004) (noting that distrust of judiciary is not a neutral justification); H. REP. NO. 108-614, at 152-54 (same).

581. *See* H. REP. NO. 108-614, at 47, 53-54, 116-17 (noting that the proposed due process and equal protection amendment to H.R. 3313 would gut the bill).

582. W. Forrester, *Are We Ready for Truth in Judging?*, 63 AM. BAR ASS'N J. 1212 (1977), *quoted in* SCHLAFLY, *supra* note 6, at 10.

583. *Haley v. Ohio*, 332 U.S. 596, 603 (1948) (Frankfurter, J. concurring), *quoted in* BERGER, *GOVERNMENT, supra* note 83, at 283.

584. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

585. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

586. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003).

587. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

588. *See supra* Part III.B.1 (showing the Founders' insistence on checks and balances).

589. *See supra* Part III.E.3 (showing that not every federal claim requires federal trial); *see also* Gunther, *supra* note 13, at 915 (noting that due process does not require "a federal judicial forum"); Velasco, *supra* note 13, at 692-93 (noting that state court adjudication satisfies due process).

590. Wechsler, *supra* note 453, at 1005.

proceeding amply satisfies this.<sup>591</sup> The Founders rejected arguments that state judges could not be trusted with federal constitutional claims,<sup>592</sup> and the case law shows that federal judges do not have to hear every federal claim.<sup>593</sup> The law presumes that state courts can hear federal and constitutional questions unless specified otherwise,<sup>594</sup> in some cases, it forces states to hear federal claims.<sup>595</sup> For many years, state courts were the final word on some constitutional claims.<sup>596</sup> Justice Brennan once declared: "But, of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to the state courts."<sup>597</sup> Not only has Congress done this in the past,<sup>598</sup> but the Court has upheld these provisions.<sup>599</sup>

Furthermore, advocates of the due process limit erroneously assume that all constitutional violations must have a judicial remedy.<sup>600</sup> But the federal courts cannot review contested congressional elections, political questions, or claims covered by sovereign immunity.<sup>601</sup> Other constitutional violations are

591. See *supra* Part III.E.3 (showing that not every federal claim requires a federal trial); see also Redish, *Congressional Power*, *supra* note 73, at 915 (noting that state court adjudication will satisfy due process); Velasco, *supra* note 13, at 692–93 (same).

592. See 3 ELLIOTT, *supra* note 85, at 553–54 (noting Marshall's assurance that the state courts would not lose jurisdiction under the Constitution); THE FEDERALIST NO. 82, *supra* note 8, at 552 (Alexander Hamilton) (same).

593. See *supra* Part III.E.3 (showing that not all federal claims require a federal trial).

594. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477–78 (1981) (pronouncing general principle that state courts may exercise jurisdiction over a federal cause of action unless specified to the contrary), *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990) (recognizing the "deeply rooted presumption" in favor of concurrent state jurisdiction over federal claims); see also *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (explaining that the Court will not presume state courts have less sensitivity to federal rights than federal courts); Part III.D.1 & III.E.3 (noting that state courts heard federal claims Congress had not given to federal courts).

595. See *Howlett v. Rose*, 496 U.S. 356, 369–70 (1990) (stating that state courts must hear federal claims "when the parties and controversy are properly before it, in the absence of a 'valid excuse'").

596. See *supra* notes 391–94, 400–04, and accompanying text (showing that state courts can have the final word on constitutional issues).

597. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 n.15 (1982); see also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (noting that Congress could have "routed all federal constitutional questions through the state court systems" with Supreme Court review).

598. See *supra* Part III.D (showing past laws that limited federal jurisdiction).

599. See *supra* Part III.E (showing that the federal courts recognize Congress's power and implement its limits).

600. See *Webster v. Doe*, 486 U.S. 592, 609–12 (1988) (Scalia, J., dissenting) (arguing that not all constitutional claims require judicial review).

601. See *id.* at 612–13 (noting examples of constitutional claims not subject to judicial review).

unreviewable due to standing.<sup>602</sup> Justice Scalia debunked this assumption as "untenable": "Members of Congress and the supervising officers of the executive branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are."<sup>603</sup> Because the Supreme Court is neither the ultimate expositor of the Constitution nor the guarantor of individual rights, the lack of judicial remedy does not violate due process.<sup>604</sup>

Similarly, equal protection does not significantly restrict Congress's power. This argument automatically equates all distinctions with discrimination and forgets that "rights don't have rights; people have rights."<sup>605</sup> It equates laws that "distinguish among *litigants* on the basis of race or other forbidden criteria" with "jurisdictional statutes that differentiate on the basis of *subject matter*."<sup>606</sup> Equal protection does not require the federal courts to treat all constitutional claims the same.<sup>607</sup> In addition, these bills apply to both sides equally. For example, H.R. 1100 would prevent the American Civil Liberties Union from appealing an Alabama decision upholding DOMA to federal court. But it would also keep the Alliance Defense Fund from appealing a Massachusetts decision striking down DOMA. Furthermore, this equal protection argument assumes that state courts will not provide adequate protection for constitutional rights,<sup>608</sup> an assumption that is equally as false for equal protection as for due process.<sup>609</sup>

Moreover, the idea that Congress's motives determine whether limits on jurisdiction are valid lacks any constitutional basis.<sup>610</sup> First, any "neutral

602. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974) (dismissing constitutional claim for lack of standing).

603. *Webster*, 486 U.S. at 613.

604. See *supra* Part III.B.3.d, notes 448–64, and accompanying text (showing that the Court is not the ultimate expositor or guardian of rights).

605. Redish, *Congressional Power*, *supra* note 73, at 917; Velasco, *supra* note 13, at 693.

606. Gunther, *supra* note 13, at 918.

607. See *id.* at 918 (noting that not all federal question litigation must be handled the same way); Redish, *Congressional Power*, *supra* note 73, at 918 (stating that a right is not entitled to same treatment as other rights).

608. See Bator, *supra* note 464, at 625 (stating that one cannot assume that the state courts will not speak for the Constitution); see also *id.* at 633 (noting that if a state court reaches a different constitutional conclusion than a federal court, it has not necessarily disregarded the Constitution); Velasco, *supra* note 13, at 694 (same).

609. See *supra* note 594 and accompanying text (showing that state courts are presumed to have jurisdiction over federal claims).

610. See *supra* notes 357–62 and accompanying text (showing that Congress's motive is meaningless).

motives" criterion nullifies checks and balances.<sup>611</sup> Because the Court would ultimately decide whether Congress had the right motives, it would determine the scope of its own powers.<sup>612</sup> By analogy, suppose that Congress had impeached and convicted either Presidents Andrew Johnson or Richard Nixon. If either one declared the impeachment unconstitutional because Congress had improper motives, such as wanting to dominate the executive branch, he would have been clearly wrong. If he had refused to leave office based on this claim, everyone would have recognized this as an illegal, and possibly a tyrannical, act. He would have been wrong because he would have been nullifying a constitutional device that is designed to check his power, even if in a particular instance Congress may have used that device for improper reasons. Likewise, if the Court were to strike down a limit on its jurisdiction, it would then be nullifying the checks on its power.<sup>613</sup> If it simply has to find "improper motives" to invalidate a limit on its jurisdiction, then self-restraint is its only limit. This would give the least trusted branch unbounded jurisdiction, which violates the Founders' intent for the judiciary.<sup>614</sup>

Second, history and case law condemns the "neutral motivation" criterion. According to the Founders, Congress could make exceptions for any reason, including public convenience.<sup>615</sup> Even the Supreme Court ruled that Congress's motive is meaningless.<sup>616</sup>

Third, proponents of this "neutral motivation" theory wrongly assert that "distrust" of a coordinate branch of the government is an improper motive.<sup>617</sup> Rather, it is a necessary function of separation of powers and checks and balances.<sup>618</sup> Our entire government is based on distrust of official power, and the Founders trusted the judiciary even less than they trusted the legislature.<sup>619</sup>

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611. See *supra* Part III.B.1 (explaining importance of checks and balances).

612. See *Marriage Hearing, supra* note 295, at 75, 77, 83 (statement of Michael Gerhardt) (stating that the Court ultimately decides if Congress has a proper motive).

613. See *supra* Part III.C (showing that Founders viewed Exceptions Clause as Congress's check on the Court).

614. See *supra* Part III.B (explaining principles of legislative preeminence, checks and balances, and judicial skepticism).

615. See *supra* notes 213, 224, 226–35, and accompanying text (demonstrating Founders' view of why Congress could make exceptions).

616. See *supra* notes 357–62 and accompanying text (showing that Congress's motive is meaningless).

617. See *Constitution Hearing, supra* note 10, at 13–14 (stating that a neutral justification is required in order for a jurisdiction limit to be valid and distrust of the judiciary is not a neutral justification).

618. See *supra* Part III.B.1 (explaining the interaction of separation of powers and checks and balances).

619. See *supra* Part III.B.3 (explaining Founders' distrust of the judiciary).

Through the presidential veto, the congressional override, the confirmation requirements for judges and executive officials, the ratification requirement for treaties, the impeachment process, and even judicial review, one branch of the government communicates its distrust of the way that others exercise their power. Is the judiciary entitled to express distrust in Congress's and the president's ability to interpret the Constitution,<sup>620</sup> and then demand that both branches blindly trust it? To state the question is to answer it. Hence, distrust is not an improper motive; rather, it is the engine of the Constitution.<sup>621</sup>

Fourth, if distrust is an improper motive that violates due process, then the bills' critics have also violated due process. Their arguments are premised on the assumption that state judges will not fulfill their obligations under the Supremacy Clause to "faithfully protect and defend the Constitution of the United States."<sup>622</sup> If distrust of the federal courts violates due process, then equal protection would seem to require that distrust of state courts also violates due process. Thus, if Congress were to increase federal jurisdiction, it would not have a neutral reason for doing so (viz., distrust for state judges). If it were to decrease federal jurisdiction, it would also not have a neutral reason (viz., distrust for federal judges). The arbitrary nature of this requirement indicates its lack of constitutional merit.

### *G. Unprecedented Action*

Many critics of the recent and pending bills charge that they are unprecedented.<sup>623</sup> They argue that while some of the laws and precedents show that Congress can regulate federal jurisdiction, none prevented all federal courts from exercising constitutional review.<sup>624</sup> In short: "The very fact that Congress has never attempted to bar access to all federal courts when a person claims that a federal statute violates the Constitution is itself a matter of more than minor

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620. See *supra* notes 195–200 and accompanying text (showing that constitutional interpretation is not exclusively a judicial function).

621. See *supra* Part III.B.1 (showing how distrust of power guided the formation of the Constitution).

622. See *supra* notes 574–75 and accompanying text (illustrating distrust of state courts).

623. See *e.g.*, H. REP. NO. 108-614, at 159–64 (2004) (arguing that H.R. 3313 is unprecedented).

624. See, *e.g.*, H. REP. NO. 108-691, at 105–10 (2004) (trying to distinguish past legislation and precedent from H.R. 2028); H. Rep. 108-614 at 51, 114, 145, 149, 159–64 (same for H.R. 3313).

significance."<sup>625</sup> As Congress has never done this before, it does not have the power to restrict the judiciary.

This argument is not completely true. Congress has exercised its power over jurisdiction at various times and to varying degrees throughout history.<sup>626</sup> It has even used this power to keep a certain class of constitutional and federal law cases out of the federal judiciary altogether.<sup>627</sup> This charge might be true only if it means that Congress has never fully exercised its power. But not exercising power is not the same as not having power. For example, the federal courts have never exercised the full scope of their jurisdiction.<sup>628</sup> But if Congress were to extend statutory jurisdiction to its limits, the courts' power would still be constitutional. It would be unprecedented in the same way as the recent and pending bills; that is, it would be a delegated power that has never been exercised to its fullest extent. But it would still be constitutional. The "unprecedented" argument might be convincing if it were consistent with the foundational principles, the Founders' statements, congressional practice, and court precedent.<sup>629</sup> But lacking that foundation, it does not threaten the recent legislation.<sup>630</sup>

#### V. Conclusion

The pending jurisdiction withdrawal bills—including the Marriage Protection Act, the Constitution Restoration Act, and the Pledge Protection Act—focus attention on controversial social issues like "same-sex marriage" and the separation of church and state. But they also highlight an even more controversial underlying debate: the proper role of federal courts in our political system. As the courts have become more dominant in today's society, it is increasingly difficult to separate policy from constitutional principles.

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625. Letter from Mark Tushnet, Professor, Georgetown University Law Center, to the Honorable John Conyers, Jr., 2 (July 19, 2004), *quoted in* H. REP. NO. 108-614, at 159.

626. *See supra* Part III.D (showing past jurisdiction limiting legislation).

627. *See supra* Part III.D.1 (illustrating how early Congresses regulated constitutional jurisdiction).

628. *See* IDES & MAY, *supra* note 258, at 286 (noting that courts have never had full Article III jurisdiction).

629. *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230–40 (1995) (showing that Justice Scalia considered the unprecedented nature of the law in question). *But see id.* at 217–30 (showing that Justice Scalia considered the unprecedented nature of the law only after considering the text of the Constitution, its principles, and precedents).

630. *See supra* Part III (showing that the text of the Constitution, its principles, congressional practice, and court precedent support Congress's power to pass bills like those in question).

This Note has focused on one issue: Does the Constitution give Congress the power to limit the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court over constitutional issues?<sup>631</sup> To answer this question, it has examined the text and structure of Article III, the Constitution's foundational principles, and the Constitutional Convention and ratification debates.<sup>632</sup> Fearful of unrestrained power and even more skeptical of the judiciary, the Founders clearly intended that Congress use the Exceptions Clause as its weapon of constitutional self-defense against judicial encroachments.<sup>633</sup> Moreover, throughout its history, Congress has exercised this power to varying degrees,<sup>634</sup> and both the lower courts and Supreme Court have confirmed Congress's power almost without exception.<sup>635</sup>

In addition, this Note has sketched and evaluated various arguments against the recent bills.<sup>636</sup> Though many seem to rely on the Constitution and its principles, closer inspection shows that they lack a firm foundation in constitutional text, principles, history, and precedent. As these theories ultimately collapse, they further underscore that when it comes to the jurisdiction of the federal courts, including the Supreme Court, "Congress gave, and Congress hath taken away."<sup>637</sup>

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631. *See supra* Part II (outlining provisions of the jurisdiction limiting bills in the 108th and 109th Congresses).

632. *See supra* Part III.B (laying out historical backdrop, text, and debates over the Constitution).

633. *See supra* Part III.C (surveying the Founders' statements regarding the Exceptions Clause).

634. *See supra* Part III.D (illustrating Congress's past jurisdiction-limiting measures).

635. *See supra* Part III.E (showing that federal courts have upheld and implemented Congress's limits).

636. *See supra* Part IV (noting constitutional objections to Congress's power).

637. *See supra* note 1 (noting the source for this phrase).