U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

26 APR 1982

TO: William French Smith
Attorney General

FROM: Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

I have attempted to reformulate the "test" as to what would and would not be a "core" function of the U.S. Supreme Court in order to delineate between the type of situations in which Congress would not be able to withdraw the Supreme Court's appellate jurisdiction. This formulation embraces the concepts of uniformity and supremacy as well as simply whether a case involves a constitutional question. I have expressed it in two slightly different but essentially similar ways to include in different paragraphs of the draft Attorney General statement which I furnished to you last week. The balance of the Attorney General statement would be changed to make sure that nothing in it is inconsistent with these general statements of the test.

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

I have also revised the test to make it clear that you are only addressing S. 1742 and that you could and would defend the constitutionality of S. 1742 if it was enacted by Congress.

Rex and I are satisfied with this formulation. Unfortunately, Ken and John are not. Rather than try to articulate their objections and/or reservations for them and possibly mischaracterize their positions, I will leave it to them to explain their positions to you.

Attached are the two sentences which Rex and I have agreed upon.

cc: Rex E. Lee
✓Kenneth A. Starr
John Roberts

I believe, for the reasons set forth in detail below, that S. 1742, a proposal which would attempt to withdraw from the Supreme Court its ability to perform its core function as the final arbiter of those types of questions which involve the uniform and dispositive meaning of the Constitution and its status as the supreme law of the land is impermissible under the Constitution.

However, after careful and deliberate consideration, I have concluded that it would be unconstitutional to withdraw the Supreme Court's jurisdiction over a class of cases such as this so that the Court would be unable to perform its core function of assuring a uniform, final and authoritative adjudication of such types of Constitutional questions requiring such a resolution.

SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL

4/27/82

TO: The Attorney General

FROM: John Roberts JR

RE: Supreme Court Jurisdiction

Attached are two inserts in the OLC draft. The first would be substituted for the first three paragraphs in the OLC draft on pages 1-2. The second would be substituted for the final paragraph on pages 18-19.

A number of bills presently pending in the 97th Congress propose withdrawing the jurisdiction of the Supreme Court over federal constitutional issues. These bills raise fundamental and difficult questions regarding the role of the Supreme Court in our constitutional system, as well as the power of Congress to define and circumscribe that role. The issues involved have been the subject of intense scholarly debate and respectable constitutional scholars have differed as to the extent of congressional power to limit Supreme Court jurisdiction. Commentators on both sides of the dispute are able to point to constitutional provisions, court decisions, historical material, and analytic arguments supporting their positions. The legal questions in this area are exceedingly close.

This is perhaps to be expected since the question of congressional power over the appellate jurisdiction of the Supreme Court implicates in a basic way the relations between Congress and the Supreme Court, two co-equal branches of government. Relations between the different branches in our tripartite system are generally governed by the doctrine of separation of powers. Neither the Constitution nor the decisions of the Supreme Court have attempted to define the precise contours of this doctrine. As two astute students of our constitutional system have noted:

> "The accommodations among the three branches of government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To speak of lines of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory." Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harv. L. Rev. 1010, 1014 (1924).

The doctrine of separation of powers touches fundamentally on how the Nation is governed, and, as the Supreme Court noted last Term in a separation of powers case, "it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed." Dames & Moore v. Regan, U.S. (1981). In this area more than any other we must heed Justice Holmes' wise admonition that "The great ordinances of the Constitution do not establish and divide fields of black and white." Springer v. Philippine Islands, 277 U.S. 189, 209 (1928)(dissenting opinion).

The very nature of the issues involved, therefore, and the closeness of the legal arguments, counsel strongly against my issuing any generalized pronouncements regarding the limits of congressional power over the appellate jurisdiction of the Supreme Court. It would be presumptuous for the Executive Branch to provide abstract and gratuitous constitutional law analyses to a coordinate and co-equal Branch, whose members are likewise sworn to uphold the Constitution. My views have been specifically requested,

however, concerning the constitutionality of S. 1742, a proposal which would withdraw all jurisdiction from the Supreme Court to consider "any case arising out of any State statute, ordinance, rule, [or] regulation . . . which relates to voluntary prayers in public schools and public buildings." My analysis of the constitutionality of this proposal is set forth in this letter.

It is incumbent upon me to emphasize at the outset that my opinion is restricted to the particular bill before me. The considerations that have been found to be relevant in assessing this bill may not be similarly relevant in addressing other legislation in this area. Other factors may come into play, and the significance of the factors relied upon in this case may recede.

Finally, I cannot conclude without reiterating that the question of the limits, if any, of Congress' authority under the Exceptions Clause is an extraordinarily difficult one. Thoughtful and respected authorities have come to conclusions which differ from mine. The language of the Exceptions Clause, broad pronouncements in certain Supreme Court opinions, and some historical materials do offer support for the argument that the bill under consideration falls within Congress' constitutional authority. Respected scholars have argued that the Framers intended to permit Congress to determine in its discretion how broadly the federal judicial institution -- including the appellate jurisdiction of the Supreme Court -- should extend. For reasons which I have developed at some length, I do not agree and have concluded that S. 1742 is unconstitutional. Ultimately, however, it is for Congress to determine what laws to enact and for the Executive Branch to "take care that the Laws be faithfully executed." It is not for the Attorney General but for the courts ultimately to rule on the constitutionality of Congress' enactment. As I have stated in another context, the Department of Justice must and shall defend the Acts of Congress "except in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid." Accordingly, while I believe that S. 1742 is unconstitutional, should the Congress believe otherwise and should I be called upon to defend its constitutionality before the courts, I responsibly could and would do so with all of the resources at my command.

William French Smith
Attorney General

U.S. Department of Justice

Office of Public Affairs

Supreme Ct. Jurisd. F4.

Office of the Director

Washington, D.C. 20530

May 7, 1982

MEMORANDUM FOR: The Attorney General
Deputy Attorney General
Associate Attorney General
Solicitor General
Theodore Olson
Jonathan Rose
Robert McConnell
Ken Starr
Stan Morris
Tex Lezar
Hank Habicht
Carolyn Kuhl
John Roberts

FROM: Tom DeCair

Attached are transcripts of network reporting of the court-stripping and busing opinions.

Attachments

RADIO TV REPORTS, INC.

4701 WILLARD AVENUE, CHEVY CHASE, MARYLAND 20015 656-4068

FOR JUSTICE DEPARTMENT

PROGRAM CBS Evening News STATION WDVM TV
CBS Network

DATE May 6, 1982 7:00 PM CITY Washington, DC

SUBJECT Voluntary Prayers in Public Schools

DAN RATHER: Long before President Reagan backed a prayer amendment today, conservatives in Congress have been trying to accomplish the same thing another way, but passing a law limiting the powers of the court, and not just on prayers, but also on court-ordered school busing and abortion.

Today, Attorney General William French Smith ended a long silence on two of those bills. Smith said he would defend the constitutionality of one bill that would strip the Supreme Court of the power to rule on voluntary prayers in the public schools. He also said he would defend the bill curtailing the power of federal courts to order school busing for desegregation.

However, the Attorney General told conservatives there is a limit to what Congress can do to keep controversial social issues out of the Supreme Court.

RADIO TV REPORTS, INC.

4701 WILLARD AVENUE, CHEVY CHASE, MARYLAND 20015 656-4068

FOR JUSTICE DEPARTMENT

PROGRAM NBC Nightly News STATION WRC TV
NBC Network

DATE May 6, 1982 7:00 PM CITY Washington, DC

SUBJECT School Prayer Issue

ROGER MUDD: Just a few hours before the President made his Rose Garden appearance, Attorney General William Smith let it be known that he would support a Senate bill denying the Supreme Court jurisdiction over public prayer cases. That bill has heavy backing from the conservatives.

RADIO TV REPORTS, INC.

4701 WILLARD AVENUE, CHEVY CHASE, MARYLAND 20015 656-4068

FOR JUSTICE DEPARTMENT

PROGRAM ABC World News Tonight

STATION WJLA TV
ABC Network

DATE May 6, 1982 7:00 PM

CITY Washington, DC

SUBJECT School Prayer Cases

FRANK REYNOLDS: The Attorney General, William French Smith today gave a very luke warm endorsement to a bill that would deny the Supreme Court the right to rule on school prayer cases. In a letter to Congress, Smith expressed strong misgiving about legislators possibly intruding on the rights of the Court.

In a seperate letter today, the Attorney General declared that the anti-busing legislation now working its way through the Congress, is constitutional.

RADIO TV REPORTS, INC.

4701 WILLARD AVENUE, CHEVY CHASE, MARYLAND 20015 656-4068

FOR DEPARTMENT OF JUSTICE

PROGRAM Good Morning Washington STATION WJLA TV
ABC Network

DATE May 7, 1982 7:00 AM CITY Washington, DC

SUBJECT Attorney General's Statement on Busing

[David Hartman was interviewing Professor Arthur Smith, Good Morning America's legal expert.]

DAVID HARTMAN: In just a minute, Arthur, let's hit the busing question. Attorney General William French Smith's statement yesterday.

What's going on and could there be some problems on this one?

PROF. ARTHUR MILLER: Well, there's a great movement to get the federal courts of the United States out of controversial areas such as busing, school prayer and abortions. And the proposal before Congress literally strips away the jurisdiction, the power of the federal courts to hear cases involving busing.

It would not affect our policy toward desegregation of racially imbalanced schools. It simply would eliminate the use of court ordered busing as a remedy to correct that imbalance.

To File: Supreme Court Jurisdiction

U.S. Department of Justice
Office of Public Affairs

Office of the Director

May 6, 1982

AG
DAG
Associate
Olson
Rose
McConnell
Lee
Starr ✓
Morris
Lezar
Habicht
Roberts
Kuhl
Stewart
Fein
Hiller

Attached is the information provided to the White House today--all but the talking points were provided to the press at noon for release at 1 p.m.

Tom DeCair

TALKING POINTS

JOHNSTON-HELMS AMENDMENTS TO DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION BILL FOR FISCAL YEAR 1982.

° These provisions limit the power of lower federal courts to order student transportation to schools beyond those closest to their homes, with certain exceptions, beyond 10 mile or 30 minute round trips, and restrict the power of the Justice Department to seek busing decrees.

° These provisions do not restrict the power of school boards or state courts to order desegregation decrees. They do not limit the power of the Supreme Court to consider constitutional questions.

° Congress has substantial power over the jurisdiction and remedial powers of the lower federal courts. In numerous instances, most notably with respect to the Norris-La Guardia Act, the Supreme Court has upheld legislative restrictions on the power of the courts to issue injunctions.

° Mandatory cross-town busing has been destructive of quality education and the goal of desegregation. The Supreme Court has held that busing may be limited by factors of time and distance which would "risk the health of the children or significantly impinge on the educational process."

° These provisions are within Congress' power under Article III of the Constitution and Section 5 of the 14th Amendment. They do not violate the Equal Protection or Due Process Clauses.

° The restrictions on Department of Justice authority, while unnecessary and unduly restrictive of Department discretion, are not unconstitutional. The Department retains ample authority to enforce civil rights statutes.

LIMITS ON SUPREME COURT'S APPELLATE JURISDICTION

° S. 1742, limiting Supreme Court appellate jurisdiction over cases involving prayer, raises fundamental and difficult constitutional questions regarding the role of the Supreme Court. Prominent constitutional scholars have reached different conclusions.

° After careful and lengthy analysis, the Attorney General has concluded that Congress may not, consistent with the Constitution, make "exceptions" to Supreme Court appellate jurisdiction which would intrude on the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.

° Various factors must be considered in determining whether the core function would be invaded by particular legislation including whether constitutional issues would be withheld from the Court, the need for uniformity of results among the states, the extent to which Supreme Court review is necessary to ensure supremacy of federal law and whether suitable alternative forums have been left in place.

° If Congress determines to consider S. 1742 further, it may wish to do so in light of the Attorney General's analysis of the constitutional issues and the factors enunciated by him.

° The legislative record, debates in Congress, and committee reports are important analytical tools and final Attorney General analysis is necessarily predicated on completion of that process.

° As a policy matter, the Department of Justice has grave concerns over the withdrawal of Supreme Court appellate jurisdiction over classes of cases. The integrity of our federal system depends upon a single court of last resort having final say on the resolution of federal questions.

° Ultimately it is for Congress to enact laws and for the Executive to defend them unless clearly unconstitutional or an infringement on Executive Branch powers. If S. 1742 were enacted, the Attorney General would defend its constitutionality in the courts.

Department of Justice

PRESS RELEASE AND BOTH LETTERS
EMBARGOED FOR RELEASE
UNTIL 1:00 P.M. EDT
THURSDAY, MAY 6, 1982

AG

Attorney General William French Smith today released two letters he has written in response to congressional inquiries about legislative proposals that would restrict the authority of federal courts. One letter, to Chairman Peter Rodino of the House Judiciary Committee, concerns the anti-busing provisions contained in S. 951, the Senate-passed version of the Department of Justice appropriations authorization bill for Fiscal Year 1982. Those provisions would prevent the Department of Justice from expending funds to bring or maintain an action requiring busing, and limit the circumstances in which lower federal courts could order busing. The other letter, to Chairman Strom Thurmond of the Senate Judiciary Committee, addresses questions raised by members of that Committee about S. 1742, a bill to divest the Supreme Court of appellate jurisdiction over cases involving voluntary prayer in public schools or buildings.

With regard to the anti-busing legislation, the Attorney General has concluded that this legislation may be enacted consistent with the Constitution. With regard to the issue of congressional authority over Supreme Court jurisdiction raised by the school prayer bill, the Attorney General has concluded that although Congress may in some instances limit Supreme Court appellate jurisdiction, it may not do so in a

manner that intrudes upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers. The Attorney General also concluded that even if legislation in this area could be enacted consistent with the Constitution, he would have concerns as a policy matter about the withdrawal of a class of cases from the appellate jurisdiction of the Supreme Court.

The Attorney General stressed the distinctions between the two bills in his separate analyses. The anti-busing provisions of S. 951 do not affect the jurisdiction of the Supreme Court, but only limit equitable remedies in the lower federal courts. In this respect the bill is similar to the anti-injunction provisions of the Norris-LaGuardia Act, which has been in effect for fifty years. The school prayer bill, however, raises the more difficult question of the scope of congressional authority over Supreme Court appellate jurisdiction. The two issues are quite distinct.

In his letter to Chairman Rodino, the Attorney General concluded that Congress could enact the anti-busing provisions consistent with the Constitution. The bill itself does not prohibit all busing. It restricts the authority of only the lower federal courts to order busing within specified limits. It does not affect state court or U.S. Supreme Court jurisdiction, or the jurisdiction of the lower federal courts to hear desegregation cases. Congress has broad authority to regulate remedies in the lower federal courts because article III, section 1 of the Constitution vested totally within

Congress' discretion the decision whether even to establish such courts in the first place.

Congress may also, consistent with the Constitution, limit Department of Justice advocacy of busing remedies. The provisions in S. 951 that would do so do not prevent the federal government from bringing desegregation suits, but only restrict in a limited fashion participation in the remedy stage.

The Attorney General concluded that neither the limit on lower federal court remedies nor the limit on Department of Justice advocacy of busing violates the Constitution. It is reasonably clear that the bill would be sustained on the basis of the rationales advanced by its proponents -- primarily, the destructive effect of racial busing on quality education and its tendency in many communities to contribute to more, not less segregation in the schools.

In his letter on S. 1742, a bill to divest the Supreme Court of jurisdiction over cases involving voluntary prayer in public schools, the Attorney General began by noting that the bill raises fundamental and difficult questions concerning the extent of congressional power over Supreme Court appellate jurisdiction. Although Congress possesses some power over Supreme Court appellate jurisdiction under the "Exceptions Clause" of the Constitution, article III, section 2, the Attorney General concluded that Congress may not under this clause intrude upon the core functions of the Supreme Court as an independent and equal branch in the system of separation of powers. In determining if a particular

bill does intrude upon core functions, it is necessary to consider a number of elements: whether the issue is constitutional or nonconstitutional; the extent to which the area is one in which uniformity of interpretation is required; the extent to which Supreme Court review is necessary to ensure the supremacy of federal law; and whether other forums or remedies have been left in place so the intrusion can properly be characterized as an exception.

The Attorney General considered the language of the Constitution, the views expressed during the Constitutional Convention and ratification debates, opinions of the Supreme Court, and the historical record of Supreme Court jurisdiction. He also reviewed the scholarly literature and testimony before the Congress. Only following that careful review did the Attorney General reach his conclusion that Congress does not possess unlimited power over Supreme Court appellate jurisdiction but may only make exceptions to that jurisdiction which do not intrude upon the core functions of the Court. A view which accepted unlimited congressional power over Supreme Court jurisdiction would be inconsistent with the understanding of the Founding Fathers that the Supreme Court would be an independent and equal branch in the system of separation of powers.

The Attorney General stressed that the question of precise limits to congressional power under the Exceptions Clause was a difficult one on which prominent scholars had reached differing conclusions. Quoting the Supreme Court opinion in Rostker v. Goldberg, the Attorney General noted

that the legislative process was a significant factor in assessing not only the meaning of legislation, but also its constitutionality. He indicated that Congress, should it consider S. 1742, may wish to do so in light of the principles articulated in his letter.

Since the Department of Justice has the responsibility to defend acts of Congress unless they intrude on executive powers or are clearly unconstitutional, the Attorney General stated that if S. 1742 were enacted, the Department responsibly could and, if called upon to do so, would defend its constitutionality.

Last, the Attorney General indicated that he has concerns as a policy matter about the withdrawal of a class of cases from the appellate jurisdiction of the Supreme Court. The integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions. The ultimate result of depriving the Supreme Court of jurisdiction over a class of cases would be that federal law would vary in its impact among the inferior courts. There would also exist no guarantee through Supreme Court review that state courts accord appropriate supremacy to federal law when it conflicts with state enactments. Congress has wisely avoided testing the limits of its authority under the Exceptions Clause, and should continue to do so.

# # # # # #

Office of the Attorney General
Washington, D. C. 20530

May 6, 1982

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Mr. Chairman:

This letter is written to you as Chairman of the Committee on the Judiciary. It is written in response to a number of earlier inquiries from members of your Committee concerning S. 1742, a proposal which would withdraw jurisdiction from the Supreme Court to consider "any case arising out of any State statute, ordinance, rule, [or] regulation . . . which relates to voluntary prayers in public schools and public buildings." A second provision of the bill would withdraw the jurisdiction of the district courts over any case in which the Supreme Court has been deprived of jurisdiction. This bill raises fundamental and difficult questions regarding the role of the Supreme Court in our constitutional system, as well as the power of Congress to define and circumscribe that role. The issues involved have been the subject of intense scholarly debate and prominent constitutional scholars have differed as to the extent of congressional power to limit Supreme Court jurisdiction.

This is perhaps to be expected since the question of congressional power over the appellate jurisdiction of the Supreme Court implicates in a basic way the relations between Congress and the Supreme Court, two co-equal branches of government. Relations between the different branches in our tripartite system are generally governed by the doctrine of separation of powers. Neither the Constitution nor the decisions of the Supreme Court have attempted to define the precise contours of this doctrine. As two astute students of our constitutional system have noted:

> The accommodations among the three branches of government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To speak of lines of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory. Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harv. L. Rev. 1010, 1016 (1924) (emphasis in original).

The doctrine of separation of powers touches fundamentally on how the Nation is governed, and, as the Supreme Court noted last Term in a separation of powers case, "it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed." Dames & Moore v. Regan, 101 S. Ct. 2972, 2977 (1981). In this area more than any other we must heed Justice Holmes' wise admonition that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white." Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (dissenting opinion).

There is no doubt that Congress possesses some power to regulate the appellate jurisdiction of the Supreme Court. The language of the Constitution authorizes Supreme Court appellate jurisdiction over enumerated types of cases "with such Exceptions, and under such Regulations as the Congress shall make." The Supreme Court has upheld the congressional exercise of power under this clause, even beyond widely accepted "housekeeping" matters such as time limits on the filing of appeals and minimum jurisdictional amounts in controversy. See Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

Congress may not, however, consistent with the Constitution, make "exceptions" to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.

In determining whether a given exception would intrude upon the core functions of the Supreme Court, it is necessary to consider a number of factors, such as whether the exception covers constitutional or nonconstitutional questions, the extent to which the subject is one which by its nature requires uniformity or permits diversity among the different states and different parts of the country, the extent to which Supreme Court review is necessary to ensure the supremacy of federal law, and whether other forums or remedies have been left in place so that the intrusion can properly be characterized as an exception.

Concluding that Congress may not intrude upon the core functions of the Supreme Court is not to suggest that the Supreme Court and the inferior federal courts have not occasionally exceeded the properly restrained judicial role envisaged by the Framers of our Constitution. Nor does such a conclusion imply an endorsement of the soundness of some of the judicial decisions which have given rise to various of the legislative proposals now before Congress. The Department of Justice will continue, through its litigating efforts, to urge the courts not to intrude into areas that properly belong to the State legislatures and to Congress. The remedy for judicial overreaching, however, is not to restrict the Supreme Court's jurisdiction over those cases which are central to the core functions of the Court in our

system of government. This remedy would in many ways create problems equally or more severe than those which the measure seeks to rectify. 1/

With respect to other pending legislation, the Department of Justice has concluded that Congress may, within constraints imposed by provisions of the Constitution other than Article III, limit the jurisdiction or remedial authority of the inferior federal courts. See letter from the Attorney General to Chairman Rodino concerning S. 951. The question of congressional power over lower federal courts is quite different from the question of congressional power over Supreme Court jurisdiction, and the two issues should not be confused.

1/ The Department of Justice, in previous Administrations, has consistently opposed proposals to restrict Supreme Court jurisdiction. See Hearings Before the Subcomm. To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Sen. Comm. on the Judiciary, 85th Cong., 2d Sess. 573-74 (1958)(statement of Attorney Generral Rogers)("full and unimpaired appellate jurisdiction of the Supreme Court is fundamental under our system of government"); Memorandum for the Attorney General from Assistant Attorney General Malcolm R. Wilkey, Office of Legal Counsel (February 25, 1958) (bills to limit Supreme Court jurisdiction are constitutional but bad policy); Memorandum for the Deputy Attorney General from Assistant Attorney General Tompkins, Internal Security Division (February 14, 1958) (unconstitutional); Letter to Sen. James O. Eastland, Chairman, Senate Comm. on the Judiciary, from Deputy Attorney General Richard Kleindienst (September 4, 1969)(not clearly distinguishing constitutional and policy objections); Memorandum for the Attorney General from Assistant Attorney General William H. Rehnquist (September 16, 1969) (not clearly distinguishing constitutional and policy objections); letter from Assistant Attorney General Alan Parker to Rep. Peter Rodino, Chairman, House Comm. on the Judiciary (June 19, 1980)(unconstitutional); Prayer in Public Schools and Buildings, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 11 (1980) (testimony of John M. Harmon, Assistant Attorney General, Office of Legal Counsel) (unconstitutional).

I.

Proponents of congressional constitutional authority to limit the Supreme Court's entire appellate jurisdiction have contended that such authority exists under the "Exceptions Clause" of Article III of the Constitution. Article III provides, in pertinent part:

> Section 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. . . .
>
> Section 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, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. (Emphasis added.)

The language of the Exceptions Clause, underscored above, does not support the conclusion that Congress possesses plenary authority to remove the Supreme Court's appellate jurisdiction over all cases within that jurisdiction. The concept of an "exception" was understood by the Framers, as it is defined today, as meaning an exclusion from a general rule or law. An "exception" cannot, as a matter of plain language, be read so broadly as to swallow the general rule in terms of which it is defined.

The Constitution, unlike a statute, is not drafted with specific situations in mind. Designed as the fundamental charter of our political system, its most important provisions are phrased in broad and general terms. As eloquently expressed by Justice Holmes in Missouri v. Holland, 252 U.S. 416, 433 (1920):

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago.

For example, a literal interpretation of Article III as a whole would seem to mandate that Congress vest the full judicial power of the United States either in the Supreme Court or in an inferior federal court. Under such an interpretation, Congress could make "exceptions" to the Supreme Court's appellate jurisdiction only if it vested the jurisdiction at issue either in an inferior federal court or in the Supreme Court's original jurisdiction. This interpretation, which would require the conclusion that any measure which entirely ousted the federal courts from exercising any portion of the judicial power of the United States and vested that authority in state courts would be unconstitutional, is rejected by all authorities today. 2/

The Constitution contains a number of other pronouncements which, although seemingly unambiguous and absolute, have necessarily been interpreted as limited in their applicability. See, e.g., Home Building & Loan Ass'n. v. Blaisdell, 290 U.S. 398 (1934)(Contract Clause); Everson v. Board of Education, 330 U.S. 1 (1947)(Establishment Clause); Reynolds v. United States, 98 U.S. 145 (1878)(Free Exercise Clause); Brandenburg v. Ohio, 395 U.S. 444 (1969)(per curiam)(Free Speech Clause). The Supreme Court has also recognized that even when a statute is otherwise within a power granted to Congress by the Constitution, extrinsic limitations on congressional power contained in the Bill of

2/ Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), established that Congress has no authority to enlarge the Supreme Court's original jurisdiction by creating "exceptions" to its appellate jurisdiction. In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330-31 (1816), Justice Story argued that, if Congress creates any inferior federal courts, it must confer on them the full federal jurisdiction. This view, however, has never since been accepted by a majority of the Supreme Court.

Rights or elsewhere may nevertheless render the statute unconstitutional. See, e.g., National League of Cities v. Usery, 426 U.S. 833 (1976)(limitations on Commerce Clause); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)(limitations on Necessary and Proper Clause).

In light of these principles of constitutional interpretation, the Exceptions Clause may not be analyzed in a vacuum but must be understood in terms of Article III as a whole, as evidenced by the history of its framing and ratification, its place in the system of separation of powers embodied in the structure of the Constitution, and its consistency with external limitations on congressional power implicit in the Constitution and contained in the Bill of Rights. The construction of the Exceptions Clause that is most consistent both with the plain language of the Clause and with other evidence of its meaning is that Congress can limit the Supreme Court's appellate jurisdiction only up to the point where it impairs the Court's core functions in the constitutional scheme.

II.

The events at the Constitutional Convention support a construction of the Exceptions Clause that would preclude Congress from interfering with the Supreme Court's core functions. The Framers agreed without dissent on the necessity of a Supreme Court to secure national rights and the uniformity of judgments. The Resolves which were agreed to by the Convention and given to the Committee of Detail provided, simply, that "the jurisdiction [of the Supreme Court] shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony." No mention was made of any congressional power to make exceptions to the Court's jurisdiction. The Committee of Detail, charged with drafting a provision to implement these Resolves, proposed the language of the Exceptions Clause. It seems unlikely that the Committee of Detail could have deviated so dramatically from the Convention's Resolves as to have given Congress the authority to interfere with the Supreme Court's core functions without considerably more attention to the subject at the Convention.

This inference is strengthened by the events surrounding the adoption of the Judicial Article by the full Convention. In determining the scope of the Court's jurisdiction, the Convention agreed to provisions expressly confirming that the jurisdiction included cases arising under the Constitution and treaties; but it rejected, by a 6-2 vote, a resolution providing that, except in the narrow class of cases under the Court's original jurisdiction, "the judicial power shall be exercised in such manner as the Legislature shall direct." 3/ The Convention thus rejected a

3/ 2 M. Farrand, The Records of the Federal Convention of 1787 46 (1911).

clear statement of plenary congressional power over the Court's appellate jurisdiction. Nevertheless, on the same day -- without any recorded debate or explanation -- the Framers adopted the Exceptions and Regulations language now contained in Article III. In light of the value placed on the Supreme Court's appellate jurisdiction, as evidenced by the other actions of the Convention, it seems highly unlikely that the Framers would have agreed, without the slightest hint of controversy, to a provision that would authorize Congress to interfere with the Court's core constitutional functions.

There are additional reasons why the lack of controversy surrounding the adoption of the Exceptions Clause supports the inference that no power to intrude on the Court's core functions was intended. First, the historical materials show the great importance which the Framers attached to these functions. They envisaged that the Supreme Court was a necessary part of the constitutional scheme and believed that the Court would review state and federal laws for consistency with the Constitution. 4/ These sentiments were echoed by the authors of the Federalist Papers, a work which is justly regarded as an important guide to the meaning of the Constitution. 5/ In light of this explicit recognition by the Founding Fathers of the Court's vital role in the constitutional scheme, it seems unlikely that they would have adopted, without controversy, a provision which would effectively authorize Congress to eliminate the Court's core functions.

A second reason for inferring a more limited construction of the Exceptions Clause from the lack of discussion at the Convention concerns the compromise agreed to by the Framers regarding the establishment of inferior federal courts. While the necessity of a Supreme Court was accepted without significant dissent among the Framers, there was vigorous disagreement over whether inferior federal courts should be provided. The Convention first approved a provision calling for mandatory inferior federal courts, then struck this provision by a divided vote, and finally determined to leave to Congress the question whether to establish inferior federal courts. The Supreme Court was viewed as a necessary part of the constitutional structure and was established by the Constitution itself; Congress was given no control over whether the Court would be created. The inferior federal courts, however,

4/ See, e.g., 1 id. at 124; 2 id. at 589 (Madison).

5/ See, e.g., Federalist No. 39 (Madison)(Supreme Court is "clearly essential to prevent an appeal to the sword and a dissolution of the compact"); id. No. 80 (Hamilton); id. No. 82 (Hamilton).

were viewed as an optional part of the Government and were authorized but not established by the Constitution. The decision whether to create them was given to Congress. This distinction, and the role explicitly assigned to Congress with respect to the inferior federal courts, implies that the powers of Congress were to be quite different with respect to the Supreme Court and the inferior federal courts.

If the Exceptions Clause authorized Congress to eliminate the Supreme Court's appellate jurisdiction, thus limiting it to the exercise of original jurisdiction, the power of Congress over the Supreme Court would be virtually indistinguishable from its power over inferior federal courts. Just as Congress could decline to create inferior federal courts, it could, in the guise of creating "exceptions" to the Supreme Court's appellate jurisdiction, deny the Supreme Court the vast majority of the judicial powers which the Framers insisted "shall be vested" in the federal judiciary. Congress could not eliminate the Supreme Court, but it could reduce it to a position of virtual impotence with only its limited original jurisdiction remaining. Such an interpretation cannot be squared with the stark difference in treatment which the Framers accorded to the Supreme Court and the inferior federal courts. Given the intensity of the debate regarding inferior federal courts, and the compromise arrived at by the Framers, it seems highly unlikely that the Convention would have adopted without comment a provision which, for most practical purposes, would place the Supreme Court and the inferior federal courts in the same position vis-a-vis Congress.

A third reason to infer a limited construction of the Exceptions Clause from the lack of debate accompanying its adoption is found in the theory of separation of powers which formed the conceptual foundation for the system of government adopted by the Convention. The Framers intended that each of the three branches of Government would operate largely independently of the others and would check and balance the other Branches. The purpose of this approach was to ensure that governmental power did not become concentrated in the hands of any one individual or group, and thereby to avoid the danger of tyranny which the Framers believed inevitably accompanied unchecked governmental power. Indeed, it is not an exaggeration to say that the single greatest fear of the Founding Fathers was tyranny, and that concentration of power was, in their minds, "the very definition of tyranny." 6/

6/ Federalist No. 47 (Madison).

Essential to the principle of separation of powers was the proposition that no one Branch of Government should have the power to eliminate the fundamental constitutional role of either of the other Branches. As Madison stated in Federalist No. 51:

> [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.

This basic principle of the Constitution -- that each branch must be given the necessary means to defend itself against the encroachments of the two other branches -- has special relevance in the context of legislative attempts to restrict judicial authority. The Framers "applaud[ed] the wisdom of those states who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men." Federalist No. 81 (Hamilton). They believed that, by the inherent nature of their power, the legislature would tend to be the strongest and the judiciary the weakest of the Branches. This insight is reflected in the very structure of the Constitution: the provisions governing the legislature are placed first, in Article I; those establishing and governing the Judicial Branch are in the third position, in Article III. Madison recognized the great inherent power of the Legislative Branch in Federalist No. 48. Drawing extensively from Jefferson's Notes on the State of Virginia, Madison concluded that in a representative republic "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." See also Federalist No. 51 (Madison).

It was in no sense a derogation on the concept of governance responsive to popular will that the Founding Fathers desired checks on the power of the Legislature they were creating. The Acts of Parliament as well as those of the King formed the litany of grievances which produced the Revolution. The Founding Fathers believed in the voice of the people and their elected representatives and placed substantial power in the Legislature. At the same time, however, they were acutely sensitive to the rights of individuals and minorities. Most of them had first-hand experience with persecution. The idea of a written Constitution was precisely to place a check on the popular will and, in large part, to restrain the most powerful Branch. They crafted a representative republic with restraints on the legislature. "[A]n elective despotism was not the government we fought for . . . . " Federalist No. 48 (Madison), quoting Jefferson's Notes on the State of Virginia (emphasis in original).

The Supreme Court was viewed as a part of this restraint, but, nonetheless, inherently as the least dangerous Branch. Hamilton, in a famous passage from Federalist No. 78, eloquently testified to the inherent weakness of the Judicial Branch:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, 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.

As a consequence of this view, Hamilton believed that it was necessary for the judiciary to remain "truly distinct from the Legislature and the Executive. For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" Id., quoting Montesquieu's Spirit of Laws. Thus, he concluded: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution." Id.

It was in recognition of the inherent weakness of the judiciary, particularly as contrasted with the inherent power of the legislature, that the Framers determined to give special protections to the judiciary not enjoyed by officials of the other Branches. Federal judges were given lifetime positions during good behavior, and were protected against diminution of salary while in office. The purpose of these provisions was largely to provide the judiciary, as the weakest Branch, with the necessary tools for self-protection against the encroachments of the other Branches.

The notion that the Exceptions Clause grants Congress plenary authority over the Supreme Court's appellate jurisdiction cannot easily be reconciled with these principles of separation of powers. If Congress had such authority, it could reduce the Supreme Court to a position of impotence in the tripartite constitutional scheme. The Court could be deprived of its ability to protect its core constitutional functions against the power of Congress. The salary and tenure protections so carefully crafted in Article III could be rendered virtually meaningless in light of the power of the Congress simply to eliminate appellate

jurisdiction altogether, or in those areas where the Court's decisions displeased the legislature. It is significant that while the Framers did not focus on the Exceptions Clause, they did point to the impeachment power as "a complete security" against risks of "a series of deliberate usurpations on the authority of the legislature." Federalist No. 81.

In light of these basic considerations, it seems unlikely that the Framers intended the Exceptions Clause to empower Congress to impair the Supreme Court's core functions in the constitutional scheme. Even if some of the Framers could have intended this, it is improbable that the Exceptions Clause could have been approved by the Convention without debate or controversy, or indeed without any explicit statement by anyone associated with the framing or ratification of the Constitution that such a deviation from the carefully crafted separation of powers mechanisms provided elsewhere in the Constitution was intended. Nor does it seem likely that the Convention would have developed the Exceptions Clause as a check on the Supreme Court in such a manner that an exercise of power under the Clause to remove Supreme Court appellate jurisdiction would not return authority to Congress, but vest it in the state courts instead. Hamilton regarded even the possibility of multiple courts of final jurisdiction as unacceptable.

> The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed. Federalist No. 80.

Thus, unless there is sound and compelling evidence of a contrary interpretation in the decisions of the Supreme Court, or in the long-accepted historical practices regarding congressional control of Supreme Court jurisdiction, it must be concluded that the Exceptions Clause does not authorize Congress to interfere with the Court's core functions in our constitutional system.

III.

An examination of the Supreme Court's cases does not require any different interpretation. The Supreme Court has provided only inconclusive guidance on the meaning of the Exceptions Clause. In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), the Court noted "the importance, and even the necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution." In the absence of the Supreme Court, Justice Story observed, "the laws, the treaties and the Constitution of the United States would be different, in different states . . . . The public mischiefs that would attend such a state of things would be truly deplorable; for it cannot be believed, that they could have escaped the enlightened convention which formed the Constitution

. . . . [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils." Similar statements are found in the opinions of Chief Justice Marshall, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 415 (1821), and Chief Justice Taney, Ableman v. Booth, 62 U.S. (21 How.) 506, 517-18 (1858). 8/ Although these cases do not squarely address the question whether Congress could constitutionally deprive the Court of its core functions, the Court's language seems strong enough to cast considerable doubt, at least by implication, on the power of Congress to eliminate Supreme Court jurisdiction over cases in which a final, uniform and supreme voice is necessary in the guise of creating "exceptions" to that jurisdiction. In the words of Chief Justice Taney, the exercise of such a power would withdraw authority which is "essential . . . to [the] very existence [of the Federal] government [and] essential to secure the independence and supremacy of [that] Government." Id.

The Supreme Court has, in a number of early cases, referred to the power of Congress over its appellate jurisdiction as being quite broad. For example, in Barry v. Mercein, 46 U.S. (5 How.) 103 (1847), the Court stated that "[i]f Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction, and if the rule is provided, we cannot depart from it." See also The "Francis Wright," 105 U.S. 381, 386 (1881); Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865); Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810); United States v. More, 7 U.S. (3 Cranch) 159 (1805); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796). However, every one of these statements is dicta; the Court has never held that Congress has the power entirely to preclude the Court from exercising its core functions. It may also be doubted whether these broad statements are intended to cover cases in which such an extraordinary congressional power was exercised. They may instead be designed to recognize a broad power which, like the Commerce Clause, is limited by other provisions of the Constitution and by the structure of the document as a whole.

8/ Cf. the famous statement of Justice Holmes:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that determination as to the laws of the several states.

O.W. Holmes, Collected Legal Papers 295 (1920).

Proponents of the "plenary power" thesis rely most heavily on the only Supreme Court decision which could be characterized as upholding a power of Congress to divest the Court of jurisdiction over a class of constitutional cases: Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). At issue in that case was the constitutionality of an 1868 statute repealing a provision enacted the previous year which had authorized appeals to the Supreme Court from denials of habeas corpus relief by a circuit court. In a brief opinion which did not discuss the scope or implications of the Exceptions Clause, the Court upheld Congress' withdrawal in 1868 of jurisdiction under the 1867 law, stating that "the power to make exceptions to the appellate jurisdiction of this court is given by express words." Id. at 514. Despite this broad language, the Court suggested that the withdrawal of jurisdiction provided by the 1867 law did not deprive the Court of jurisdiction over habeas corpus cases that had been conferred by § 14 of the Judiciary Act of 1789. "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error." Id. at 515.

The Court's dictum regarding alternative procedures for Supreme Court review of habeas corpus cases was converted into a holding several months later in Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869). The petitioner in that case had invoked the Court's jurisdiction under the Judiciary Act of 1789. In holding that it had jurisdiction, the Court in Yerger made it clear that the 1868 legislation considered in McCardle was limited to appeals taken under the 1867 act and upheld the petitioner's right to Supreme Court review under the proper jurisdictional statute. The Court noted that the 1868 act did "not purport to touch the appellate jurisdiction conferred by the Constitution . . . ." Id. at 105. In doing so, the Court observed that any total restriction on the power to hear habeas corpus cases would "seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction . . . ." Id. at 103. Thus, within months of the McCardle decision, the Court made it clear that McCardle did not decide the question of Congress' power to deprive it of all authority to hear constitutional claims in habeas corpus cases. For this reason, while the Yerger Court acknowledged that the Court's jurisdiction as given by the Constitution "is subject to exception and regulation by Congress," id. at 102, neither McCardle, nor Yerger, nor any other case, constitutes an authoritative statement that Congress could deprive the Court of its core functions.

IV.

Finally, the historical record regarding the authority actually asserted by Congress to control the Court's appellate jurisdiction supports, on balance, the construction that the Exceptions Clause does not authorize Congress to interfere with

the Court's core functions. It is indeed true that Congress did not, in the First Judiciary Act explicitly authorize the Supreme Court to exercise the full range of appellate jurisdiction established by Article III. Perhaps the most prominent category of cases in which the Court was not granted statutory jurisdiction were federal criminal cases, which were not explicitly brought within the Court's appellate jurisdiction until 1889. Although Supreme Court review over these cases may have been available in special circumstances, it is probably true that most federal criminal cases were not reviewable by the Supreme Court during this period under the terms of the applicable legislation. The Judiciary Act also failed to grant the Supreme Court appellate jurisdiction over state court decisions striking down state laws as being inconsistent with the federal Constitution, or upholding federal statutes against constitutional attack.

The failure of Congress in the First Judiciary Act to provide the Court with the full appellate jurisdiction authorized under Article III does not undermine the conclusion that Congress cannot interfere with the Supreme Court's core functions, for several reasons. First, while Congress did omit certain specific categories of cases from the appellate jurisdiction provisions of the First Judiciary Act, it is noteworthy that the first Congress, containing among its members many delegates to the Constitutional Convention, recognized the Court's appellate jurisdiction over an extremely broad range of constitutional cases. Most significantly, the Court was given authority under § 25 of the Judiciary Act to review decisions of state courts striking down federal statutes or upholding state statutes against constitutional attack. That authority was conferred despite the intense controversy which it sparked among the states -- controversy which resulted in state resistance to Supreme Court judgments and in attempts in Congress, foreshadowing the current attempts to limit the Court's jurisdiction, to repeal § 25 of the Judiciary Act. The fact that the Judiciary Act did not explicitly recognize jurisdiction over state court decisions upholding the validity of federal laws or striking down state laws, or over federal criminal cases, does not undercut the position that the Court cannot be divested of its ability to fulfill its essential responsibility under the Constitution. The supremacy of federal law, guaranteed by the Supreme Court, would not be seriously threatened by state court decisions upholding federal laws or striking down state laws on federal constitutional grounds.

Second, the history of Supreme Court appellate review has confirmed the importance of its core functions. To the extent that any inferences can be drawn from the failure of the First Judiciary Act explicitly to recognize the full range of the Supreme Court's appellate jurisdiction over constitutional cases, those inferences are subject to refutation by later events. The Supreme Court now has appellate jurisdiction over all federal cases. Each of the areas of incomplete jurisdiction has long since been fulfilled. The vast majority of constitutional

decisions which are on the books today, and which affect our national life in many and important ways, have been rendered by the Court under a statutory regime which included such broad appellate jurisdiction. As Justice Frankfurter said in another context, "the content of the three authorities of government is not to be derived from an abstract analysis . . . . It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (concurring opinion). The gloss which life has written on the Supreme Court's jurisdiction is one which protects the essential role of the Court in the constitutional plan.

V.

As noted at the outset, Congress has substantial authority over the jurisdiction and power of the inferior federal courts. It also is given the power under Article III to regulate the Supreme Court's appellate jurisdiction in circumstances which do not threaten the core functions of the Court as an independent branch in our system of separation of powers. Congress may, for example, specify procedures for obtaining Supreme Court review and impose other restraints on the Court. But the question of the limits of Congress' authority under the Exceptions Clause is an extraordinarily difficult one. Thoughtful and respected authorities have come to conclusions which differ.

The legislative process itself is often important in assessing not only the meaning but also the constitutionality of Congressional enactments. The Court has stated that it must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." Rostker v. Goldberg, 453 U.S. 57, 64 (1981).

If Congress considers the subject matter of S. 1742 it may wish to do so in light of the principles enunciated above and carefully weigh whether whatever action is taken would intrude upon the essential functions of the Supreme Court as an independent branch of government in our system of separation of powers. As the Court has stated, "The customary deference accorded the judgments of Congress is certainly appropriate when . . . . Congress specifically considered the question of the Act's constitutionality." Id. at 64.

Ultimately, it is for Congress to determine what laws to enact and for the Executive Branch to "take care that the Laws be faithfully executed." It is settled practice that the Department of Justice must and will defend Acts of Congress except in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly

indicates that the statute is invalid. Accordingly, should the Department be called upon to defend the constitutionality of this bill before the courts, it responsibly could and would do so.

It is appropriate to note, however, that even if it were concluded that legislation in this area could be enacted consistent with the Constitution, the Department would have concerns as a policy matter about the withdrawal of a class of cases from the appellate jurisdiction of the Supreme Court. History counsels against depriving that Court of its general appellate jurisdiction over federal questions. Proposals of this kind have been advanced periodically, but have not been adopted since the Civil War. There are sound reasons that explain why Congress has exercised restraint in this area and not tested the limits of constitutional authority under the Exceptions Clause.

The integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions. The ultimate result of depriving the Supreme Court of jurisdiction over a class of cases would be that federal law would vary in its impact among the inferior courts. State courts could reach disparate conclusions on identical questions of federal law, and the Supreme Court would not be able to resolve the inevitable conflicts. There would also exist no guarantee through Supreme Court review that state courts accord appropriate supremacy to federal law when it conflicts with state enactments.

Sincerely,

William French Smith
Attorney General

Office of the Attorney General
Washington, D. C. 20530

6 MAY 1982

Honorable Peter W. Rodino
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This responds to your request concerning those portions of S. 951, the Senate-passed version of the Department of Justice appropriation authorization bill for Fiscal Year 1982, which relate to the mandatory transportation of school children to schools other than those closest to their homes ("busing"). One of these provisions relates to the remedial powers of the inferior courts and the other to the authority of the Department of Justice. This letter discusses the effect of these provisions as well as the policy and constitutional implications of the provisions as construed. The funding provisions of S. 951 will be addressed in a separate letter by the Assistant Attorney General of the Office of Legislative Affairs.

It is important to note at the outset that S. 951 does not withdraw jurisdiction from the Supreme Court or limit the jurisdiction of the federal courts to decide a class of cases. The provisions of the bill and its legislative history make clear that the effect of these provisions relate only to one aspect of the remedial power of the inferior federal courts -- not unlike the Norris-LaGuardia Act, enacted in 1932. Nor do the provisions limit the power of state courts or school officials to reassign students or require transportation to remedy unconstitutional segregation. Careful examination of these provisions indicates that they are constitutional.

I. Busing Provisions of S. 951

The first provision, § 2 of the bill, entitled the "Neighborhood School Act of 1982," recites five congressional findings to the effect that busing is an inadequate, expensive, energy-inefficient and undesirable remedy. It then states that, pursuant to Congress' power under Article III, § 1 and § 5 of the Fourteenth Amendment, "no court of the United States may order or issue any writ directly or indirectly ordering any student to be assigned or to be transported to a public school other than that which is closest to the student's residence unless" such assignment or transportation is voluntary or "reasonable". The bill declares that such assignment or transportation is not reasonable if

> "(i) there are reasonable alternatives available which involve less time in travel, distance, danger, or inconvenience;
>
> (ii) such assignment or transportation requires a student to cross a school district having the same grade level as that of the student;
>
> (iii) such transportation plan or order or part thereof is likely to result in a greater degree of racial imbalance in the public school system than was in existence on the date of the order for such assignment or transportation plan or is likely to have a net harmful effect on the quality of education in the public school district;
>
> (iv) the total actual daily time consumed in travel by schoolbus for any student exceeds thirty minutes unless such transportation is to and from a public school closest to the student's residence with a grade level identical to that of the student; or

> (v) the total actual round trip distance traveled by schoolbus for any student exceeds 10 miles unless the actual round trip distance traveled by schoolbus is to and from the public school closest to the student's residence with a grade level identical to that of the student."

Section 2(f) of the bill adds a new subparagraph to § 407(a) of Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c-6(a), authorizing suits by the Attorney General to enforce rights guaranteed by the bill if he determines that a student has been required to attend or be transported to a school in violation of the bill and is otherwise unable to maintain appropriate legal proceedings to obtain relief. The bill is made "retroactive" in that its terms would apply to busing ordered by federal courts even if such order were entered prior to its effective date. Section 16 of the bill supplements these provisions by providing that "[n]otwithstanding any provision of this Act, the Department of Justice shall not be prevented from participating in any proceedings to remove or reduce the requirement of busing in existing court decrees or judgments."

The second provision, § 3(1)(D), limits the power of the Department of Justice to bring actions in which the Department would advocate busing as a remedy:

> "No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest to the student's home, except for a student requiring special education as a result of being mentally or physically handicapped."

II. General Comments

There appear to be ambiguities in the Neighborhood School Act's provisions for suits to be brought by the Attorney General challenging existing decrees. For example, it is unclear what, if any, obligations are placed on the Attorney General with regard to court decrees that offend § 2. Since the bill does not purport to prevent any governmental entities other than federal courts from requiring the transportation of students, the Attorney General's review of a complaint must include the inquiry whether the transportation is the result of federal court action. It is difficult to determine the party against whom the action is to be brought. The assignment violates the Neighborhood School Act only if it is required by court order. Does the Attorney General sue the court? If so, then what relief is appropriate? Does the bill permit an action against a school board even though its actions are not the subject of the bill's prohibition? If a school board is the defendant, then what relief is appropriate? Does the Attorney General ask that the school board be enjoined from complying with the court order? Does he ask for a declaratory judgment of the board's obligations under the order? If the latter is the case and the board wishes to continue its present assignment patterns, what will have been accomplished by the lawsuit? These questions illustrate the problems incident to the provisions that allow for collateral attack on existing decrees.

Serious concern arises also because of the limitation on the Attorney General's discretion contained in § 3(1)(D). This Administration has repeatedly stated its objection to the use of busing to remedy unlawful segregation in public schools. See Testimony of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, Concerning Desegregation of Public Schools, October 16, 1981. The express limitation on the Department's authority is unnecessary and may inhibit the ability to present and advocate remedies which may be less intrusive and burdensome than those being urged on a court by other litigants. Moreover, because the limitation is imposed only in the Department's one-year authorization, there is no force to the argument that a statutory provision is necessary to ensure that successive Administrations will also carry out congressional intent. Finally, to the extent that Congress does intend to effect a long-term substantive change in the law, the proper vehicle would seem to be permanent substantive legislation, not an authorization bill which must be reviewed annually by Congress and which becomes more difficult to

enact and thus less efficient for its necessary purposes when it is encumbered by extraneous matters.

III. Constitutionality

A. Textual Interpretation of the Neighborhood School Act

The Neighborhood School Act restricts the power of inferior federal courts to issue remedial busing decrees where the transportation requirement would exceed specified limits of reasonableness. That it does not purport to limit the power of state courts or school boards is amply demonstrated by its text and by statements of its supporters. Senator Hatch, in a colloquy with Senator Johnston, stated that "this bill does not restrict in any way the authority of State courts to enforce the Constitution as they wish . . . ." 127 Cong. Rec. S 6648 (daily ed. June 22, 1981). On the day that the bill passed the Senate, Senator Johnston echoed these remarks:

> If a school board wants to bus children all over its parish or all over its county, it is not prohibited from doing so by this amendment. Nor indeed would a state court if it undertook to order that busing. The legislation deals only with the power of the Federal courts . . . .

128 Cong. Rec. S 1324 (daily ed. March 2, 1982).

The impact of the Neighborhood School Act on the federal courts is also limited. It withdraws, in specified circumstances, a single remedy from the inferior federal courts. The substantial weight of the text and legislative history supports the proposition that the bill limits the remedial power only of the inferior federal courts, not the Supreme Court. There is strong textual support for this conclusion, because the bill recites that it is enacted pursuant to congressional power under Article III, § 1. Section 1 of Article III provides authority for limiting the jurisdiction and the powers of the inferior federal courts, not the Supreme Court. The source of congressional authority relative to the jurisdiction of the Supreme Court is the "Exceptions Clause," Article III, § 2, cl. 2. The conspicuous

and apparently intentional omission of that clause as a source of congressional authority to enact this measure strongly indicates that no restriction of the Supreme Court appellate jurisdiction was intended.

Moreover, there do not appear to be any direct statements in the legislative history to the effect that any restriction on the Supreme Court's jurisdiction was intended. To the contrary, there is an explicit colloquy between Senators Hatch and Johnston indicating that no restriction on Supreme Court jurisdiction was intended. In response to a question posed by Senator Mathias to Senator Johnston, Senator Hatch stated:

> There is little controversy, in my opinion . . . that the constitutional power to establish and dismantle inferior federal courts has given Congress complete authority over their jurisdiction. This has been repeatedly recognized by the Supreme Court . . . .
>
> This amendment would be only a slight modification of lower federal court jurisdiction. These inferior federal courts would no longer have the authority to use one remedy among many for a finding of a constitutional violation.
>
> * * *
>
> I would hasten to add that this bill does not, however, restrict in any way . . . the power of the Supreme Court to review State court proceedings and ensure full enforcement of constitutional guarantees.
>
> In short, this is a very, very narrow amendment, it only withdraws a single remedy which Congress finds inappropriate from the lower Federal courts.
>
> * * *
>
> Mr. JOHNSTON. Mr. President, I thank the distinguished Senator from Utah for his exegesis on the legality, the power of Congress under Article III to restrict jurisdiction.

127 Cong. Rec. S 6648-49 (daily ed. June 22, 1981)(emphasis added).

B. Legal Status of Transportation Remedies

In Brown v. Board of Education [II], 349 U.S. 294, 300 (1955), the Supreme Court held that federal courts must be guided by equitable principles in the design of judicial remedies for unlawful racial segregation in public school systems. Under those principles, as the Court has more recently explained, "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Milliken v. Bradley [I], 418 U.S. 717, 746 (1974). The Court has indicated that the principle that justifies judicial discretion to impose transportation remedies also implies a limitation on that discretion.

The judicial power to impose such remedies "may be exercised only on the basis of a constitutional violation," Swann v. Charlotte-Mecklenburg Board, 402 U.S. 1, 16 (1974), and "a federal court is required to tailor 'the scope of the remedy' which included the transportation of students to schools other than the ones which they had formerly attended. to fit 'the nature and the extent of the constitutional violation,'" Dayton Board of Education v. Brinkman [I], 433 U.S. 406, 420 (1977), quoting Milliken v. Bradley [I], supra at 744. In other words, reassignment of students and concomitant transportation of students to different schools is appropriate only when it is "indeed . . . remedial," Milliken v. Bradley [II], 433 U.S. 267, 280 (1977), that is, when it is aimed at making available to the victims of unlawful segregation a school system that is free of the taint of such segregation.

The Supreme Court has stated that circumstances might conceivably exist in which the imposition of a desegregation remedy which included the transportation of students to schools other than the ones which they had formerly attended would be unavoidable in order to vindicate constitutional rights. If school authorities have segregated public school students by race, they shoulder a constitutional obligation "to eliminate from the public schools all vestiges of state-imposed discrimination," Swann, supra, 402 U.S. at 15. The Court has said that if this duty cannot be fulfilled without the mandatory reassignment of students to different schools, with the concomitant requirement of student transportation, this remedy cannot be statutorily eliminated. In North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971), the Court overturned a North Carolina statute that proscribed the assignment of students to any school on the basis of race, "or for the purpose of creating a balance or ratio of race," and prohibited "involuntary" busing in violation of the statutory proscription. The Chief Justice, writing for a unanimous Court, concluded:

> [I]f a State-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of constitutional rights.
>
> * * *
>
> We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio" will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As we noted in Swann, supra, at 29, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it.

402 U.S. at 45-46.

Although the Court has indicated that some student transportation might be a necessary incident to a desegregation decree, it has never stated with particularity what those cases might be, nor has it identified the limitations on busing orders in cases where transportation is constitutionally required. In Swann v. Charlotte-Mecklenburg Board, supra, for example, the Court declined to provide "rigid guidelines" governing the appropriateness of busing remedies. It stated only that busing was to be limited by factors of time and distance which would "either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30-31. Limits on time and distance would vary with many factors, "but probably with none more than the age of the students." Id. at 31.

C. Congressional Power Under Section 5 of the Fourteenth Amendment

In light of the Supreme Court's conclusion that student transportation might in some circumstances be a necessary feature of a remedial desegregation decree, it is necessary to consider whether the limitation on the power of the inferior federal courts under the Neighborhood School Act would be justified as an exercise of congressional authority under § 5 of the Fourteenth Amendment. Section D, infra, focuses on Congress' power under Article III, § 1, which is broader in this context than § 5.

Section 5 provides that Congress "shall have power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, including the Equal Protection Clause, which has been held to guarantee all students a right to be free of intentional racial discrimination or segregation in schooling. Brown v. Board of Education [I], 347 U.S. 483 (1954). The question is whether congressional power to enforce that right by appropriate legislation includes authority to limit the power of the lower federal courts to award transportation remedies generally and specifically in those cases in which some transportation is necessary fully to vindicate constitutional rights.

The cases of Katzenbach v. Morgan, 384 U.S. 641 (1966), Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); and Fullilove v. Klutznick, 448 U.S. 448 (1980)(plurality opinion), firmly establish that the § 5 power is a broad one. Congress may enact statutes to prevent or to remedy situations which, on the basis of legislative facts, Congress determines to be violative of the Constitution. At the same time, these cases rather firmly establish that Congress is without power under § 5 to revise the Court's constitutional judgments if the effect of such revision is to "restrict, abrogate, or dilute" Fourteenth Amendment guarantees as recognized by the Supreme Court.

The limitation on busing remedies contained in the Neighborhood School Act would be authorized under § 5 to the extent that it does not prevent the inferior federal courts from adequately vindicating constitutional rights. The grant of power under § 5 to "enforce" the Fourteenth Amendment carries with it subordinate authority to determine specific methods by which that amendment is to be enforced. As an incident of its enforcement authority, therefore, Congress may instruct the lower federal courts not to order mandatory busing in excess of the § 2(d) limits, so long as the court retains adequate legal or equitable powers to remedy whatever constitutional violation may be found to exist in a given case.

Moreover, federal and state courts would probably pay considerable deference to the congressional factfinding upon which

the bill is ultimately based in determining the scope of constitutional requirements in this area. The Court has stated that, so long as it can "perceive a basis" for the congressional findings, Katzenbach v. Morgan, supra, 384 U.S. at 653, it will uphold a legislative determination that a situation exists which either directly violates the Constitution or which, unless corrected, will lead to a constitutional violation. Similar deference would be appropriate for findings under this bill, notwithstanding the somewhat limited hearings which were held and the absence of printed reports. It does not appear that any particularized research was presented to the Senate which might have supported or undermined the specific limitations on federal court decrees contained in § 2(d) of the bill. It is likely, however, that the time and distance limitations contained in § 2(d) of the bill would serve as legitimate benchmarks for federal and state courts in the future in devising appropriate decrees. To this extent, the exercise of congressional power under § 5 would be fully proper and effective.

Nor does it appear that the Neighborhood School Act would be interpreted to "dilute" Fourteenth Amendment rights merely because it denies a certain form of relief in the inferior federal courts or includes certain retroactivity provisions in §§ 2(f) and (g). Congress cannot, under § 5, prohibit a federal district court from granting a litigant all the relief that the Fourteenth Amendment requires. Moreover, the state courts would remain open to persons claiming unconstitutional segregation in education after this bill becomes law, and would be empowered -- indeed, required -- to provide constitutionally adequate relief.

Under § 5 Congress cannot impose mandatory restrictions on federal courts in a given case where the restriction would prevent them from fully remedying the constitutional violation. Congressional power to enforce the Fourteenth Amendment is not a power to determine the limits of constitutional rights. Although it includes the power to limit the equitable discretion of the lower federal courts to impose remedial measures which are not necessary to correct the constitutional violation, the courts must retain remedial authority sufficient to correct the violation. And although Congress can express its view through factfinding, but subject to the limitations set forth in § 2(d) of the bill, that busing is an ineffective

remedial tool and that extensive busing is not necessary to remedy a constitutional violation, it is ultimately the responsibility of the courts to determine, after giving due consideration to the congressional findings contained in this bill, whether in a given case an effective remedy requires the use of mandatory busing in excess of the limitations set forth in § 2(d) of the bill.

In sum, Congress, pursuant to § 5, can: (1) limit the authority of federal district courts to require student transportation where it is not required by the Constitution; and (2) adopt guidelines, based on legislative factfinding, as to when busing is effective to remedy the violation, which guidelines will tend to receive substantial deference from the courts. Section 5 does not, however, authorize Congress to preclude the inferior federal courts from ordering mandatory busing when, in the judgment of the courts, such busing is necessary to remedy a constitutional violation. This authority must be found, if at all, in the power of Congress under Article III, § 1 to restrict the jurisdiction of the lower federal courts.

D. Congressional Power Under Article III, § 1

Congress' authority to limit the equitable powers of the inferior federal courts has been repeatedly recognized by the Supreme Court. Article III, § 1 of the Constitution provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." See also U.S. Const., Art. 1, § 8, cl. 9 (giving Congress power to "constitute Tribunals inferior to the supreme Court"). It seems a necessary inference from the express decision of the Framers that the creation of inferior courts was to rest in the discretion of Congress that, once created, the scope of the court's jurisdiction was also discretionary. The view that, generally speaking, Congress has very broad control over the inferior federal court jurisdiction was accepted by the Supreme Court in Cary v. Curtis, 44 U.S. (3 How.) 236 (1845), and Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). That view remains firmly established today.

Congress' power over jurisdiction has been further recognized, most notably in cases under the Norris-LaGuardia

Act, to include substantial power to limit the remedies available in the inferior federal courts. In Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938), the Court upheld provisions of the Norris-LaGuardia Act which imposed restrictions on federal court jurisdiction to issue restraining orders or injunctions in cases growing out of labor disputes. In two cases under the Emergency Price Control Act, the Supreme Court recognized the power of Congress to withdraw certain cases from the jurisdiction of the inferior federal courts and to prohibit any court from issuing temporary stays or injunctions. See Lockerty v. Phillips, 319 U.S. 182 (1943); Yakus v. United States, 321 U.S. 414 (1944).

The provisions of the Neighborhood School Act appear to be firmly grounded in Congress' Article III, § 1 power, as interpreted in Lauf, Lockerty, and Yakus, to control the inferior federal court jurisdiction. The bill does not represent an attempt by Congress to use its power to limit jurisdiction as a disguise for usurping the exercise of judicial power. The bill does not instruct the inferior federal courts how to decide issues of fact in pending cases. See United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

Nor does the bill usurp the judicial function by depriving the inferior federal courts of their power to issue any remedy at all. The bill does not withdraw the authority of inferior federal courts to hear desegregation cases or to issue busing decrees, so long as they comport with the limitations in § 2(d) of the bill. This limited effect on the court's remedial power does not convert the judicial power -- to hear and decide particular cases and to grant relief -- into the essentially legislative function of deciding cases without any power to issue relief affecting individual legal rights or obligations in specific cases. Whatever implicit limitations on Congress' power to control jurisdiction might be contained in the principle of separation of powers, they are not exceeded by this bill, which does not withdraw all effective remedial power from the inferior federal courts.

Neither the text of the bill nor the legislative history appears to support the conclusion that the bill requires an automatic reversal of any outstanding court order that imposed a busing remedy beyond the limits specified in the bill. Such an attempt to exert direct control over a court order would raise constitutional problems associated with legislative revision of judgments. E.g., Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)(on petition for mandamus). The "retroactive" effect is felt instead through a change in the substantive law, in this case the law of remedies, to be applied by courts in determining whether to impose or to

revise a busing remedy, coupled with the grant of authority to the Attorney General to seek relief on behalf of a student transported in violation of the Act. Upon the Attorney General's application, the court would itself determine whether the busing remedy was consistent with the Act. The bill, therefore, does no more than require the court to apply the law as it would then exist at the time of its decision in a "pending" case. See The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

The busing remedy is "pending" and not final to the extent that the court has retained jurisdiction over the case or the order is otherwise subject to modification by the court in the exercise of its equity jurisdiction. See United States v. Swift & Co., 286 U.S. 106, 114-15 (1932). Prior to or in the absence of relief by the court from a previously imposed busing order, the parties before the court would be required to continue to perform pursuant to the court's order. Cf. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

E. Constitutionality of § 3(1)(D)

Section 3(1)(D) of the bill prohibits the Department of Justice from using any appropriated funds to bring or maintain any action to require, directly or indirectly, virtually any busing of school children. The Department's authority to institute litigation under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, against segregated school systems would not be diminished. Nor would the federal courts, under this section, be limited in their power to remedy constitutional violations. The effect of § 3(1)(D) is only to prohibit the Department in the litigation in which it is involved from seeking, directly or indirectly, a busing remedy. If the language and legislative history of the bill, as finally enacted, support this interpretation, it would appear that § 3(1)(D) would be upheld despite the limitations that it would impose on the discretion currently possessed by the Executive Branch.

The limitation would restrict the litigating authority presently conferred upon the Department by Title IV to seek all necessary relief to vindicate the constitutional rights at stake. At least in cases that do not involve the use of federal funds by segregated school systems, the Executive's authority may be restricted to this limited extent. Because the restriction does not entirely preclude enforcement actions by the United States, § 3(1)(D) does not impermissibly limit the Executive's "inherent" authority to remedy constitutional violations, to the extent recognized in United States v.

Philadelphia, 644 F.2d 187 (3d Cir. 1980), or New York Times v. United States, 403 U.S. 713, 741-47 (1971)(Marshall, J., concurring). And because the restriction applies only to one remedy and does not preclude the Department from seeking other effective remedies or prevent the Executive from objecting to inadequate desegregation plans, § 3(1)(D) does not exceed the congressional power over the enforcement authority that is granted.

Where federal funds are provided, § 3(1)(D) would be constitutional if read to preserve the Government's ability to fulfill its Fifth Amendment obligations by initiating antidiscrimination suits, restricting only, and in a very limited fashion, the Department's participation, by seeking a busing order, in the remedial phase of such suits. The Department would be authorized to seek alternative remedies and to comment on the sufficiency of these alternatives. If the alternative remedies to busing are inadequate in a particular case to vindicate the rights at stake, the court would retain authority, subject, of course, to the Neighborhood School Act provisions, to order a transportation remedy. The Department could be asked to comment on the sufficiency of this remedy if ordered by the court.

Moreover, § 3(1)(D) would not appear to disable the Department of Justice from seeking a court order foreclosing the receipt of federal funding by schools in unconstitutionally segregated school systems in those cases, if any, where the court was prevented by the limits contained in the Neighborhood School Act from issuing an adequate remedy and the administrative agency was precluded from terminating federal funds. See Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980).

F. Due Process Clause

Finally, both the limitation on the courts under the Neighborhood School Act and on the Department of Justice under § 3(1)(D) should be upheld if challenged under the equal protection component of the Fifth Amendment's Due Process Clause, see Bolling v. Sharpe, 347 U.S. 497 (1954), as a deprivation of a judicial remedy from a racially identifiable group. These provisions neither create a racial classification nor evidence a discriminatory purpose. Absent either of these constitutional flaws, the provisions will be upheld if they are rationally related to a legitimate government purpose. See Harris v. McRae, 448 U.S. 297 (1980).

As the law has developed, the courts will review statutory classifications according to a "strict scrutiny" standard either if they create a racial or other "suspect" classification, e.g., Hunter v. Erickson, 393 U.S. 385 (1969), or if they reflect an invidious discriminatory purpose. E.g., Village of Arlington Heights v. Washington Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); cf. Mobile v. Bolden, 446 U.S. 55 (1980) (plurality opinion). Satisfaction of the strict scrutiny standard requires a classification that is narrowly tailored to achieve a compelling governmental interest. Neither basis for invoking strict scrutiny appears to be applicable here.

First, these provisions, unlike the provision found unconstitutional in Hunter v. Erickson, supra, do not contain a racial classification. Mandatory busing for the purpose of achieving racial balance is only one of the circumstances in which student transportation is placed off limits to Justice Department suits or district court orders. The proposals prohibit Justice Department suits or court orders for the transportation of students specified distances or away from the schools nearest their homes for any reason. Moreover, a racial classification would not result even if these provisions limited advocacy or ordering of mandatory busing only to achieve racial integration. The issue of what sorts of remedies the Justice Department should advocate or the federal district courts should order simply does not split the citizenry into discrete racial subgroups. Cf. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).

Second, there appears to be no evidence of purposeful discrimination. Whatever might be the arguable impact on racial minorities, the legislative history to date contains no suggestion of an invidious discriminatory purpose. To the contrary, the sponsors and supporters of these measures endorsed the decision in Brown v. Board of Education, 347 U.S. 483 (1954), and repeatedly stated their abhorrence of de jure segregation in schooling. The proponents rest their support of this legislation on the conclusion that busing has been destructive not only of quality education for all students but also of the goal of desegregation. Even the opponents of the bill did not suggest that any invidious purpose was present.

Accordingly, the bill will not be subject to review under the strict scrutiny standard. Instead, the bill will be reviewed, and upheld, under the principles of equal protection, if it is rationally related to a legitimate governmental purpose. This test is a highly deferential one. It is reasonably clear that the defects in busing noted by the proponents of the bill and discussed above would suffice to satisfy the minimum rationality standard. Moreover, the proponents of these provisions advanced other rationales to support the measure, including that mandatory busing is a excessive burden on the taxpayer; that it wastes scarce petroleum reserves; and that education is a local matter that should be administered on a local level. These reasons appear to be legitimate governmental purposes, and the busing restrictions appear to be rationally related to these purposes.

It should be noted in closing that these conclusions are predicated in substantial part on the legislative history of this bill to date. Subsequent history in the House or thereafter could well affect these views.

Sincerely,

William French Smith
Attorney General

SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL

April 13, 1982

TO: The Attorney General

FROM: John Roberts

RE: Supreme Court Jurisdiction

Attached are the two versions of introductory language which you requested yeserday. They are identical except for the last paragraph.

We have been asked for our views on the constitutionality of S. 1742, a bill "to restore the right of voluntary prayer in public schools and to promote the separation of powers." The bill would divest the federal courts of jurisdiction over suits challenging voluntary prayer in public schools or other public places. It contains two principal provisions. The first, to be added as 28 U.S.C. §1259, would deprive the Supreme Court of jurisdiction to review "any case arising out of any State statute, ordinance, rule, regulation, or part thereof, or arising out of any act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, or part thereof, which relates to voluntary prayers in public schools and public buildings." The second provision, to be added as 28 U.S.C. §1364, would withdraw the jurisdiction of the district courts over any case in which the Supreme Court has been deprived of jurisdiction under proposed §1259.

After careful consideration we have concluded that Congress has the constitutional power to divest the lower federal courts of jurisdiction over school prayer cases. Under Article III, section 1 Congress has discretion whether to create lower federal courts at all, and it follows that the jurisdiction of such courts, once established, is also discretionary.

We conclude, on the other hand, that Congress does not have the power to divest the Supreme Court of appellate jurisdiction over school prayer cases. The appellate jurisdiction of the Supreme Court is subject to "such exceptions . . . as the Congress shall make," Article III, section 2, but a broad reading of this clause authorizing Congress to divest the Supreme Court of appellate jurisdiction over constitutional cases would essentially eliminate the federal judicial branch as an independent check on Congress. If Congress were permitted to exercise the asserted authority over Supreme Court appellate jurisdiction, the highest courts of the 50 states would become the final arbiters of the federal Constitution in school prayer cases. This could result in disparate readings of the same constitutional provision in different states, with no final federal judicial review to guarantee the supremacy and uniformity of federal law. We find such a prospect very troublesome, and are persuaded on balance that the Framers did not intend Congress to have the power to bring about such a result. The question is very close, however, with no definitive guidance from the Supreme Court and with reputable scholars arguing both sides of the issue. If Congress should pass S. 1742, therefore, the Department of Justice, if called upon to do so, responsibly could and would defend its constitutionality in the courts.

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SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL

April 13, 1982

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U.S. Department of Justice
Civil Rights Division

Assistant Attorney General *Washington, D.C. 20530*

4/16/82

Ken
John

This is a copy of my "rough outline" for the Attorney General's review in connection with the Opinion Letter on "Legislative Authority To Remove or Limit Supreme Ct. Jurisdiction.

Brad

Proposed Outline

Re: Legislative Initiatives Directed at Supreme Court Jurisdiction

I. Introduction

A. Acknowledge that there are currently pending in Congress over 20 bills designed to divest the Supreme Court (and in some instances, the lower federal courts) of jurisdiction to hear certain issues.

B. State that, in speaking to the constitutionality of such legislative proposals, it would be injudicious to address the issue in the context of any particular bill that is pending but has not passed either House. (Such bills will be debated and likely amended in a number of respects as they proceed through the legislative process. It would serve no useful purpose for the Attorney General to opine on the constitutionality of proposals before they have emerged in final form either in the House or Senate -- or preferrably both).

C. At the same time, my opinion has been requested on the general constitutional question presented by the various legislative proposals, and this letter is in response to that (those) request(s).

D. Issue lends itself to no easy resolution. It has been the subject of extensive legal commentary, scholarly debate and thoughtful discussion both within and outside the profession. There are perhaps as many who endorse one side of the issue as the other.

E. It is, therefore, with an understandable measure of caution that the Attorney General enters the debate. In so doing, I have found it useful to the analysis of this complex issue to examine the question of constitutionality on two levels: first, legally in terms of the Courts' Article III powers; and second, from the public policy vantage point.

F. For the reasons that follow, my opinion is that Article III contains no absolute prohibition against Congress divesting the Supreme Court of appellate jurisdiction in discrete and particularized classes of cases where it has determined that there exists an overriding need to take such dramatic action. To say that Congress has such power, however, does not suggest an endorsement of the exercise that power. Fundamental policy considerations as integral to our Constitution as the provisions themselves counsel against Congress moving into this area unless absolutely necessary. Even then, there is reason to caution against legislating too broadly. The Exceptions Clause in Article III may well have inherent limitations that were intended to protect the Supreme Court's jurisdiction from wholesale assault, and there are in any event other constitutional provisions that cannot be ignored by Congress if it seeks to legislate in this area.

G. For present purposes, however, it is not necessary to resolve the outer limits of Congress' authority under the Constitution to restrict Supreme Court appellate jurisdiction. None of the bills currently under consideration seek to denude the Court of all, or even a substantial portion, of its appellate jurisdiction. Rather, the various efforts to legislate in this area are limited in scope and carefully tailored to discrete and well-defined issues. It is to that situation -- and that situation alone -- that this opinion is directed.

II. Constitutionality

A. The starting point in the analysis is with the language of Article III. At first blush, it is seemingly straight forward and assigns to Congress unfettered power to make "such Exceptions" to the Supreme Court's appellate jurisdiction as it deems appropriate. There are those who argue for a narrower interpretation of the Exceptions Clause, and some have suggested that it should be read as applying solely to the jurisdiction of lower federal courts. On balance, I cannot read the Exceptions Clause as having no application whatsoever to the Supreme Court's appellate jurisdiction. Moreover, whatever implicit limitation might be contained in use of the word "exception" (suggesting something less than total removal), it seems to me that the current bills under consideration would not overstep the bounds of permissible congressional authority to act in this area.

B. When one turns to the history of the Constitution, there are weighty arguments on both sides of the issue. [The opinion letter would undertake to summarize the differing positions in this regard.] Here again, I favor the position of those who argue that the Framers did not intend to insulate entirely from legislative redefinition the Supreme Court's appellate jurisdiction.

C. Interestingly, when one looks at the manner in which the Supreme Court has reacted to this issue, its response seems to reinforce the foregoing conclusion. In those instances where Congress has in fact enacted legislation that "cuts back on" Supreme Court jurisdiction in particularized fashion, the Court has declined to invalidate the legislation as unauthorized action. See Ex parte McCardle, 74 U.S. (7 Wall) 506 (1869); Ex parte Yerger, 75 U.S. (8 Wall) 85 (1869); Lockerty v. Phillips, 319 U.S. 182, 187 (1943); And see J. Roberts memo discussing judicial response, et. pg. 8-13. This is not to suggest that the Court might not do so if Congress enacted a statute that cuts too deeply into the appellate jurisdiction of the Supreme Court. On that I express no opinion. But, Congress has not yet gone to such lengths, nor do the pending bills suggest that it is contemplating doing so.

III. Policy Considerations

A. Having concluded as a legal matter that the Constitution does not preclude Congress from imposing restraints on Supreme Court's appellate jurisdiction, at least to a limited extent, does not, in my view, end the matter. The issue is, as the foregoing discussion demonstrates, a terribly complex one. As tempting as it sometimes is for lawyers to discuss such matters in a legal vacuum, that is often ill-advised and can frequently lead to undesirable (and even unintended) results. Here, it would be a monumental mistake to take so cabined an approach.

B. The fact is that, as persuasive as is the legal argument upholding constitutionality where the legislation is carefully drawn and narrowly defined, the policy considerations counselling against such legislation seems to tilt the balance just as far in the other direction. Fidelity to the fundamental principle of Separation of Powers is alone a strong argument against Congress moving into this area. Other policy questions raising doubts as to the wisdom of such legislation relate to the interest in uniformity of judicial decision, the integrity of our system of federal law, the credibility of legislative action that bears the earmarks of retaliation for particular court decisions, and the long-term ramifications if a precedent is set that allows congressional intrusion on court jurisdiction, even if done on a piecemeal basis. [This list can, of course, be expanded and further developed].

C. These policy considerations are obviously not to be decided by the Attorney General; they are peculiarly within the province of the elected representatives of the people. As such, with respect to every bill pending in Congress that seeks to redefine the Supreme Court's jurisdiction, it is incumbent on every member of the House and Senate to assess fully

how much legislation will impact on our system of government in terms of the several policy considerations discussed above. It is not enough simply to conclude that a piece of legislation is constitutionally permissible under Article III. Congress has a higher threshold of inquiry. Before it enacts a statute it must, in addition, be satisfied that the legislation is sound public policy, that it is as wise as it is lawful. That is not a responsibility that can be avoided simply because the Attorney General has announced a position on the pure legal question.

IV. Conclusion

A. The constitutional question is indeed a close one, and in stating my position I am fully aware that many respected authorities have taken the other side of the issue. Perhaps the ultimate irony is that it will in all likelihood be the Supreme Court that finally resolves the debate. Before Congress takes legislative action that forces the issue to the courts, however, I personally would urge that the most serious attention be given to the weighty policy considerations at work any time that an effort is made to alter the delicate balance among the three branches of government. No branch should allow its zeal to correct perceived indiscretions of a sister branch to blind it to the overriding principle embedded in the Separation of Powers doctrine. Even where the raw power exists under Article III for Congress to trench on the authority of the Judiciary, history teaches that the strength and resiliancy of our system of government resides not so much in the wholesale exercise of such power, but in our representatives' ability to show wise restraint. I can think of no more appropriate situation for heeding that lesson than where Congress is contemplating the removal of appellate jurisdiction of the Supreme Court

COUNSELOR TO THE
ATTORNEY GENERAL

October 30

Ted,

Attached is the memo that John Roberts has done on the Supreme Court jurisdiction issue. John attended the AEI session on this issue, as you may recall. At my suggestion, John has done an advocacy piece taking a particular position -- namely that Congress does have the power in question -- utilizing the points made during the AEI session and working in other resources. This, I hope, will help crystallize the issues further.

As John's piece makes clear, this does not purport to be an objective

COUNSELOR TO THE
ATTORNEY GENERAL

dispassionate treatment of the issue; to the contrary, I felt it important that we see on paper the strongest case that can be made by those who feel that, whatever the wisdom of the device, the Exceptions Clause can be used constitutionally by Congress to curb what are deemed to be judicial excesses.

This, I hope, will be of some help in the process.

Thanks.

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MEMORANDUM

Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments

There are currently pending in Congress over twenty bills which would divest the Supreme Court (and, in most instances, lower federal courts as well) of jurisdiction to hear certain types of controversies, ranging from school prayer and desegregation cases to abortion cases. Proposals of this sort have been commonplace in Congress for at least thirty years, covering such diverse subject matter areas as subversive activities, S. 2646, 85th Cong., 2d Sess. (1958), reapportionment, H.R. 11926, 88th Cong., 2d Sess. (1964), and the admissibility of confessions, S. 917, 90th Cong., 2d Sess. (1968). None of the proposals prompted by specific Supreme Court decisions, however, have been enacted into law.

The Office of Legal Counsel has prepared an opinion concluding that such proposals are probably unconstitutional. Since that time, several developments have occurred which are worthy of review. Specifically, the question of the constitutionality of such proposals has been the subject of recent scholarly activity, particularly in the form of testimony before congressional committees and participation at a recent conference sponsored by the American Enterprise Institute for Public Policy Research. The theme of the A.E.I. Conference, chaired by Professor Gunther, was "Judicial Power in the United States: What are the Appropriate Constraints?" Most of the participants at the Conference recognized a serious problem in the current exercise of judicial power, epitomized in the lower courts by intrusive remedial orders and in the Supreme Court by what is broadly perceived to be the unprincipled jurisprudence of Roe v. Wade. The power of Congress to remove the jurisdiction of the lower federal courts over particular classes of cases in response to this problem was generally accepted; more importantly, a number of distinguished commentators recognized a similar power with respect to the appellate jurisdiction of the Supreme Court. Based on the A.E.I. Conference, congressional testimony, and earlier writings, the list of those who consider Congress to have the constitutional authority to divest the Supreme Court of appellate

jurisdiction over certain classes of cases includes Professors Wechsler, Mishkin, Bator, Scalia, Redish and Van Alstyne.

In light of the recent activity on the subject, Ken Starr recommended that a memorandum be prepared that marshals arguments in favor of Congress' power to control the appellate jurisdiction of the Supreme Court. Thus, in order to assist in the process of analysis, this memorandum is prepared from a standpoint of advocacy of congressional power over the Supreme Court's appellate jurisdiction; it does not purport to be an objective review of the issue, and should therefore not be viewed as such. The memorandum does not consider specific proposals but rather the general question of congressional power, particularly in light of the developments summarized above.

I.

The source of Congress' power to remove certain classes of cases from Supreme Court appellate review is found in Article III, Section 2, Clause 2:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be Party, the supreme Court shall have original jurisdiction. In all other Cases 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." (Emphasis supplied).

The underscored language stands as a plenary grant of power to Congress to make exceptions to the appellate jurisdiction of the Supreme Court. The exceptions clause by its terms contains no limit; the power to make exceptions to the Court's appellate jurisdiction exists by virtue of the express language of the clause over questions of both law and fact.

This clear and unequivocal language is the strongest argument in favor of congressional power and the inevitable stumbling block for those who would read the clause in a more restricted fashion. The clause does not say that Congress may make such exceptions as do not impair the essential functions of the Supreme Court, see, e.g., Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960), however those "essential functions" may be defined, nor does the clause grant the exception power only as to questions of fact, see, e.g., Berger, Congress v. The Supreme Court 285-296 (1969); Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53 (1962).

As Professor Van Alstyne has put it:

> "The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated, and hopefully, generally to be respected by Congress as a matter of enlightened policy once the power was granted, as it was, to the fullest extent. In short, the clause is complete exactly as it stands: the appellate jurisdiction of the Supreme Court is subject to 'such exceptions and under such regulations as the Congress shall make.'" Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 Ariz. L. Rev. 229, 260 (1973).

Professor Bator, although believing that withdrawal of Supreme Court appellate jurisdiction would violate the "spirit" of the Constitution and would be bad policy, nonetheless concluded that Congress did possess this power under the exceptions clause and that "the arguments which would place serious limits on the power of Congress to make exceptions are not persuasive." Hearings Before the Subcommittee on the Constitution of the Senate Judiciary Committee. His conclusion was based, in large part, on the plain language of the exceptions clause:

> "The text of the Constitution provides that the appellate jurisdiction of the Supreme Court shall be subject to 'such exceptions, and under such Regulations as the Congress shall make'. This language plainly indicates that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the appellate jurisdiction, it has the authority to do so. If the Constitution means what it says, it means that Congress can make the state courts -- or, indeed, the lower federal courts -- the ultimate authority for the decision of any category of case to which the federal judicial power extends." Id.

Nor has the impact of the plain language been lost on members of Congress. As Senator Ervin noted during hearings on the exceptions clause, "I don't believe that the Founding Fathers could have found any simpler words or plainer words in the English language to say what they said, which was that the appellate jurisdiction of the Supreme Court is dependent entirely upon the will of Congress." Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 22 (1968).

This focus on the plain language of the exceptions clause is not a simplistic approach. The Framers were not inartful draftsmen and can be expected to have known how to express the more restricted interpretations advanced by modern commentators had such constructions in fact been intended. In this regard it is important to recognize that we are not considering a constitutional clause that is by its nature indeterminate and incapable of precise or fixed meaning, such as the due process clause or the prohibition on unreasonable searches and seizures.

II.

The history of the drafting and enactment of the exceptions clause is not particularly revealing and does not justify a departure from the plain meaning of the words. According to Professor Goebel, the exceptions clause "was not debated" by the Committee of Detail which drafted it or the whole Convention, Antecedents and Beginnings to 1801, in I History of the Supreme Court of the United States 240 (P. Freund, ed., 1971). Nonetheless, several commentators have sought to limit its scope by arguing that it was included for the sole purpose of permitting Congress to prohibit the Supreme Court from reviewing jury determinations of fact. See, e.g., Berger, Congress v. The Supreme Court (1969); Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53 (1962). The primary support for this argument is found in the ratification debates. Opponents of ratification criticized Supreme Court appellate jurisdiction "both as to law and fact" on the ground that it would permit the Court to violate the right to jury trial by reviewing questions of fact determined by a jury. As Luther Martin argued:

> "The proposed Constitution . . . by its appellate jurisdiction, absolutely takes away that inestimable privilege [trial by jury]; since it expressly declares that the Supreme Court shall have appellate jurisdiction both as to law and fact. . . The Supreme Court is to take up all questions of fact . . . to decide upon them as if they had never been tried by a jury." 3 Farrand 221.

In response, supporters of ratification pointed to the exceptions clause as providing Congress the authority to protect against this danger. Hamilton, in Federalist 81, noted that although appellate jurisdiction in the Supreme Court over questions of law had been generally accepted, there was a clamor against such jurisdiction over questions of fact. He answered:

> "It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States all causes are tried in this mode; and such an exception would preclude the revision of matters of fact, as well where it might be proper as where it might be improper. To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security."

The argument is that the exceptions clause was designed simply to permit exception to Supreme Court appellate review of questions of fact, and that therefore Congress cannot invoke the authority of the clause in making exceptions to Supreme Court review of questions of law.

To the extent the argument focuses on opposition during the ratification debates to the specific language granting appellate jurisdiction "both as to law and fact," it encounters the serious difficulty that this language was added after the exceptions clause. As reported by the Committee of Detail, the clause in question simply provided "in all other cases before mentioned, it [Supreme Court jurisdiction] shall be appellate, with such exceptions, and under such regulations, as the legislature shall make." 5 Elliott 380 (1866). When this draft was being considered on the floor of the convention, Gouverneur Morris of Pennsylvania inquired whether the appellate jurisdiction was to extend to matters of fact as well as law. James Wilson, a member of the Committee of Detail, stated that the Committee intended that to be so. A motion by Dickinson of Delaware to insert the words "both as to law and fact" was made and adopted. See Merry, supra, at 58-59; Goebel, supra, at 243. In light of the chronology, therefore, it cannot be argued that the exceptions clause was designed to answer objections caused by the "both as to law and fact" language, since the exceptions clause antedated the objectionable language. As Professor Strong has concluded, "this sequence raises a presumption that the exception-regulations clause was originally included, and continued, for a purpose quite different from that of limiting the Supreme Court's appellate jurisdiction in fact as well as law." Strong, Prescription For A Nagging Constitutional Headache, 8 San Diego L.Rev. 246, 252 (1971).

It is of course true that it can still be maintained that the purpose of the clause was to permit Congress to restrict Supreme Court jurisdiction to review fact questions, since the appellate jurisdiction was intended to cover both law and fact questions even prior to the clarification amendment proposed by Dickinson. There is, however, no direct evidence that this was the purpose of the exceptions clause when it was drafted. The problem was not highlighted at that stage as it would be in the ratification debates, after the addition of the "both as to law and fact" language. Indeed, Judge Pendelton expressed his wish during the Virginia ratification debates that the words "both as to law and fact" "had been buried in oblivion. If they had, it would have silenced the greatest objections against the section." 3 Elliott 519. This suggests that the objection did not exist before the addition of the language, and that it therefore cannot explain the need for the exceptions clause. See also Goebel, supra, at 243 ("By one addition, a well-intentioned clarification of the scope of appellate authority, the convention unwittingly sowed seeds from which much trouble was soon to sprout"). (Emphasis supplied).

Proponents of ratification did point to the exceptions clause in response to criticisms that the Supreme Court possessed the power to violate the right to a jury trial by appellate review of questions of fact. It is a nonsequitur, however, to argue that the clause was therefore intended for this purpose alone. Even if the Framers were concerned about the vulnerability of jury determinations, the exceptions authority they provided went well beyond that particular problem. The fact that the clause provided a ready response to criticisms based on the right to a jury trial hardly supports the inference that it was intended to do nothing else. In this regard it is important to recognize that statements made by supporters of the Constitution concerning the exceptions clause, while perhaps directed to the problem of jury determinations of questions of fact, did not at all suggest a limited scope to Congress' power under the clause. As Professor Van Alstyne has put it, "the references . . . scarcely go so far as to suggest that that is all the clause would reach." Van Alstyne, supra, at 261 n. 99. See also Bator, Senate Hearings ("the evidence to support the proposition that the exceptions clause was to be reserved exclusively to issues of fact is weak"). For example, Hamilton noted that the clause would enable "the government to modify [appellate jurisdiction] in such a manner as will best answer the ends of public justice and security," and that appellate jurisdiction was "subject to any exceptions and regulations which may be thought advisable . . . . " Federalist 81. Marshall himself discussed the exceptions clause in the following terms:

> "What is the meaning of the term exception? Does it not mean an alteration or 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." 3 Elliott 560.

As Governor Randolph of Virginia noted in connection with the exceptions clause, "it would be proper to refer here to anything that could be understood in the federal court. They [Congress] may except generally both as to law and fact, or they may except as to the law only, or fact only." 3 Elliott 572.

The most compelling argument against the Merry-Berger thesis is that the Judiciary Act of 1789, passed in the immediate wake of ratification and with the involvement of many of the Framers themselves, went far beyond fact questions in making exceptions to the appellate jurisdiction of the Supreme Court. Redish, Senate Hearings, 10. For example, the Supreme Court had no appellate jurisdiction over federal criminal cases, nor any jurisdiction over appeals from state courts in cases in which the state court struck down a state statute on federal constitutional grounds, or upheld the validity of a federal statute. As Chief Justice Marshall made clear in Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810), the failure explicitly to grant jurisdiction was an implicit exercise of the exceptions power. As noted, however, several of the implicit exceptions in the Judiciary Act of 1789 had nothing to do with excepting review of jury determinations of fact.

The Merry-Berger thesis is also difficult to reconcile with the existence of the Seventh Amendment. The Seventh Amendment provides, in part, that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The Seventh Amendment does everything that Professors Merry and Berger argue the exceptions clause was designed to permit Congress to do. It is difficult to see what happened in the short period between ratification of the Constitution and enactment of the Seventh Amendment that created a need for the Seventh Amendment if there was no such need at the time of ratification of the Constitution. Further, if the purpose of the exceptions clause was to protect jury determinations of fact, it is difficult to understand why the Framers did not take a direct approach as was soon done in the Seventh Amendment. Professor Berger is singularly unpersuasive in suggesting that the purpose of the Seventh Amendment was simply to make "doubly sure" of the protections already available through the exceptions clause. Berger, supra, at 288.

Finally, the language of the exceptions clause does not support an interpretation limiting the power to make exceptions to questions of fact. As Professor Redish has put it, "to construe the language of the Constitution to reach the conclusion that the clause modifies only the word 'fact' requires a most tortured, and probably impermissible, grammatical construction." Senate Hearings, 10.

III.

Judicial pronouncements on the exceptions clause also support Congress' power to divest the Supreme Court of appellate jurisdiction over certain classes of cases. Any discussion of case law in this area must begin with Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). McCardle, an unreconstructed Mississippi newspaper editor, was being held in the custody of United States marshals on the order of the military governor. He applied to the federal circuit court for habeas corpus relief, under the Habeas Corpus Act of 1867. This relief was denied, and McCardle thereupon appealed to the Supreme Court pursuant to the appellate review provisions of the Act of 1867. While the case was pending in the Supreme Court Congress enacted, over President Johnson's veto, an act which repealed the provisions of the Act of 1867 permitting an appeal to be taken to the Supreme Court. The legislative history of the repealer provision left no doubt that Congress' purpose was to prevent the Court from deciding the McCardle case and perhaps undermining the entire military reconstruction scheme. See Van Alstyne, supra, at 240-241.

A unanimous Court upheld the power of Congress to divest the Supreme Court of jurisdiction. The Court clearly based its decision on Congress' power under the exceptions clause. Chief Justice Chase began the opinion by recognizing that the appellate jurisdiction of the Court "is conferred 'with such exceptions and under such regulations as Congress shall make.'" 74 U.S., at 513. He noted that Congress, in explicitly conferring certain appellate jurisdiction, was considered to have implicitly excepted all other jurisdiction. In the McCardle case, however, Congress had not merely exercised its power to make exceptions to appellate jurisdiction by negative implication. It had done so expressly:

> "The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the Act of 1867, affirming the appellate jurisdiction of this Court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception." Id., at 513-514.

Chief Justice Chase went on to note that the Court would not decline to recognize the effect of the repealer provision because of Congress' motive to avoid a possibly objectionable Supreme Court ruling on the merits. "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." Id, at 514 (emphasis supplied). The opinion then concluded that the Court was without jurisdiction, and that "the only function remaining to the Court is that of announcing the fact and dismissing the cause." Id.

It is true, as has been pointed out by several commentators, that Ex parte McCardle did not involve a situation in which the Supreme Court was totally divested of jurisdiction over an entire class of cases. Jurisdiction remained over habeas corpus appeals under the Judiciary Act of 1789, as the Court soon made clear in Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869). Indeed, if he had taken a different procedural route, McCardle himself could have had his case heard on the merits in the Supreme Court. This point was adverted to in the concluding paragraph of the McCardle opinion:

> "Counsel seem to have supposed, if effect be given to the Repealing Act in question, that the whole appellate power of the Court, in cases of habeas corpus, is denied. But this is an error. The Act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the Act of 1867. It does not affect jurisdiction which was previously exercised." 74 U.S., at 515.

None of this, however, detracts from the force of the analysis employed in the McCardle opinion. The Court considered the exceptions power to be plainly at issue, as did counsel in the case, see 74 U.S., at 511, and gave broad, indeed unlimited scope to that power. As Professor Bator has put it, "It has often been pointed out that McCardle is special and distinguishable; nevertheless, the language of the Court in McCardle plainly proceeded on the assumption that Congress' power is plenary and this is the only Supreme Court opinion squarely on point." Senate Hearings.

It is important to recognize that the concluding paragraph in the McCardle opinion had nothing to do with any reservation on the part of the Court concerning the scope of the exceptions power. The source of the concern, as was soon made clear in the Yerger opinion, was rather with the suspension clause, Article I, Section 9, which provides "the privilege of the writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." The Court went out of its way to

note that it was not totally divested of appellate jurisdiction in McCardle not because such action would have been improper under the exceptions clause, but rather because it would have been unusual insofar as habeas corpus jurisdiction was concerned. As the Court stressed in Yerger:

> "That this Court is one of the courts to which the power to issue writs of habeas corpus is expressly given by the [Judiciary Act of 1789] has never been questioned. It would have been, indeed, a remarkable anomaly if this Court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts of England, had been denied, under a Constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares those courts to possess." 75 U.S., at 96.

Indeed, far from diminishing the impact of McCardle, Yerger actually fortifies its conclusions concerning the plenary scope of the exceptions power. Yerger concluded that in passing the repealer provision in 1868 Congress affected only habeas corpus appeals under the 1867 Act, not those under the 1789 Act. At several points in the opinion, however, the Court noted that Congress had the power to do this if it desired. The Yerger court explicitly noted that "appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make." 75 U.S., at 98. The Court noted that it had appellate power to review habeas corpus cases under the Judiciary Act of 1789 and subsequent acts, "except in cases within some limitations of the jurisdiction by Congress." Id. The Court explicitly recognized the power of Congress to deprive it of jurisdiction in habeas corpus cases, not only those arising under the Act of 1867, but also those arising under the Act of 1789. "It is proper to add, that we are not aware of anything in any Act of Congress except the Act of 1868, which indicates any intention to withhold appellate jurisdiction in habeas corpus cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the Act of 1789. We agree that it is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this Court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ . . . These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction." Id., at 102-103 (emphasis supplied). Because of what it perceived to be the oddity of Congress depriving the Supreme Court of

habeas corpus jurisdiction, when the Constitution specifically provided that the writ should not be suspended except in exigent circumstances, the Court in Yerger adopted a rule of construction and on the basis of that rule declined to hold that Congress had totally divested it of appellate jurisdiction in habeas corpus cases. There was never any doubt in the opinion, however, concerning the power of Congress to do this if it so desired. That power had been clearly established in the McCardle opinion. The holding in McCardle, together with statements in Yerger concerning congressional power, clearly indicate that the Court accepted the proposition that Congress could, if it desired, totally divest the Supreme Court of appellate jurisdiction in habeas corpus cases.

United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), is often cited as undermining the apparent import of McCardle. Klein, however, is actually a red herring so far as the present question is concerned. The President had decreed that any former rebels who took an oath of loyalty could regain their property confiscated during the Civil War. Congress passed a statute providing that once the Court determined that such an oath was taken it was not to award the property but rather to dismiss the suit for want of jurisdiction. Once again, as in Yerger, the Court in its opinion recognized Congress' power under the exceptions clause:

> "If it [the Act] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient." Id., at 145.

The Court struck down the statute, however, because it did not simply make an exception to appellate jurisdiction, but rather permitted the Court to exercise jurisdiction only to achieve a certain result. The Act was unconstitutional because it granted the Court jurisdiction but then limited the Court's consideration of relevant law. As the Court noted, "the Court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction." Id., at 146. The result was that "the Court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." Id., at 147. Nothing of the sort is involved in the question presently under consideration.

McCardle is simply the most prominent in a long and consistent line of judicial opinions reading the exceptions clause as meaning exactly what it says. As early as 1796 the Supreme Court recognized that its appellate jurisdiction was not automatically vested by the Constitution but rather depended upon congressional legislation. The opinions establishing this fundamental principle referred expressly to the exceptions power. The theory was that in explicitly granting jurisdiction short of the full scope of Article III, Congress was implicitly exercising its power to make exceptions to appellate jurisdiction as to those areas not expressly granted. In Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796), Chief Justice Ellsworth explained:

> "The appellate jurisdiction is . . . qualified; in as much as it is given 'with such exceptions, and under such regulations, as Congress shall make.' Here then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."

Chief Justice Marshall also drew the connection between an implicit exercise of the exceptions power and the theory that appellate jurisdiction is dependent on congressional action in United States v. More, 7 U.S. (3 Cranch) 159, 173 (1805): "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." The point was made even more explicit five years later, in Marshall's opinion for the Court in Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-314 (1810): "when the first legislature of the union proceeded to carry the third Article into effect, it must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court . . . ."

Under this established theory, Congress has exercised the exceptions power in a substantive fashion from the outset, since Congress has never granted the Supreme Court appellate jurisdiction over the full Article III judicial power. Four years before McCardle the Court recognized that "it is for Congress to determine how far, within the limits of the capacity of this Court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law," Daniels v. Railroad, 70 U.S. (3 Wall.) 250, 254 (1865), and in The Francis Wright, 105 U.S. 381, 386 (1881), Chief Justice Waite wrote for a unanimous Court that "not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while

others are not." The Chief Justice specifically referred to "that the power to except from -- take out of -- the jurisdiction, both as to law and fact" and noted that "the general power to regulate implies power to regulate in all things." As the Court concluded in Colorado Central Consolidated Mining Co. v. Turck, 150 U.S. 138, 141 (1893), "it has been held in an uninterrupted series of decisions that this Court exercises appellate jurisdiction only in accordance with the acts of Congress upon the subject." Again, it bears emphasis that the basis for this theory is the implicit exercise by Congress of its exceptions power when it makes a limited grant of jurisdiction.

There have been several judicial expressions recognizing the plenary nature of Congress' authority under the exceptions clause in more recent opinions. Dissenting on other grounds in National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1948), Justice Frankfurter noted that "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is sub judice." Also dissenting on other grounds, Justice Rutledge noted in Yakus v. United States, 321 U.S. 414, 472-473 (1944), that "Congress has plenary power to confer or withhold appellate jurisdiction." In Lockerty v. Phillips, 319 U.S. 182, 187 (1943), the Court stated that Congress could have declined to create any inferior federal courts, leaving litigants to the state courts, "with such appellate review by this Court as Congress might prescribe." (emphasis supplied). Ex parte McCardle was cited with approval in Glidden Co. v. Zdanok, 370 U.S 530, 567 (1962), as were Hamilton's assurances in Federalist 80 to those who thought the federal judicial power too extensive that "the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove [any] . . . inconveniences." Id. Justice Douglas objected to the citation of McCardle, id., at 605, but his objection apparently was based simply on the sub judice aspect of that case, since in Flast v. Cohen, 392 U.S. 83, 109 (1968) he wrote that "as respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III. See Ex parte McCardle . . . ." (concurring opinion).

IV.

Those opposed to recognizing the power of Congress under the exceptions clause argue that the Constitution requires that the Supreme Court be capable of insuring the uniformity and supremacy of federal law. If the Court were divested of its jurisdiction over certain classes of cases, it would be prevented from exercising these assertedly "essential functions" in those

areas. With no appellate review in the Supreme Court, state courts could refuse to uphold the supremacy of federal law, and reach different conclusions on identical questions of federal law. See Ratner, supra. The primary support for this argument is drawn from statements by the Framers and Supreme Court opinions in cases such as Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1806) and Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821).

In justifying the establishment of one Supreme Court, the Framers did indeed point to the virtues of uniformity and the need to secure the supremacy of federal law. Hamilton, for example, wrote that "if there are such things as political axioms, the propriety of the judicial power of the government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts having final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed." Federalist No. 80. Rutledge noted that "the right of appeal to the supreme national tribunal" was sufficient "to secure the national rights and uniformity of judgments." 1 Farrand 124.

It is also true that the use of Supreme Court appellate jurisdiction as a means of securing the supremacy of federal law and uniformity in its interpretation figures as a prominent theme in significant Supreme Court cases. In Martin v. Hunter's Lessee, Justice Story upheld the power of the Supreme Court to review state court decisions, noting that "the Constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." Story went on to note:

> "A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself: if there were no revising authority controlling these jarring and discordant judgments, and harmonizing them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states."

Chief Justice Marshall reiterated these themes in Cohens v. Virginia. Noting that many state judges were dependent for their office and salary on the will of the legislature, Marshall reasoned: "when we observe the importance which the Constitution attaches to the independence of judges, we are less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of Congress." He also stated that "the necessity of uniformity, as well as correctness in expounding the Constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal, the power of deciding, in the last resort, all cases in which they are involved." 19 U.S., at 387, 416.

The argument which is based on the foregoing statements, however, confuses a permissive grant of constitutional authority with a constitutional requirement. The question presented in Martin v. Hunter's Lessee and Cohens v. Virginia was whether Congress acted constitutionally when it conferred appellate jurisdiction on the Supreme Court over decisions of state courts in the Judiciary Act of 1789. The question was whether Congress could constitutionally provide for such review, not whether such review was required by the Constitution. Story and Marshall stressed the policy arguments concerning supremacy and uniformity which persuaded the Framers to permit Congress to provide for Supreme Court appellate review, and which also persuaded Congress in the Judiciary Act of 1789 to authorize such review. None of this suggests that such review is constitutionally required. That this is the proper reading of Martin v. Hunter's Lessee and Cohens v. Virginia is made clear by examination of the opinions, discussed above, which establish the principle that the Supreme Court's exercise of appellate jurisdiction is entirely dependent upon an act of Congress.

Indeed, in Martin v. Hunter's Lessee, Justice Story noted that the appellate jurisdiction of the Supreme Court was "subject . . . to such exceptions and regulations as Congress may prescribe." In the very next sentence he noted that the appellate jursidiction was "therefore capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction." The appellate jurisdiction was "capable" of embracing every case in the Constitution, and did not simply do so, because of Congress' power to make exceptions to the appellate jurisdiction. Cohens v. Virginia considered as a separate point whether jurisdiction was conferred by the Judiciary Act of 1789. This clearly indicated that the Court did not consider such jurisdiction to be required by the Constitution, even in the pursuit of the identified goals of federal supremacy and uniformity in the interpretation of federal law. Rather the matter was one for Congress to decide on policy grounds, in light of these considerations.

Hamilton's Federalist No. 80, with its statements concerning supremacy and uniformity, also contained full recognition of the exceptions power. Indeed, the essay concluded with these words:

> "From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences."

The removal of appellate jurisdiction from the Supreme Court does not, in any event, relieve courts from an obligation to respect the supremacy of federal law. Under Testa v. Katt, 330 U.S. 386 (1947), state courts cannot discriminate against the enforcement of federal rights. Under Article VI, state court judges are "bound by oath" to support the Constitution, including the supremacy clause. That Congress has available the stronger guarantee of supremacy and uniformity of vesting appellate jurisdiction in the Supreme Court does not mean that Congress is required to employ this device.

It is also significant to note that the Nation has in fact experienced and survived situations in which exceptions to Supreme Court appellate jurisdiction prevented that Court from guaranteeing uniformity in the interpretation of federal law. These exceptions were not limited to review of questions of fact, nor were they simply regulations of procedures. As Professor Gunther has put it, "They were not simply procedural matters as to when you file a case or how you prepare a case or how you raise the issues. I think they were of great substantive significance in the sense that a very large bulk of potential Supreme Court material did not get to the Supreme Court because of the congressional failure to vest the whole jurisdiction." Hearings, supra, at 17.

A leading illustration is the fact that, from the Judiciary Act of 1789 until the Act of December 23, 1914, 38 Stat. 790, the Supreme Court had no appellate jurisdiction of any kind over state court decisions interpreting the Federal Constitution and striking down state laws on the basis of the Federal Constitution. Thus, an interpretation of the Federal Constitution by a state Supreme Court, even if considered erroneous by

the United States Supreme Court, and even if in direct conflict with prior decisions of the highest courts of other states (or, for that matter, a prior decision of the United States Supreme Court), could not be reviewed. The United States Supreme Court could not guarantee uniformity in such cases.

This fact was clearly demonstrated in the early years of the 20th Century. In Ives v. South Buffalo Railroad Co., the highest court of the state of New York struck down the first American workmen's compensation law, finding it "a deprivation of liberty and property under the Federal and State Constitutions." 201 N.Y. 271, 294 (1911). Although the decision was roundly criticized as an outrage, and contrary to what the Supreme Court of the United States would have done, "under the existing appellate jursidiction there was no way of reviewing the Ives result by the Supreme Court." Frankfurter and Landis, The Business of the Supreme Court 195 (1928). Later in 1911 the Supreme Court of Washington upheld the constitutionality of a statute similar to that which was struck down in Ives, State v. Clausen, 65 Wash. 156 (1911), and soon thereafter the New Jersey Supreme Court also upheld a workmen's compensation statute, Sexton v. Newark District Telegraph Co., 84 N.J. 85 (1915). The confusion over the impact of the Federal Due Process Clause on workmen's compensation laws led to reform of Supreme Court appellate jurisdiction. As the House Judiciary Committee reported, "The Fourteenth Amendment meant one thing on the east bank of the Hudson and the opposite thing on the west bank." H.R. Rep. 1222, 63d Congress, 3d Sess., serial number 6766, 2. It was not suggested that this state of affairs was unconstitutional, simply bad policy. It was remedied by the Act of 1914. See Frankfurter and Landis, supra, 192-198.

Throughout the 19th Century, the Supreme Court also interpreted the Judiciary Act of of 1789 as withholding authority to review state court decisions upholding the validity of a federal statute. See, e.g., Baker v. Baldwin, 187 U.S. 61 (1902). This created a situation in which federal laws could be upheld in some jurisdictions, although struck down in others. Although the Court eventually abandoned this restrictive interpretation of the Judiciary Act, there was no suggestion that the prior interpretation was unconstitutional. Cf. Ratner, supra, at 185.

To take one more prominent illustration, until 1889 the Supreme Court could exercise no appellate jurisdiction over federal criminal cases. United States v. More, 7 U.S. (3 Cranch) 159 (1805). This made possible conflicts in the interpretation of federal criminal laws, conflicts which could not be resolved by resort to Supreme Court appellate review. Professor Ratner has argued that some review was

available, since there could be review upon a certificate of division of opinion filed by the circuit court, and in habeas corpus cases. See Ratner, supra, at 195-196. Habeas corpus review, however, hardly covered the whole range of questions which could arise under the federal criminal laws, see Van Alstyne, supra, at 262 n. 103, and review through certificate of division of opinion by the circuit court was a slender reed on which to rest the "essential functions" of the Supreme Court. Indeed, it became the practice for a single judge to hold circuit court, and, barring a rather severe case of judicial schizophrenia, this restricted the availability of review through certificate of division of opinion. See Carroll v. United States, 354 U.S. 394, 401 n. 9 (1957). As Frankfurter and Landis put it:

> "For a full hundred years there was no right of appeal to the Supreme Court in criminal cases. Until 1889 even issues of life or death could reach that Court only upon a certificate of division of opinion. As the practice became more prevelant for a single judge to hold circuit court (until in the '80's it became the rule rather than the exception), the finality of power of the single judge became particularly open to criticism in criminal cases." Frankfurter and Landis, supra, at 109.

Here again there was no suggestion that the lack of Supreme Court appellate review somehow unconstitutionally interfered with the essential functions of the Supreme Court. See Bator, Senate Hearings, at 36 ("For 100 years Federal criminal cases were not reviewable in the Supreme Court. That, of course, greatly prejudices the argument that the power to render uniform judgments is an essential fundamental of the constitutional plan").

At the Senate Hearings Professor Redish disposed of the "essential functions" argument in these terms:

> "The major difficulty with the 'essential functions' theory, however, is that it finds no basis in either the language or history of the Constitution. Certainly the explicit wording of the provision says nothing about it, and the history of the 'Exceptions' Clause is not of significant assistance to those urging the 'essential functions' thesis. Therefore as attractive as the theory may seem as a matter of policy, it does not appear to find support in the Constitution. To turn the words of Professor Hart, one of the thesis' leading advocates, against him, '[w]hose Constitution are you talking about--Utopia's or ours?'"

It has been argued that uniformity in the interpretation of federal law, imposed through Supreme Court appellate review, may no longer constitute sound policy. Until the scope of the due process clause of the Fourteenth Amendment was expanded far beyond the intent of the Framers, protections against state as opposed to federal action varied depending on local circumstances. At the A.E.I. Conference, Professor Scalia pointed out that Congress could make exceptions to Supreme Court appellate review in those areas where uniformity was not necessarily desired. Non-uniformity and diversity depending on local conditions can be viewed as desirable goals, and the exceptions clause provides a possible means to that end. Scalia recognized that non-uniformity in the interpretation of federal law could be criticized as "sloppy", but asked: compared to what? Given the choice between non-uniformity and the uniform imposition of the judicial excesses embodied in Roe v. Wade, Scalia was prepared to choose the former alternative.

A general argument is made that permitting Congress to make exceptions to the Supreme Court's appellate jurisdiction would put Congress above the judicial branch and undermine the entire structure of checks and balances established by the Constitution. As Professor Bator has noted, however, "Arguments which derive from 'structural' notions are . . . weak, primarily because they are so vague particularly in the face of a text which is not at all vague." Senate Hearings. The structural arguments also overlook the fact that the exceptions clause itself is part of the structure of the Constitution:

> "True, there is evidence that the Framers generally contemplated Supreme Court review of state court judgments. But they also contemplated Congressional regulation of this jurisdiction, and nothing in the 'structure of the document' serves in any powerful way to distinguish between regulations which are valid and those which are invalid." Id.

Professor Wechsler has criticized arguments that seek to limit the scope of the exceptions clause as themselves "antithetical to the plan of the Constitution for the courts -- which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power, or, stated differently, how far judicial jurisdiction should be left to the state courts. . . ." The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1005 (1965).

A short answer to the arguments that use of the exceptions power would undermine the system of checks and balances is that in divesting the Supreme Court of appellate jurisdiction, Congress is not attempting to dictate any particular result.

Other courts of competent jurisdiction, either lower federal courts or state courts, would still exist and have the capacity to declare acts of Congress unconstitutional. The state courts "are not free to refuse enforcement" of a federal right, Testa v. Katt, 330 U.S. 386, 394 (1947).

It is argued, however, that divesting the Supreme Court of jurisdiction over a particular class of cases would undermine the constitutional role of the Court as the ultimate arbiter of constitutional questions. The Consitution, however, does not accord such a role to the Court. The authority of the Court to interpret the Constitution derives from the necessity of its doing so in the course of discharging its judicial responsibility to decide those cases and controversies properly presented to it. As put in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803):

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constituion, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. . . . In some cases, then, the Constitution must be looked into by the judges." (Emphasis supplied).

If the necessity of interpreting the Constitution is removed, as it would be if the Court were divested of jurisdiction, the basis for the Court's role as final arbiter of the Constitution is removed. As Professor Wechsler has recognized:

> "Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. That is, at least, what Marbury v. Madison was all about." Wechsler, supra, at 1006.

See also Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1.

Furthermore, the vision of a wholesale divesting of the Supreme Court's appellate jurisdiction is unfounded. Although many divestiture bills have been proposed, no bill which would have divested the Supreme Court of appellate jursidiction in response to a decision of the Supreme Court has ever been enacted. There are serious institutional restraints which inhibit Congress' exercise of the exceptions power. See Van Alstyne, supra, at 289; Wechsler, supra, at 1006-1007. The vociferous opposition which has been raised to the more recent proposals bears witness to these institutional restraints. If Congress were to divest the Supreme Court of appellate jurisdiction, as contemplated by the bills pending in Congress, it would not undermine the entire system of judicial review. Rather, Congress would simply be exercising its "ample authority to make such exceptions" as are necessary to remove the "partial inconveniences" which have developed in the system. Hamilton, Federalist No. 80.

Those who truly believe that the exercise of this exceptions power threatens the system of checks and balances should pursue the remedy suggested by Justice Roberts, namely amendment of the Constitution to remove Congress' exceptions power. Roberts, Now Is The Time: Fortifying The Supreme Court's Independence, 35 ABA J. 1 (1949). The American Bar Association supported such an amendment, see 34 A.B.A. J. 1072-1073 (1948), and the Senate actually passed one, S.J. Res. 44, 83d Cong., 1st Sess. (1953), but it was tabled by the House. In light of the foregoing it is perhaps not unfair to criticize those who argue against the power of Congress under the exceptions clause as the ones who are circumventing the amendment process.

It has even been suggested that the existence of the exceptions power aids the Court in the discharge of its functions by securing the legitimacy of judicial review.

> "Could it not be argued that, politically and pyschologically, the legitimacy of judicial review is enormously buttressed by the continuing existence of Congressional power to curtail jurisdiction? That the continuing existence of this power, rather than being a threat to judicial independence, is one of its important (though subtle) bulwarks?" Hart and Wechsler, The Federal Courts and The Federal System 364 (2 ed. 1973).

Professor Bator reiterated this theme in his recent Senate testimony, stating that "a powerful case can be made that such a plenary power [to make exceptions to the appellate

jurisdiction of the Supreme court] may be essential to making the institution of judicial review tolerable in a democratic society."

Along the same lines Professor Mishkin, participating at the A.E.I. Conference, recognized Congress' power under the exceptions clause and argued that the clause served the "important purpose" of providing a direct channel for expression of congressional discontent with the activity of the judicial branch, even if no legislation was ever actually enacted under the clause. He had made this same point thirteen years earlier during the hearings before Senator Ervin's subcommittee:

> "When the Butler constitutional amendment was proposed which would have taken constitutional cases out of the exceptions clause, I opposed it then on the ground that there ought to be the opportunity for Congress to direct itself to questions of jurisdiction, indeed as a response to Court decicions. . . . It would be a very, very unusual set of circumstances -- I am not sure there are any -- which would seem to me sufficient to actually abrogate the jurisdiction, but the possibility of it, and the existence of the power, seem to me to be healthy parts of the system." Senate Hearings, supra, at 202.

There would also be significant institutional restraints preventing the Court from declaring a law divesting it of jurisdiction unconstitutional. As three justices pointed out just last Term:

> "The exercise of jurisdiction over a case which Congress has provided shall terminate before reaching this Court . . . is a serious matter. The imperative that other branches of government obey our duly-issued decrees is weakened whenever we decline, for whatever reason other than the exercise of our own constitutional duties, to adhere to the decrees of Congress and the Executive." Jeffries v. Barksdale, 101 S. Ct. 3149, 3150 (1981)(Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari).

V.

Once the power of Congress to make substantive exceptions to the appellate jurisdiction of the Supreme Court is recognized, particular proposals must be considered to determine if they comport with other constitutional protections. The exercise by Congress of its power under the exceptions clause is as subject to the due process clause, and the equal protection component

of the due process clause, as the exercise of any other constitutional grant of power. See Van Alstyne, supra, at 263-266. At the same time, however, the due process and equal protection constraints on the exercise of the exceptions power cannot be interpreted so stringently as to vitiate the clause and incorporate by the back door the more restricted constructions previously rejected. "If the exceptions clause meant to permit Congress to 'check' the court specifically in the exercise of substantive constitutional review, then the categorical exception of any group of cases made by Congress for that very reason cannot possibly be deemed offensive to the Fifth Amendment's equal protection concern: the exceptions clause itself would provide the source for the goverment's argument that that reason is both licit and compelling enough." Van Alstyne, supra, at 264 (emphasis in original).

The pending proposals to divest the Supreme Court of appellate jurisdiction do not seem to present a serious due process problem, since they all provide for at least some judicial forum, either the lower federal courts or state courts, to hear any claims. Due process does not require judicial review in a federal court or final review by the Supreme Court. See Hart, The Power of Congress To Limit The Jurisidiction of Federal Courts: An Exercise In Dialectic, 66 Harv. L. Rev. 1362, 1363-1364, 1401 (1953); Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("[Congress] could have declined to create any [inferior federal] courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe"); Yakus v. United States, 321 U.S. 414, 444 (1944) ("There is no constitutional requirement" that the "test of the validity of a regulation be made in one tribunal rather than another, so long as there is an opportunity for judicial review which satisfied the demands of due process"). As Professor Redish noted in his Senate testimony, "the Supreme Court has made clear that there is no due process right to any form of appellate review, and as long as some independent forum -- whether state or lower federal courts -- is available to review the constitutionality of federal legislation, the due process right is technically satisfied."

Equal protection challenges would seem to present the most serious hurdle for the pending bills to divest the Supreme Court of appellate jurisdiction. The argument would be that the bills in question classify in such a way as to affect fundamental rights, such as the right to an abortion, or classify on the basis of suspect criteria, such as race in the case of bills divesting the Supreme Court of appellate jurisdiction over school desegregation cases. Strict scrutiny would therefore be applied, demanding that the decision to "except" the specific classes of cases from Supreme Court appellate jurisdiction be closely related to the achievement of a compelling governmental purpose. It seems un-

likely that any of the bills could withstand this extremely heightened standard of review.

In response it should first be noted that not all of the pending bills affect fundamental rights or classify on the basis of suspect criteria. H.R. 2365 and H.R. 2791, for example, would divest all federal courts of jurisdiction to review claims of sex bias in the selective service system. There is no fundamental right to be drafted, nor is gender a suspect criterion calling for heightened judicial review. See Rostker v. Goldberg, 101 S. Ct. 2646 (1981). These bills would therefore be tested under more relaxed equal protection standards.

As to the other bills a strong argument against the application of strict scrutiny can be made by focusing on the nature of the classification the bills would make. For example, the bills to divest federal courts of jurisdiction in school desegregation cases do not classify on the basis of the suspect criteria of race. A bill that did would provide that the Supreme Court shall have no jurisdiction to hear cases brought by blacks. The pending school desegregation bills rather classify on the basis of the type of case involved, and although blacks are a "suspect class", school desegregation cases are not. The classification involved does not operate on the basis of race, and affects both black and white litigants. The point is clearest so far as exceptions to Supreme Court appellate jurisdiction are concerned. For example, if the highest court of a particular state were to rule in favor of a black group seeking school desegregation on the basis of the federal constitution, the school board or a white group could not, if one of the pending bills were enacted, obtain review in the Supreme Court. It is therefore difficult to see why that group whose cases are excepted from Supreme Court review -- a group which includes both black and white litigants, both those in favor of and opposed to any particular desegregation order -- are entitled to the extraordinary protection of strict scrutiny judicial review. The same is true of that aspect of the pending bills excluding such cases from the lower federal courts as well as from Supreme Court appellate review. Both whites and blacks and both those opposing and seeking relief alleged to promote desegregation sue in the federal courts, raising claims going both ways on the merits.

As to bills alleged to affect the exercise of a fundamental right, it can be argued that strict scrutiny should not be required simply because the bills classify on the basis of cases involving the exercise of such a right. Previous cases calling for strict equal protection scrutiny in the area of fundamental rights involved legislation directly burdening the exercise of the fundamental right. For example, in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966),

the requirement of payment of a poll tax before becoming eligible to vote was a direct restriction on the fundamental right to vote. In Shapiro v. Thompson, 394 U.S. 618 (1969), the one-year residency requirement before eligibility for welfare benefits directly penalized the fundamental right to travel. None of the pending bills concerning jurisdiction in abortion or school prayer cases directly burden the exercise of any fundamental rights. Once again the distinction between laws going to the merits and laws simply regulating jurisdiction to hear claims on the merits must be stressed.

Any proper application of fundamental rights equal protection analysis would have to be based on an asserted fundamental right of access to federal court, rather than any fundamental right to an abortion or the exercise of First Amendment freedoms. The pending bills would of course burden the "right" of access to federal court, although they do not burden the exercise of the right to an abortion or free speech. Access to federal court, however, has never been identified as a fundamental right. The fundamental right involved in this area is the right to due process, and that right can be satisfied by access to state courts.

VI.

Congress may derive additional authority in regulating Supreme Court appellate jurisdiction over Fourteenth Amendment cases by virtue of §5 of that Amendment. This provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." Congress could invoke the authority of this section in divesting the Supreme Court of appellate jurisdiction over specified Fourteenth Amendment claims and providing that such claims shall receive final enforcement in the state courts. As the Court noted in the Katzenbach v. Morgan, 384 U.S. 641 (1966), "section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." It is certainly within the broad scope of §5 for Congress to determine that in certain cases, such as abortion and school desegregation cases, the guarantees of due process and equal protection are more appropriately enforced by state courts.

The history of the Fourteenth Amendment strongly supports the authority of Congress to advance its view of the appropriate means of enforcing the guarantees of due process and equal protection under §5. The Fourteenth Amendment was drafted and passed in an atmosphere of great hostility to the Supreme Court.

Those who were triumphant in the Reconstruction Congress and drafted and passed the Civil War Amendments had suffered great defeats at the hands of the High Court in the Dred Scott and Fugitive Slave decisions. A court which would render such decisions was certainly not to be entrusted with securing the protections of the Thirteenth through Fifteenth Amendments. In the view of the Framers of the Civil War Amendments, therefore, Congress was to have primary responsibility for providing for the enforcement of the guarantees of due process and equal protection. See generally Berger, Government by Judiciary 222-223 (1977); Berger, Congressional Contraction of Federal Jurisdiction, 1980 Wis. L. Rev. 801.

It is of course true that the Supreme Court has long since assumed a dominant role in enforcing the Fourteenth Amendment. This does not, however, detract from the authority of Congress to enter the field under section 5 as originally contemplated. In Katzenbach v. Morgan, the Court upheld a congressional enactment striking down New York's English literacy requirement for voting because the Court could "perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause." This was so even though the Court itself had ruled in Lassiter v. North Hampton Election Board, 360 U.S. 45 (1959), that English literacy requirements did not violate the Equal Protection Clause. The activity of Congress in divesting the Supreme Court of appellate jurisdiction over certain Fourteenth Amendment claims is far less intrusive, since the legislation does not purport to "correct" previous Supreme Court decisions but simply provides a different final forum for resolution of the issues.

In Katzenach v. Morgan, Justice Brennan, in response to Justice Harlan's criticism that the majority was giving Congress the power to define the substantive scope of the Fourteenth Amendment, declared that §5 gave Congress no authority to restrict, abrogate, or dilute the guarantees of the Fourteenth Amendment. This so-called ratchet theory, permitting Congress under §5 to expand but not contract the protections of the Fourteenth Amendment, has been roundly criticized by commentators. One commentator, for example, has argued that the ratchet theory "does not satisfactorily explain why Congress may move the due process and equal protection handle in only one direction." There is also "difficulty in determining the direction in which the handle is turning." Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan .L. Rev. 603 (1975). See generally Buchanan, Katzenbach v. Morgan and Congressional Enforcement Power Under the Fourteenth Amendment: A Study In Conceptual Confusion, 17 Houston L. Rev. 69 (1979). Although

substantive legislation purporting to define the parameters of the Fourteenth Amendment may encounter difficulty with the ratchet theory, legislation simply governing court jurisdiction over Fourteenth Amendment claims, which is neutral on its face, cannot be said to contract the guarantees of the Fourteenth Amendment.

It should be noted that §5 of the Fourteenth Amendment can be considered to give Congress the power to divest the Supreme Court of appellate jurisdiction over Fourteenth Amendment claims even if Congress is considered to lack this power under Article III. It is not enough to argue that Article III and the structure of judicial review established by that Article prevents Congress from exercising such power. The Fourteenth Amendment, including §5, limits Article III. Cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)("the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . is necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment"). In this regard it is important to remember that the Framers of the Fourteenth Amendment intended it to be enforced primarily by Congress, and not the federal courts. Whatever validity "structural" arguments concerning the role of the federal judiciary may have in other contexts, these arguments are considerably weakened in the area of Fourteenth Amendment claims.

John Roberts
Special Assistant to
the Attorney General

cc: The Attorney General

Edward C. Schmults
Deputy Attorney General

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THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

December 14, 1981

TO: Attorney General
Ted Olson
Ken Starr
John Roberts

FROM: Ed Schmults

Attached is a report by the Committee on Federal Legislation of the Association of the Bar of the City of New York entitled, "Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review." In Footnote 5 the following two sentences appear: "...The Reagan Administration, so far as we are aware, has not yet taken an official position. A Justice Department spokesman has said that the Justice Department 'will not be announcing' its position on the bills."

Attachment

Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review

By THE COMMITTEE ON FEDERAL LEGISLATION

TABLE OF CONTENTS

INTRODUCTION

Central to our system of government, and to its success, is the principle of separation of powers and the elaborate system of checks and balances that prevents any organ of government from exceeding its authority or infringing the rights of the people. The federal judiciary has long played a central role in that scheme by exercising the power of judicial constitutional review—by which we mean judicial determinations, in cases properly brought by parties having standing, of whether actions by the political branches of the federal government or by the states conform with or contravene our supreme law, the United States Constitution. It is principally through the mechanism of judicial constitutional review that the Constitution's limitations on the political branches of government are enforced. Alexis de Tocqueville observed:

> "I am inclined to believe this practice of the American courts to be at once the most favorable to liberty and to public order . . . . [T]he power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies."[1]

The "barrier against tyranny" praised by de Tocqueville nearly two centuries ago is today under attack by newly powerful forces in Congress. There are pending in both houses of Congress at least 25 bills that, if enacted and upheld as constitutional, would have the effect of scrapping the federal courts' historical role in the system of checks and balances. These bills, listed in the Appendix to this Report, would divest the federal courts of all original and appellate jurisdiction to hear cases relating to (1) the constitutionality of programs of "voluntary" prayer in the public schools or other public places, (2) the constitutionality of laws or regulations affecting abortions, (3) busing as a remedy for school segregation, and (4) the constitutionality of treating men and women differently in connection with the armed forces or the draft. One bill, H.R. 114, may be read to go even further—to eliminate all federal judicial review of state court decisions.

In this Report, we do not address the merits of the various federal court decisions on these subjects that have prompted the proposed legislation, nor do we analyze the individual bills in detail. Rather, we address a question that is raised by all such proposals: Is the elimination of federal court jurisdiction to hear constitutional claims a lawful and appropriate response to judicial decisions of which a current majority in Congress disapproves? That question is fundamental to the structure of our government because, if Congress can legitimately curtail the federal courts' jurisdiction to hear constitutional claims concerning such specific issues as school prayer, abortion, and desegregation, then there is no principled limitation on Congress' power effectively to eliminate the judicial branch as a check on the other branches of the federal government or the states. By enacting any of the present bills, Congress would necessarily be claiming the power, should it so choose, to forbid the federal courts to hear *any* claim asserted under the Bill of Rights or under any other provision of the Constitution.

Although most of the proponents of these bills generally style themselves as "conservatives," our review of the historical record reveals that their proposals are *radical* in the most extreme sense of that word. They would not only cast doubt upon the abortion, school prayer, and busing decisions of the past few years, but two centuries of historical development and constitutional doctrine. For the reasons set forth below, we conclude that this radical departure from the system of checks and balances that has served our nation well for the past two centuries is unwise and probably unconstitutional. There is no precedent of enacted legislation eliminating all federal court jurisdiction to hear claims of deprivation of constitutional rights. To find any precedent for the present bills, one must look to many bills that have been proposed over the years but *not* enacted.[2] Congress wisely declined these previous invitations to tamper with our constitutional structure

of government, and should decline the same invitation presented by the current bills.

Article III of the Constitution does grant Congress power to regulate the jurisdiction of the federal courts (see Part III below). But, as the following analysis shows, this power cannot fairly be construed to permit Congress to deprive the courts of jurisdiction to hear claims arising under the Constitution itself, particularly on an issue-by-issue basis. If Congress' power were so extensive, it would undo the elaborate system of checks and balances that the Framers of the Constitution so carefully crafted. First, it would upset the checks and balances among the three coordinate branches of the federal government, eliminating the judiciary as a check upon unconstitutional actions of the political branches by the simple expedient of removing their jurisdiction to consider challenges to such actions. Second, it would disrupt the allocation of power between the federal government and the states, by eliminating the power of the federal judiciary to restrain acts of the states that violate the Constitution. Third, and perhaps most significant, it would alter the constitutional balance between individual rights and majority will, since the judiciary is the only organ of government that is institutionally suited to protect the rights that our Constitution guarantees to individuals against the wishes of a strong-willed majority.

Another serious objection to legislation of the sort currently proposed is that it is undesirable to deal with complex and controversial social issues, particularly those of constitutional dimension, by eliminating the opportunity for full airing and debate in the federal judiciary. Indeed, one of the ironies of the present bills is that the constitutional interpretations with which the bills' sponsors differ would remain frozen as the supreme law of the land forever, binding upon the state courts under the Supremacy Clause[3] and the doctrine of *stare decisis*, without any possibility of change through the evolution of legal thought or a change in judicial (particularly Supreme Court) personnel.

We are not alone in voicing our alarm over the present jurisdiction-stripping proposals. In August 1981, the American Bar Association announced its strong opposition to the jurisdiction-stripping device.[4] The New York State Bar Association has issued a report that reaches the same conclusion. The substantial majority of legal scholars and former senior Government lawyers who have testified before committees of Congress—from both sides of the political spectrum—have explained their opposition to the jurisdiction-stripping proposals.[5] And a distinguished jurist, Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit, has written that the jurisdiction-stripping device

> "threatens not only a number of individual liberties, but also the very independence of the Federal courts, an independence that has safeguarded the rights of American citizens for nearly 200 years."[6]

* * *

We begin this Report with a brief description of the pending bills (Part I). We then examine in detail the role of the federal judiciary in our governmental structure (Part II) and the extent of Congress' control over federal court jurisdiction under Article III of the Constitution (Part III).

I. *PENDING BILLS TO RESTRICT FEDERAL COURT JURISDICTION OVER CONSTITUTIONAL CLAIMS*

As noted, at least 25 bills are pending in both houses of Congress that would restrict the powers exercised by federal courts in cases involving constitutional questions. While these bills to a large extent invoke the same claims to congressional power over federal court jurisdiction, the nature of the constitutional interests affected by them, and the scope of the restrictions proposed, vary substantially. The bills of which we are aware (listed in the Appendix) fall into five categories: prayer, abortion, school desegregation, sex-based military classifications, and federal court review of state court decisions.

A. *Prayer*

"Voluntary prayer in public schools and public buildings" is the subject of seven virtually identical bills in the House[7] and one bill in the Senate.[8] These bills are a response to court decisions holding that certain religious observances in public schools, whether voluntary or involuntary, violate the First Amendment's prohibition against laws establishing religion.[9] Modeled on the so-called Helms amendment introduced in the 96th Congress,[10] such bills would divest the Supreme Court and the lower federal courts of jurisdiction to hear any case that relates to "voluntary prayer" and that arises out of either "any State statute, ordinance, rule, regulation, or any part thereof" or out of any act of Congress "interpreting, applying, or enforcing" such state acts. Actions currently pending in the federal courts would not be affected by these proposals.[11]

Since each of these proposed bills applies only to the jurisdiction of the federal courts, challenges to the constitutionality of state acts relating to voluntary prayer could still be brought in state courts. State courts, like the federal courts, are bound to give full effect to the provisions of the Federal Constitution and to recognize its supremacy over state laws and regulations.[12] In addition, since the proposed legislation does not and could not purport to alter any prior federal court decisions on the subject of prayer in public schools and public buildings, state courts would still be obligated to apply existing Supreme Court precedent in ruling on future cases.

One of the pending bills would eliminate the Supreme Court's appellate jurisdiction in any case involving a state act that relates to voluntary prayer in public schools or buildings, or that relates to "the qualifications imposed by the State as a condition of teaching in the public schools of the State."[13] The latter provision would eliminate all federal appellate jurisdiction where a state law unconstitutionally imposed racial, religious, political, or other invidious qualifications for schoolteachers.

B. *Abortion*

The Supreme Court has held that certain types of laws restricting or regulating therapeutic abortions infringe women's constitutionally guaranteed right of privacy.[14] Four bills pending in the House and two in the Senate would restrict the federal courts' power to enforce these constitutional rights.

Two identical bills, H.R. 73 and S. 583, would simply forbid lower federal courts to enjoin the operation of federal or state laws that restrict abortion, pending final review by the Supreme Court.[15] In the event that the Supreme Court does not review a lower court's ruling in an abortion case, the bills would foreclose any injunctive relief. These bills would not affect the Supreme Court's appellate jurisdiction, nor would they foreclose the lower federal courts from ruling on the constitutionality of state or federal laws relating to abortion. However, by prohibiting the lower federal courts from enjoining the operation of federal or state abortion laws, the bills would in most cases remove the only effective means to enforce such rulings. It would be extremely difficult to maneuver a case through a district court, a court of appeals, and then the Supreme Court quickly enough for an abortion to be safely performed at the end of the judicial process; requiring abortion cases to be handled so hastily would place an intolerable burden on the courts.

Three other bills[16] would also divest the lower federal courts of jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in cases involving state or local laws prohibiting or regulating abortion, but would go further, in seeking to undo the Supreme Court's decisions on abortion by declaring that, for constitutional purposes, human life begins at conception. These bills, although not fully impairing the Supreme Court's appellate jurisdiction, also go further than H.R. 73 in proscribing declaratory as well as injunctive relief and in proscribing declaratory or injunctive relief even after review by the Supreme Court.

Although these bills purport to be a limitation on federal court jurisdiction, they actually represent a restriction not on the types of cases the federal courts may hear, but on the relief those courts may grant. The bills thus raise questions as to the extent of Congress' power to restrict the traditional remedies dispensed by duly constituted courts in cases over which they have jurisdiction—questions that are outside the scope of this Report.[17]

H.R. 867 more closely resembles the pending prayer bills. That bill would remove the jurisdiction of both the Supreme Court and the lower federal courts in cases arising out of either any "State statute, ordinance, rule, regulation or any part thereof" which relates to abortion, or any "Act interpreting, applying, or enforcing" any such state act.

C. *School Desegregation*

The Supreme Court has held that in certain circumstances, where public schools have been racially segregated in violation of the Fourteenth Amendment's Equal Protection Clause and where no other remedy will effectively eliminate the pattern of segregation, the Constitution *requires* that pupils be assigned and transported to schools in a manner that eliminates the unconstitutional pattern of racial segregation.[18] The only limitation upon this constitutional mandate is that "the time or distance of travel" not be "so great as to either risk the health of the children or significantly impinge on the educational process."[19] Six bills proposed in the House and one in the Senate would restrict the federal courts' jurisdiction to award this remedy even where constitutionally required.[20] Although phrased in terms of a limitation on federal court jurisdiction, these bills really limit the power of federal courts to award a particular remedy, not the power of federal courts to hear cases involving certain types of disputes.

H.R. 761 is much broader than the other bills, in that it is not confined to desegregation orders that require busing. Read literally, this bill would forbid any federal court remedy for school segregation, since any desegregation order—even one that did not employ busing—would require that individual students be assigned to a "particular school," even if the assigned school were the one nearest his home.

H.R. 869, which parallels the prayer bills in form, would deny to the federal courts jurisdiction to hear "any case arising out of" any state act (or any act interpreting, applying, or enforcing a state act) "which relates to assigning or requiring any public school student to attend a particular school because of his race, creed, color, or sex." While the intent of the draftsman was probably to eliminate federal court jurisdiction to assign students to schools on the basis of race, if the bill is read literally it would eliminate all federal court original and appellate jurisdiction to hear *any* segregation case, since even a state statute that blatantly assigned all black students to one school and all whites to another would be a "State statute . . . assigning . . . any . . . student to attend a particular school because of his race" and therefore beyond federal judicial purview under this bill.

Two other bills, H.R. 2047 and S. 528, would not prohibit the federal courts from employing busing as a remedy for school segregation. Rather, these bills would limit the circumstances in which busing may be ordered, limit the length of the bus ride, and require that alternative remedies be explored before ordering busing as a last resort.

D. *Armed Forces*

H.R. 2365 would eliminate Supreme Court and lower federal court jurisdiction to review equal protection challenges to males-only registration or induction for military service—a constitutional claim rejected by the Supreme Court after the bill was introduced.[21]

Of more concern, therefore, is H.R. 2791, which would deprive the Supreme Court and lower federal courts of jurisdiction

to hear constitutional challenges not only to different treatment of the sexes in registration for the draft or induction, but also to sex-based standards for the composition of, or duty assignments in, the armed forces. While courts have generally given the military wide latitude in determining whether sex-based distinctions are appropriate, some sex-based classifications in the military, apart from the draft, have been ruled unconstitutional.[22]

These two bills raise serious constitutional problems beyond those presented by the bills previously discussed, since they foreclose federal court challenges to federal laws and regulations. The other bills primarily address federal judicial review of state acts, and at least leave the state courts as forums for judicial constitutional review. These two bills, however, might eliminate *any* avenue of judicial constitutional review, since state courts may be powerless to afford a remedy for unconstitutional actions by federal officials.[23]

E. *Review of State Court Decisions*

H.R. 114 would deny to any court "that is established by Act of Congress under Article III of the Constitution . . . jurisdiction to modify, directly or indirectly, any order of a court of a State if such order is, will be, or was, subject to review by the highest court of such State."

It is not clear whether this bill would affect the Supreme Court's jurisdiction, since the Supreme Court was created directly by Article III of the Constitution, but is organized by congressional act, or whether it refers only to the inferior federal courts. If the bill is intended to apply to the Supreme Court, it would entirely eliminate the Supreme Court's appellate jurisdiction over all state court decisions—constituting a radical curtailment of the Supreme Court's constitutional role (see Part IIB below). If, on the other hand, H.R. 114 is intended to affect only the jurisdiction of the lower federal courts, it is likely to have little impact, since the lower federal courts do not have appellate jurisdiction over state court decisions, and therefore ordinarily have no occasion to modify state court orders (except perhaps indirectly, as in habeas corpus cases).

* * *

Having briefly described what the 25 pending bills seek to do, we turn now to our analysis of the wisdom and constitutionality of the basic concept underlying them all. We consider first whether such legislation would profoundly alter the system of checks and balances upon which our constitutional government rests. We then discuss whether, in any event, Congress has the power under the Constitution to enact such laws.

II. *THE CONSTITUTIONAL ROLE OF THE FEDERAL JUDICIARY*

Such power as Congress has over federal court jurisdiction derives from two brief phrases in Article III of the Constitution. One of them, following a statement that the Supreme Court shall have appellate jurisdiction, both as to law and fact, in all cases within the broadly defined "judicial power of the United States," adds, "with such Exceptions, and under such Regulations as the Congress shall make" (Art. III, § 2). The other, providing that the judicial power of the United States shall be vested in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish" (Art. III, § 1), is the source of Congress' power over lower court jurisdiction.

To interpret these provisions, it is necessary to examine them in the context of the role of the judicial branch of the federal government in our constitutional system. Central to that system is the principle of separation of powers among the branches of the federal government as it relates to judicial constitutional review. Within that system, judicial constitutional review by the federal judiciary serves four distinct, yet interrelated, functions: (a) the federal judiciary enforces the Constitution's limitations on the power of the political branches of the federal government; (b) the federal judiciary assures the supremacy of the United States Constitution and laws vis-a-vis the states; (c) the federal judiciary

protects individual rights guaranteed by the Constitution against encroachments by majority will as expressed in acts of the federal and state governments; and (d) the federal judiciary accommodates the principles of our written Constitution with the changing needs of society. We shall examine in turn each of these aspects of the federal judiciary's role and show why the proposed legislation would undermine them all.

A. *Judicial Review and the Separation of Powers*

The first three articles of the Constitution set forth the specific, limited powers granted to the three coordinate branches of the federal government: the legislature, the executive, and the judiciary. The Framers conceived of this separation of powers as the essential safeguard of the liberties of American people. Thus, in *The Federalist Papers*, Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny."[24] The doctrine of separation of powers does not require that the legislative, executive, and judicial departments be wholly unconnected with each other, but rather that they should be "so far connected and blended as to give to each a constitutional control over the other."[25] The Supreme Court has repeatedly reaffirmed these concepts as basic to our federal governmental structure.[26]

The Founding Fathers feared tyranny by a majority of the public and therefore feared tyranny by a legislature elected by that majority. Judicial constitutional review by an independent federal judiciary not beholden to the public or legislature for tenure in office or continued compensation[27] was intended by the Framers as the people's safeguard against the exercise of governmental power in excess of that conferred under the Constitution and against the invasion of the individual's rights of liberty and property.[28]

In our jurisprudence, the federal judiciary can only exercise this essential power of judicial constitutional review by declaring and applying the law in cases and controversies submitted to the courts for decision. That fundamental concept led, in 1803, to the Supreme Court's unanimous decision in *Marbury v. Madison*,[29] and Chief Justice Marshall's heretofore unchallenged declaration that: "It is emphatically the province and duty of the judicial department to say what the law is."[30] More than 150 years later, another unanimous Supreme Court, in the Little Rock school desegregation case, said of *Marbury v. Madison*:

> "This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional sytstem."[31]

The function of constitutional review is allocated to an independent judiciary in order to prevent the accumulation of power in one department of the government. As Hamilton wrote in *The Federalist Papers*, it could not be expected "that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges."[32] Thus, a constitutional system that imposes limitations on the authority of the legislative branch also requires an independent branch to determine whether legislation comports with the constitutional limitations; otherwise, the legislature would have the power both to enact and to judge the law, and there would be no check on its proper exercise of its powers.[33]

Judicial constitutional review does not imply judicial supremacy, but rather rests on the foundation of legislative supremacy. As Hamilton explained, because the adoption of the Constitution expressed the people's ultimate legislative act of ratification, the courts are *obliged* to invalidate legislation that is contrary to the Constitution.[34] The function of constitutional review is safely entrusted to the judiciary not because it is the supreme branch of

government, but rather because it is the weakest. As Hamilton observed, "The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated."[35] In contrast, the judiciary "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."[36]

The power of judicial constitutional review is not absolute, but is limited by the very nature of the judicial function. Courts may decide constitutional questions only when those questions must be answered to decide justiciable cases submitted to them by litigants with standing to raise such questions.[37] Hence, the judiciary does not sit in general review of legislation as it is enacted or executive actions as they are taken. Nor have the courts any power to review legislation or executive actions on their own initiative. Rather, judges must wait for the necessity of constitutional review to be thrust upon them by litigants whose interests are adversely affected by conduct claimed to be unconstitutional.[38] This limitation is expressed in Article III's definition of the judicial power as extending only to "cases" and "controversies."[39]

The Founding Fathers were not unmindful of the possibility that the judiciary, like the other two branches of government, might be tempted to exceed its constitutionally circumscribed role. Hamilton conceded the possibility that judges, in construing a statute, "may substitute their own pleasure to the constitutional intentions of the legislature." But such action would be improper, for the "courts must declare the sense of the law"; they may not exercise "will" instead of "judgment."[40] Thus, Hamilton acknowledged the need for judicial accountability, but stressed that the "precautions" for the "responsibility" of the federal judiciary were to be found *only* in the Constitution's provision for impeachment. That device, he wrote, was "the only provision on the point which is consistent with the necessary independence of the judicial character."[41]

Hamilton characterized as "a phantom" any feared danger of judicial encroachments on legislative authority.[42] To him, not only was the judiciary a comparatively weak branch of government, but there was also

> "the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security."[43]

If, as the Framers thus believed, the judicial branch is the only realistic check to prevent the political branches from exceeding their constitutional powers,[44] then it must follow that Congress' power to regulate federal court jurisdiction cannot be so broad as to enable Congress to divest the courts of the function of judicial constitutional review, as the bills currently under consideration would do. In the system explicated by the Framers, Congress could not have the power to make any statute review-proof by the simple expedient of divesting all federal courts of jurisdiction to hear a challenge to it. Even more abhorrent to that scheme is the notion inherent in the current bills, that a simple majority of Congress may eviscerate judicial constitutional decisions with which that majority disagrees merely by stripping the federal courts of power to consider such cases in the future. To conclude that the Framers viewed the judiciary as the fundamental check upon excesses by Congress, but also gave Congress the power by simple majority to nullify that check, is, in the words of a recent commentary, "to charge them with chasing their tails around a stump."[45]

B. *Judicial Review and the Supremacy of Federal Law*

Federal judicial review of state laws and acts is as important to our federal system as review of federal laws and acts. Yet most of the bills now under consideration are aimed primarily at restricting this form of judicial review.

The Supremacy Clause provides that the United States Constitution, and all federal laws enacted pursuant thereto, are the "supreme Law of the Land."[46] The federal judiciary, especially the Supreme Court, is the Constitution's mechanism for enforcing the Supremacy Clause vis-a-vis the states.[47]

Many constitutional scholars believe that the Supreme Court's most important role in our constitutional system is assuring that federal law, and particularly the Constitution, is interpreted uniformly throughout the nation. In this view, the notion of a single supreme Constitution would be rendered virtually meaningless if it could be interpreted to mean different things in different states.[48]

Professor Charles Black has written:

> "There is nothing in our entire governmental structure which has a more leak-proof claim to legitimacy than the function of the courts in reviewing state acts for federal constitutionality."[49]

And Justice Holmes stated:

> "I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that determination as to the laws of the several states."[50]

These views echo those of the Framers. A major criticism of the Articles of Confederation was the weakness of the national government and the consequent disharmony among the states.[51] Hamilton regarded it as essential that, in a national union, there be a national judiciary to assure uniform interpretation of national laws:

> "If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of the uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."[52]

Hence, the Framers understood that the supremacy of federal law can only be effected if there is a single tribunal with the ultimate responsibility for deciding what the law is. As Hamilton wrote:

> "To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice."[53]

Even those at the Constitutional Convention who emphasized the independence of the states in the proposed federal system and wished to minimize the scope of the federal judiciary acknowledged that such independence was limited by the requirements of the Constitution and federal law, and that the federal judicial branch had the authority to interpret the Constitution and the laws. For example, John Rutledge of South Carolina argued at the Constitutional Convention:

> "The State Tribunals might and ought to be left in all cases to decide in the first instance, *the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments.*"[54]

Over nearly two centuries, Congress has consistently recognized the necessity of appellate jurisdiction in the Supreme Court over state court decisions as the primary means of enforcing the Supremacy Clause. From the Judiciary Act of 1789[55] through the present Judicial Code,[56] Congress has always preserved the Supreme Court's appellate jurisdiction to consider whether state acts contravene the Constitution or federal laws en-

acted pursuant thereto.[57]

The debate over the first Judiciary Act is instructive. Although the First Congress continued the Constitutional Convention's debate over the desirability of creating inferior federal courts, the necessity of the Supreme Court's having appellate jurisdiction to assure national uniformity was not questioned.[58] Even those who "were anxious to give the Federal Courts as little jurisdiction as possible" acknowledged that state court decisions on questions of federal law must be "subject to Federal revision through the appellate power of the United States Supreme Court."[59] The universal acceptance of federal judicial constitutional review over state acts and court decisions sheds light on the intent of the Constitution's Framers, for the Judiciary Act of 1789 was "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."[60]

Following passage of the Judiciary Act of 1789, leading Supreme Court decisions have consistently expounded the importance to our system of constitutional federalism of federal judicial review over state acts. As one scholar observed:

> "From an early date the Supreme Court itself has explicitly recognized that its indispensable functions under the Constitution are to resolve conflicting interpretations of the federal law and to maintain the supremacy of that law when it conflicts with state law or is challenged by state authority."[61]

Justice Story's opinion in *Martin v. Hunter's Lessee*[62] reaffirmed the Supreme Court's essential role in securing a uniform system of law throughout the United States by holding that its appellate jurisdiction applied to all cases specified in Article III, whether those cases arose in state or federal courts. That landmark opinion emphasized

> "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. . . . [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils."[63]

These principles have never been seriously questioned. In *Cohens v. Virginia*,[64] Chief Justice Marshall's opinion, upholding the Supreme Court's authority to review a state court criminal conviction that involved interpretation of a federal statute, stated that

> "the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved . . . .
>
> "[The Constitution's Framers] declare that in such cases the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction."[65]

In *Ableman v. Booth*,[66] the Supreme Court reiterated that the Supremacy Clause requires a single federal tribunal to make a final determination as to the laws of the United States and the Con-

stitution, "for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place . . . and the government of the United States would soon become one thing in one State and another thing in another."[67]

In the face of these clear Supreme Court pronouncements, Congress has never disturbed the Supreme Court's appellate jurisdiction to hear federal constitutional challenges to state acts, either broadly or as to specific issues. To do so now, as proposed in the bills here under consideration, would violate the spirit, if not the letter, of the Supremacy Clause by eliminating the only federal means for enforcing it, and would run counter to a consistent line of historical authority affirming the Supreme Court's central role under that clause.

C. *Judicial Review and Individual Rights*

The pending bills strike most directly at the third basic function of judicial constitutional review: protecting individual rights against abridgement by majority rule as expressed through the political branches of government.

Majority rule is not the *only* rule in the United States. Rather, our Constitution guarantees specific rights to individuals—freedom of speech, free exercise of religion, equal protection of the the law, and due process of law, to name a few—against infringement by majority will expressed as through the political branches of government. As the Supreme Court stated nearly 40 years ago in *West Virginia State Board of Education v. Barnette*:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[68]

And as James Madison wrote much earlier:

> "[I]n our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."[69]

Hence, the Founding Fathers recognized that the exercise of fundamental rights, and the individuals who exercise them, would not always win public favor, and that, from time to time, a substantial and vocal majority of the public might clamor to abridge them in certain instances. Were this not so, there would be no reason to enjoin the infringement of these rights in the Constitution.

Institutionally, the federal judiciary is the only organ of government that can be counted upon to protect individual rights when they are pitted against the will of the majority. That was why Article III, Section 1, of the Constitution made the judiciary independent of public favor by giving judges lifetime tenure and undiminished compensation throughout their judicial service.[70] It was thus intended that the courts should be free to render unpopular decisions that thwart the current majority's will when the law, as the courts interpret it, so requires.

The central role of the federal courts in protecting individual rights from encroachment by the majoritarian branches of government has been repeatedly acknowledged.[71] Chief Justice Hughes wrote in 1927:

> "In our system, the individual finds security in his rights because he is entitled to the protection of tribunals that represent the capacity of the community for impartial judgment as free as possible from the passion of the moment and the demands of interests or prejudice."[72]

Similarly, Justice Frankfurter, while a professor of law at Har-

vard, wrote:

> "The Supreme Court is indispensable to the effective workings of our federal government .... I know of no other peaceful method for making the adjustments necessary to a society like ours—for maintaining the equilibrium between state and federal power, for settling the eternal conflicts between liberty and authority—than through a court of great traditions free from the tensions and temptations of party strife, detached from the fleeting interests of the moment."[73]

And Justice Black observed that our federal courts "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[74]

While most commentators have emphasized the courts' role as protectors of personal liberty (freedom of speech, religion, privacy, and the like), equally important is the courts' role as guardians of private property.[75] The courts are the people's only means of enforcing the Fifth and Fourteenth Amendment prohibitions against the taking of private property for public use without just compensation and the deprivation of a person's property without due process of law.

Given the historic swings of the political pendulum, it is not inconceivable that a majority of the people of the United States, or of just one state, might someday elect a socialist government, as has already occurred in Western Europe. Should that government embark on a program that included nationalization of major industries or redistribution of private property, the judiciary would be the only institution sufficiently independent to protect the rights of private property guaranteed by the Constitution in the face of public clamor. But if the 97th Congress can legitimately curtail the federal courts' jurisdiction to adjudge selected constitutional claims, as now proposed, then a future Congress, by

simple majority, could as easily eliminate the courts' jurisdiction to hear claims based on government seizures of private property without due process or just compensation.[76]

The federal judiciary's historic role as guardian of the rights of personal liberty and property guaranteed by the Constitution should not be cast aside simply because, as the Framers intended, courts sometimes render opinions that are unpopular. It is no secret that the bills presently under consideration were prompted by controversial judicial decisions—banning prayer from public schools, imposing busing as a means of integrating public schools, and permitting abortions—that are extremely unpopular in many quarters. Whether or not one agrees with the courts' decisions in these cases, it is clear that the courts were acting in their constitutional capacity as the protector of individual rights guaranteed by the Constitution. It would ill serve the long-term stability of our form of government, and would probably be unconstitutional, for Congress now to claim the power to curtail the federal courts' jurisdiction to perform this essential constitutional function.

D. *Judicial Review and Constitutional Development*

A final objection to the practice of divesting the federal courts of jurisdiction to hear constitutional claims is that it would stultify the development of constitutional law. Our Constitution is more than the words put on paper some two hundred years ago; rather, it is a living document that grows and adapts with the experience of our people.[77]

The meaning of laws, and particularly the meaning of constitutional provisions, is not always a bright-line truth, especially as it may be applied to factual circumstances never envisioned by the Framers. For example, radio and television did not exist at the time that the First Amendment was drafted, nor indeed for most of the Amendment's history. Yet, although the technological advances raise questions of access and other matters not pre-

sent in the case of other forms of publication such as newspapers, the courts have applied the principles of the First Amendment to these new means of communication.

The federal judiciary has been the primary instrument for reflecting such growth and adaptation in constitutional doctrine. Thus, one of the ironies in proposals like the present bills is that the very judicial decisions that were so unpopular that they spawned such bills would become frozen in the law forever. If the federal courts are divested of jurisdiction to engage in the normal processes of change through the development of new legal doctrine, shifts in social conditions, or turnover of judges (especially Supreme Court Justices), and if state courts continue to follow federal constitutional law, as they are required to do under the Supremacy Clause, the current state of the law on abortions, school prayer, and busing will be preserved, subject to change only by constitutional amendment.[78]

In cases where a bright-line result is not immediately apparent, the interplay between the courts and Congress and among the different courts throughout the country is an important process in the development of the law. Silencing the federal courts to speak on such issues by withdrawing their jurisdiction would deprive the nation of this important element in the lawmaking process and would be grievously unwise. Not only would the creative interplay between the inferior federal courts and the Supreme Court be lost, but so too would the interplay between the federal courts and the state courts. Three years ago, this Committee, commenting upon proposals to abolish diversity jurisdiction, stated:

> "The *Erie* requirement that federal courts apply state substantive law in diversity cases has resulted in a continuous flow between the federal and state systems of both procedural and substantive reforms. . . . Elimination of such cross-fertilization could have significant adverse effects on the general character and competence of the two systems."[79]

This process of cross-fertilization is all the more important in the realm of the basic constitutional issues, which the pending bills propose to remove from the jurisdiction of the federal courts.

III. *THE EXTENT OF CONGRESS' AUTHORITY UNDER ARTICLE III*

Given the federal judiciary's essential role in our system of checks and balances, its basic function of enforcing the Supremacy Clause, and its task of protecting individual rights, does it stand to reason that Congress has the constitutional power to curtail those functions by limiting the courts' jurisdiction as the proponents of the current bills contend? It is with that question in mind that we now examine the Constitution's provisions granting Congress a measure of control over federal court jurisdiction, which are cited as the constitutional authorization for most of the pending bills.

Congress' power to regulate the jurisdiction of the federal courts is conferred by Article III of the Constitution (emphasis added):

> "Section 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.* The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> "Section 2. . . .
>
> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all the other Cases before mentioned [within the judicial power of the United States], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*"[80]

Historically, the federal judiciary has never exercised jurisdiction as broad as the full judicial power defined in Article III. From the Judiciary Act of 1789 onward, statutes defining the jurisdiction of the Supreme Court and lower federal courts have never utilized the entire reach of the "judicial power" defined in Article III, Section 2, and the courts have never claimed jurisdiction to reach the categories of cases outside the statutory definition. To cite two contemporary examples: (1) no federal court has original jurisdiction to hear diversity claims that do not meet the statutory jurisdictional amount,[81] even though there is no such limitation on diversity jurisdiction in Article III; (2) the Supreme Court does not have appellate jurisdiction over diversity cases tried in the state courts that do not involve a federal question, [82] even though such jurisdiction would be within the reach of Article III.

On the other hand, since the Judiciary Act of 1789, statutes defining federal court jurisdiction have regularly conferred broad jurisdiction upon the federal judiciary within the definition of "judicial power" contained in Article III of the Constitution. Congress has not sought to use its power over federal court jurisdiction to erode the judiciary's central role in interpreting the Constitution and federal law or in exercising the responsibility of judicial constitutional review. Nor has it previously attempted to define federal court jurisdiction in terms of substantive issues, as opposed to neutral principles such as citizenship of the parties or amount in controversy. Because of this, there has been little occasion for the courts to consider the metes and bounds of Congress' control over federal court jurisdiction.[83] Most of the statements in judicial opinions concerning the extent of Congress' power over federal court jurisdiction are therefore dicta, and cannot be viewed as controlling doctrine.[84]

This much, however, seems clear: There is no support, from the debates surrounding the adoption of Article III or otherwise, for the proposition that the Framers intended Article III to confer upon Congress power to strip the federal courts of jurisdiction to hear constitutional claims or to abrogate the federal courts' essential function of judicial constitutional review in response to unpopular, or even erroneous, judicial decisions.[85] Nor is there authority for the proposition that Congress' power to regulate jurisdiction may be used as an indirect means of undermining judicial opinions with which Congress disagrees.[86]

The statements in *The Federalist Papers* that the power of impeachment was intended to be the *only* check on the federal judiciary[87] strongly indicate that the Framers never intended Congress' Article III control over jurisdiction to be so used. Rather, read in context, it appears that Congress' regulation of federal court jurisdiction was intended solely to permit Congress, through policy-neutral criteria, to allocate judicial business among the federal courts, to prevent the federal courts from becoming overburdened by cases that do not involve substantial federal claims, and to provide orderly procedures for the federal judiciary's exercise of its jurisdiction.[88] This view is supported by the manner in which Congress has actually exercised its Article III powers to regulate federal court jurisdiction since the beginning of the Republic; Congress has never curtailed the courts' jurisdiction to adjudicate constitutional claims as proposed in the jurisdiction-stripping bills.

The unprecedented nature of the bills here under consideration poses serious doubts about their constitutionality as well as their wisdom. While the manner in which Congress has historically exercised its jurisdictional power cannot alter the Constitution's grant of that power, it can illuminate the proper meaning of that grant. As Justice Frankfurter explained:

> "The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply imbedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is

an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[89]

* * *

We turn now to specific consideration of the constitutional language relied upon as authority for enactment of the pending bills. Since Congress' power over Supreme Court and lower court jurisdiction depends upon different provisions of Article III, those provisions must be analyzed separately.

A. *Supreme Court Jurisdiction*

The Constitution confers original jurisdiction upon the Supreme Court in a relatively narrow range of cases involving diplomatic personnel or in which a state is a party.[90] Congress can neither add to nor subtract from the original jurisdiction thus conferred.[91]

The Supreme Court's most important role in our system is thus as an appellate court, hearing appeals from both inferior federal courts and state courts on issues of federal constitutional, statutory, and administrative law. As discussed above (Part II), the history of the Constitution indicates that the Supreme Court was intended to be the final arbiter of federal law; to review the constitutionality of acts of Congress and federal executive actions; to review the constitutionality of state enactments in light of federal statutory and constitutional law, thereby serving as the primary instrument for enforcing the Supremacy Clause; and to protect individual rights from encroachments by the majoritarian branches of the federal and state governments.

Such power as Congress has over the Supreme Court's appellate jurisdiction is conferred by the Exceptions Clause of Article III, Section 2, which grants such jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." If Congress has authority to restrict the Supreme Court's appellate jurisdiction to hear constitutional claims, as proposed in the pending bills, it must derive from this clause.

Those who advocate such authority for Congress contend that the Exceptions Clause, read literally, gives Congress plenary power over the Supreme Court's appellate jurisdiction. One answer to this contention is that the Constitutional Convention voted down a proposal that would have expressly given Congress such plenary power. In the course of the Constitutional Convention's consideration of Article III, a motion was made to replace a provision that was substantively identical to the Exceptions Clause as enacted with the following language: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct." The Convention rejected this proposal, and instead adopted the Exceptions Clause in its present form.[92]

Moreover, while such a literal reading of a single phrase might be acceptable in construing a detailed regulatory statute, it is not appropriate in constitutional interpretation. In the words of Chief Justice Marshall, "we must never forget, that it is a constitution we are expounding."[93] It is thus axiomatic that the Constitution necessarily must be read as a broad outline of our system of government, and its individual provisions must be read in the context of the organic whole.[94] Proper interpretation of the Constitution requires consideration of its spirit, as well as its letter, and the spirit should control over an interpretation that would defeat an essential tenet of the Constitution, such as the doctrine of separation of powers.

Accordingly, the Exceptions Clause must be read in the context of the broad language of Article III establishing the judicial power of the United States. It would be curious drafting, and contrary to established principles of constitutional, statutory, *and* contractual construction, if an "exception" in the third paragraph of the Article were read to grant to Congress the power totally to efface the Supreme Court's appellate jurisdiction granted in the same Article—especially in the absence of any historical evidence that this clause was intended to permit, at Congress' op-

tion, a radical diminution of the constitutional role of the Supreme Court.

There was no discussion in the Constitutional Convention of any such far-reaching effect to be attributed to the Exceptions Clause. Nor was there any suggestion of any such significance in the preparation of earlier drafts of the Constitution.[95] Although the clause was debated at the Constitutional Convention, the point at issue was the scope of the Supreme Court's appellate jurisdiction with respect to matters of fact, which some considered to be an infringement of the cherished right to a trial by jury.[96] As Hamilton observed, "The propriety of this appellate jurisdiction has scarcely been called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact."[97] As one constitutional scholar has noted, the debate ended in a compromise that left the First Congress to struggle with the scope of the Supreme Court's appellate jurisdiction over factual determinations under the Exceptions Clause:

> "So complicated were the varying practices [of review of facts] that it was concluded to leave the problem for handling by the Congress through the medium of the 'exceptions' clause, fashioned to meet the 'principal criticism' of the appellate jurisdiction, its inclusion of matters of 'fact.' "[98]

In his well-known "Dialogue," Professor Hart rejected as "preposterous" the notion that the Exceptions Clause might be read "as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether."[99] According to Hart, the measure of Congress' power over the Supreme Court's appellate jurisdiction under the Exceptions Clause "is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[100] As Professor Ratner pointed out, this interpretation of the limits of the Exceptions Clause is buttressed by legal usage known to the Framers when the Constitution was drafted, by which an "exception" cannot be construed to nullify the rule that it limits or to negate an essential part of what was granted.[101]

Judicial precedent on the scope of Congress' power under the Exceptions Clause is not illuminating. As noted above, because Congress has never challenged the Supreme Court's jurisdiction to hear constitutional claims, there are no definitive rulings on the extent or limits of Congress' power.[102] While some cases contain extravagantly broad statements concerning Congress' power over the Supreme Court's jurisdiction, [103] the statements are dicta, for the cases did not involve any attempt by Congress to limit the Court's jurisdiction to hear constitutional claims.[104] Only two Reconstruction-era cases, *Ex parte McCardle*[105] and *United States v. Klein*,[106] actually addressed the scope of Congress' power under the Exceptions Clause, and they point in opposite directions.

Those who urge that the Exceptions Clause gives Congress plenary power to divest the Supreme Court of appellate jurisdiction most often cite *Ex parte McCardle* as the leading authority for this view.[107] In 1867, William H. McCardle, a newspaper editor in Mississippi, had been arrested by the army pursuant to the Military Reconstruction Act[108] passed earlier the same year, which subjected the South to federal military command. Based upon anti-reconstructionist editorials McCardle had published, he was charged with libel, disturbing the peace, inciting insurrection, and impeding reconstruction. He petitioned the federal circuit court for a writ of habeas corpus, challenging the constitutionality of the Military Reconstruction Act, under a Habeas Corpus Act passed by the same Reconstruction Congress in 1867.[109] There was some irony in this: the 1867 Habeas Corpus Act was passed for the purpose of advancing reconstruction by expanding the federal courts' powers to release former slaves and others who were being unlawfully held prisoner by the southern states.[110] But the terms of the statute were not confined to prisoners in state custody, and McCardle, an anti-reconstructionist, was using it as a device to challenge the very reconstruction that the act was intended to promote.

The circuit court denied McCardle's petition, and he appealed to the Supreme Court under a provision of the 1867 Act. The Government moved to dismiss the appeal, and the Supreme Court denied the motion.[111] The Government then faced the prospect that the Supreme Court, on reaching the merits, might declare one of the cornerstones of reconstruction policy to be unconstitutional. To avert this threat, while McCardle's appeal was still pending, Congress repealed the provision of the 1867 Habeas Corpus Act that allowed a direct appeal to the Supreme Court.[112] In light of that repeal, the Supreme Court dismissed the appeal in a terse opinion, containing the following language relied upon by proponents of the current bills:

> ". . . The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.
>
> "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> "What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[113]

In reading *Ex parte McCardle*, it must be borne in mind that the opinion was written under the most intense imaginable pressure at the peak of radical Reconstruction. As one commentary has noted, "With troops in the streets of the capital and the President of the United States on trial before the Senate, a less ideal setting for dispassionate judicial inquiry could hardly be imagined."[114] And as Justice Douglas once observed, "There is a serious question whether the *McCardle* case could command a majority view today."[115]

Moreover, the full *McCardle* opinion shows that it does not support so broad a view of Congress' power over the Supreme Court's jurisdiction as the above-quoted excerpt might suggest.[116] While the opinion terms the 1868 repealer act an "exception" to the Court's appellate jurisdiction, in fact the repealer merely withdrew a *procedure* for appealing to the Supreme Court under the 1867 Habeas Corpus Act enacted the preceding year. The repealer did not narrow the Supreme Court's *subject matter* jurisdiction—that is, it did not limit the kinds of claims that the Supreme Court could hear, assuming they came to it by an available route.[117] The *McCardle* opinion made this very point:

> "Counsel seems to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. *It does not affect the jurisdiction which was previously exercised.*"[118]

The Supreme Court made the distinction even plainer later the same year in *Ex parte Yerger*.[119] There, the Court considered another appeal by another anti-reconstructionist newspaper editor held in military custody under the Military Reconstruction Act. Like McCardle, Yerger was charged with impeding reconstruction. Like McCardle, he petitioned a circuit court for a writ of habeas corpus under the Habeas Corpus Act of 1867. The circuit court denied Yerger's petition, and Yerger sought review by the Supreme Court. But unlike McCardle, Yerger invoked the Supreme Court's appellate jurisdiction under the procedures provided by the Judiciary Act of 1789, not the repealed provision for direct appeals of the Habeas Corpus Act of 1867. The Supreme Court held, over objection by the Government, that it had appellate jurisdiction under the prior law to hear appeals in ha-

beas corpus cases brought under the 1867 Act, and that this jurisdiction was not affected by the 1868 repealer act.[120] Significantly, the Court intimated that any attempt through legislation to remove entirely the Supreme Court's appellate jurisdiction in habeas corpus cases would strike at one of the Court's essential constitutional functions and raise serious constitutional questions.[121]

United States v. Klein,[122] the second case to address directly Congress' authority to legislate exceptions to the Supreme Court's appellate jurisdiction, was decided three years after *Ex parte McCardle*. That opinion disposed of any remaining impression that the Exceptions Clause gave Congress plenary power to deprive the Supreme Court of appellate jurisdiction. A Civil War statute authorized suits in the Court of Claims to recover captured property by owners who were loyal to the Union or had been pardoned by the President. Klein had received a pardon that recited his previous disloyalty. Based upon his pardon, Klein brought an action in the Court of Claims and recovered judgment under the statute. While an appeal to the Supreme Court was pending, Congress passed a statute purporting to deprive the Court of Claims and the Supreme Court of jurisdiction in any case where a presidential pardon recited disloyalty and to direct that any such case be dismissed. The Supreme Court held that this was an attempt to prescribe a rule of decision in cases before the judiciary, violated the principle of separation of powers, and was not a permissible use of Congress' Article III powers over jurisdiction.[123] The Court opined:

> "It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . .
>
> "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.
>
> "It is of vital importance that these powers be kept distinct."[124]

The power claimed in the present bills to divest the Supreme Court of appellate jurisdiction to hear constitutional claims goes well beyond anything Congress has done in the exercise of its Article III powers at least since the turbulent Reconstruction era. Since the pending bills erode the Supreme Court's essential role in our constitutional system of government, they cannot be found to be within Congress' power under the Exceptions Clause of Article III in the absence of compelling authority. But that authority is not to be found in the history of Article III, judicial decisions under that Article, or the weight of scholarly authority concerning the Article's intent.

B. *Lower Court Jurisdiction*

The foregoing analysis shows that Congress' power to regulate the Supreme Court's jurisdiction under Article III does not give Congress power to withdraw the Supreme Court's jurisdiction to hear constitutional claims. The issue of Congress' power under Article III to divest the lower federal courts of jurisdiction to hear constitutional claims presents a closer question. However, taking into account other provisions of the Constitution and considerations of sound policy toward the judiciary, the case against the jurisdiction-stripping proposals as applied to the lower federal courts is no less compelling.

1. *Article III*

Congress' control over lower court jurisdiction derives not from the Exceptions Clause, but from its power under Article III, Section 1, to "ordain and establish" courts inferior to the Supreme Court.[125] One early view, expressed by Justice Story,[126] was that Article III *required* Congress to establish lower federal courts to exercise original jurisdiction in all cases within the constitutionally defined judicial power, other than those in which the Supreme Court had original jurisdiction. Under this view, Congress' discretion was limited to deciding where, what number,

and what character of lower federal courts to establish, and how jurisdiction should be allocated among them.[127]

The premise underlying this view—that the entire judicial power defined by Article III must be vested in the federal judiciary—has since been rejected.[128] Indeed, Justice Story's position ignored the historical evidence that the Framers were divided as to the desirability of establishing any lower federal courts and intended to leave that decision to Congress.[129]

The prevailing view has been that the Constitution gives Congress absolute discretion as to whether to establish any lower federal courts. From this it is said to follow that Congress has plenary control over the jurisdiction of such lower courts as it chooses to create.[130] Some modern scholars have questioned the premise underlying this view, arguing that federal courts of original jurisdiction are now necessary to carry out the Constitution's plan for the federal judiciary. Professor Eisenberg argues that, because of the proliferation of federal law and federal court caseloads since the Framers' era, lower federal courts have become a constitutional necessity to administer federal justice; he argues that, if the federal courts were abolished and their cases turned over to the state courts, the burden of harmonizing conflicting interpretations of federal law by the 50 state court systems and vindicating federal rights would be more than the Supreme Court, exercising its appellate jurisdiction, could bear.[131] Professors Redish and Woods argue that lower federal courts are constitutionally necessary to restrain unconstitutional acts by federal officials, since state courts are generally without power to award relief in such cases.[132]

Whether or not it was constitutionally required to do so, the First Congress did establish a system of lower federal courts in the Judiciary Act of 1789, and Congress has since then consistently endowed those courts with a broad measure of the judicial power defined in Article III. The lower federal courts have long had original jurisdiction over diversity cases and cases arising under the Constitution and federal laws. Exercising that subject

matter jurisdiction, the lower federal courts have been important instruments of judicial constitutional review, although their role in enforcing the Supremacy Clause vis-a-vis the states is not so central as that of the Supreme Court. Congress has never before enacted legislation to deprive the lower federal courts of jurisdiction to hear cases arising under the Constitution generally, nor on an issue-by-issue basis, as proposed in the pending bills.

The lower federal courts play a vital role as courts of first instance in which federal rights can be vindicated. In *Mitchum v. Foster*,[133] the Supreme Court reaffirmed this role in tracing the history of 28 U.S.C. § 1983 to its origin in the Civil Rights Act of 1871. The Court noted that this provision "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."[134] The Court continued:

> "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' . . . And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. *Ex parte Young*, 209 U.S. 123; cf. *Truax v. Raich*, 239 U.S. 33; *Dombrowski v. Pfister*, 380 U.S. 479."[135]

For individuals seeking to enforce federal rights, the ability to bring suit in a federal forum rather than a state court is significant. As a leading study by the American Law Institute concluded, "federal courts are more likely to apply federal law sympathetically and understandingly than are state courts."[136]

An important advantage of the lower federal courts over most state courts in protecting constitutional rights is the independ-

ence of federal judges from political influence, based upon their appointment for lifetime terms and their guarantee of undiminished compensation.[137] Judge McGowan of the D.C. Circuit saw the lower federal courts' role in desegregating the public schools as a prime example of that advantage:

> "[I]s it conceivable that the job could have been entrusted entirely to the state courts, bearing in mind the differences in loyalties and the vulnerability to local pressures inherent in an elective system of judges? The federal judges themselves have, even with the security provided them by the Constitution, found the going hard. It is not fanciful to think that it would have been too much for unsheltered state judges . . . . Certainly it would have been hard to ask them to risk such an exposure with so few shields."[138]

Another important role of the lower federal courts is to develop a body of empirical evidence that the Supreme Court can later use in formulating constitutional doctrine. The Supreme Court will often permit a difficult issue to germinate among the lower courts before it accepts a case to resolve the issue.[139] From that process of grappling with a thorny issue through several different cases in different courts, a more judicious final resolution may result—or, at least, the areas of uncertainty and disagreement may be crystallized. Then, when the Supreme Court announces doctrine, it often does so in broad terms, leaving to the lower federal courts the task of fashioning from that doctrine decisions in concrete cases. As Judge Craven of the Fourth Circuit explained, the Supreme Court

> "quite sensibly is willing to take the time to allow the inferior courts to experiment with words, giving content and meaning to the doctrine which has been expounded. The truth is that the Court is wise enough to know that it does not know precisely what ought to be done and must be required. Like the rest of us, the Court learns from experience—the experience of the inferior federal courts. Trial balloons constantly soar aloft from the United States District Courts. Some are shot down in flames by the United States Circuit Courts of Appeals, while others are allowed to orbit indefinitely."[140]

In sum, the lower federal courts have historically played a vital role in vindicating constitutional rights and in promoting national uniformity in the interpretation of the Constitution and the federal laws. The federal courts have successfully functioned side-by-side with the state courts. As a practical matter, the proposed limitations on the lower federal courts (even assuming that an avenue of review by the Supreme Court were left open) would so inundate the Supreme Court as the sole federal arbiter of such issues that the effectiveness of the federal judicial branch would be impaired. We see no compelling interest to justify this kind of radical tampering with the present judicial system and the form in which it has functioned for so many years. Indeed, given the lower federal courts' present-day role in that system, such tampering may now be unconstitutional, whatever Congress could have done in 1789.

2. *Other Constitutional Provisions*

Aside from the limitations inherent in Article III of the Constitution and the historic role of the judiciary in our system of government, other constitutional provisions and considerations should constrain Congress from enacting any of the pending bills. Whatever the scope of Congress' authority over federal court jurisdiction under Article III, Congress may not exercise that authority in a manner that contravenes any other provision of the Constitution. While Congress is acknowledged to have plenary power to regulate interstate commerce,[141] for example, no one would suggest that Congress constitutionally could use that power to prohibit interstate transport of political pamphlets in violation of First Amendment guarantees, or to seize property moving in interstate commerce without due process of law in dis-

regard of the Fifth Amendment. Congress' exercise of its authority over federal court jurisdiction, like the exercise of all of its other powers, is "entirely subject to all of the other provisions of the Constitution that constrain government power."[142]

As the Supreme Court observed:

> "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."[143]

By the same token, Congress' authority over jurisdiction may not constitutionally be used to shield government actions from judicial constitutional review.[144]

(a) *The Due Process Clause*

The Fifth Amendment prohibits the Government from depriving any person of life, liberty, or property without due process of law. Judicial constitutional review of government actions is an essential element of due process. While Congress has never before put the issue to the test by impairing federal court jurisdiction to exercise such review, several cases have intimated that a law eliminating any opportunity for federal judicial review in any class of cases would violate the Due Process Clause.[145]

Hence, Congress' authority over federal court jurisdiction under Article III is limited by the requirements of the Fifth Amendment's Due Process Clause.[146] And due process requires that there be a judicial remedy for someone claiming to be aggrieved by a government's violation of the Constitution.[147]

Applying these due process principles, the Supreme Court disregarded a section of the Military Selective Service Act[148] that purported to prohibit any judicial review of selective service classifications except in a criminal prosecution for violation of the Act and upheld a registrant's right to bring an action to enjoin an

unlawful classification practice.[149] And the Court of Appeals for the District of Columbia Circuit refused to give effect to a provision of the Federal Deposit Insurance Act[150] that purported to deprive the courts of jurisdiction to review certain administrative actions taken pursuant to it.[151] Other cases have carefully scrutinized jurisdiction-limiting statutes according to these due process principles.[152]

In light of these precedents, it is extremely doubtful that the bills withdrawing jurisdiction in draft and military classification cases would withstand constitutional scrutiny. The Due Process Clause would not tolerate subjecting a citizen to loss of liberty by being inducted into the military without an opportunity for some form of judicial review of the law ordering that loss of liberty.[153] It is equally doubtful that Congress could constitutionally require the federal courts to enforce federal legislation—for example, by trying individuals for the crime of refusing induction into the military—but deny those courts jurisdiction, as two of the pending bills would do, to consider a challenge to the law's constitutionality by a person against whom enforcement is sought.[154]

Another due process principle limiting Congress' power over judicial jurisdiction is the requirement that all persons receive equal treatment under the law.[155] Statutes that would eliminate jurisdiction to hear narrow categories of constitutional claims violate this principle by invidiously discriminating against those who assert the particular claims thus singled out.[156] All of the bills presently under consideration save one (H.R. 114) suffer this infirmity. They each single out narrow categories of constitutional claims for jurisdictional oblivion—those involving public prayer, abortion, school desegregation, and sex discrimination in the military.

Since closing off federal judicial redress to persons claiming violations of specific constitutional rights impinges upon fundamental liberties, such jurisdictional limitations should be subjected to strict scrutiny by the courts and can satisfy the equal protection component of the Due Process Clause only where they are

"shown to be *necessary* to promote a *compelling* governmental interest."[157] Yet it is doubtful that these jurisdictional limitations would satisfy even the lower standard applicable where fundamental rights are not involved: a statutory classification must bear a reasonable relationship to a permissible governmental purpose.[158] No legitimate, let alone compelling, governmental interest is served by curtailing federal court jurisdiction to hear specified constitutional claims. No serious argument can be made that such jurisdictional limitations are intended to promote judicial efficiency or any similar interest legitimately within Congress' purview under Article III.[159] And a desire to alter some judicial interpretations of the Constitution with which a majority of the Congress may disagree is not a licit governmental purpose that will satisfy the constitutional standard.[160]

(b) *Specific Constitutional Rights*

Statutes that would eliminate federal court jurisdiction to hear specified constitutional claims, as proposed in the present bills, may well be held to be impermissible abridgements of the constitutional rights underlying the claims as to which jurisdiction is denied. For example, the bills that would eliminate any federal judicial remedy against governmental violations of the First Amendment through school prayer programs would themselves be an abridgement of First Amendment rights.[161]

It is established that, where the purpose and effect of a law is to obstruct judicial protection of constitutional rights, the law is unconstitutional unless it is necessitated by compelling and legitimate governmental interests.[162] As shown above, no such showing of justification can be made for bills like those here considered. Indeed, the present bills appear to have no purpose other than limiting constitutional rights as those rights have been enforced by the courts.

In *Faulkner v. Clifford*,[163] a district court invalidated a statutory provision that purported to deprive all federal courts of jurisdiction to review selective service classifications except in criminal prosecutions of registrants for violation of the Military Selective Service Act.[164] There, a registrant was punitively classified I-A for returning his registration card as a protest against the draft. The registrant commenced a civil action to challenge the punitive classification, arguing that his First Amendment right to protest the draft had been infringed. The Government moved to dismiss for lack of jurisdiction based on the statutory prohibition against judicial review. The court held that denying the registrant a judicial forum for his constitutional claim impermissibly chilled his exercise of First Amendment rights, and ruled the jurisdictional limitation to be unconstitutional as so applied.[165]

(c) *Structural Provisions*

As discussed above (Part II), depriving the federal judiciary of jurisdiction to hear constitutional claims threatens the basic structure of our government and particularly the principle of separation of powers. As Chief Justice Burger wrote in 1976:

> "Long ago, this Court found the ordinary presumption of constitutionality inappropriate in measuring legislation directly impinging on the basic tripartite structure of our Government. . . .
>
> "Our role in reviewing legislation which touches on the fundamental structure of our Government is therefore akin to that which obtains when reviewing legislation touching on other fundamental constitutional guarantees. Because separation of powers is the base framework of our governmental system and the means by which all our liberties depend, [the statute in question] can be upheld only if it is necessary to secure some overriding governmental objective, and if there is no reasonable alternative which will trench less heavily on separation-of-powers principles."[166]

We have already discussed how jurisdictional limitations of the

sort proposed would offend one important structural provision of the Constitution, the Supremacy Clause (Part IIB above). Such jurisdictional limitations, by seeking indirectly to alter authoritative judicial interpretations of the Constitution, may also be regarded as an impermissible attempt to circumvent the process of constitutional amendment.[167]

We do not take issue with those who point out that, ultimately, legislative supremacy is at the heart of our democratic system. But the established constitutional mechanism for resolving a profound and lasting disagreement between the judicial branch and Congress, as the elected will of the people, as to the meaning of a constitutional provision, is amendment of the Constitution, not tampering with the jurisdiction of the courts. Under Article V, an amendment to the Constitution can be proposed by two-thirds of both houses of Congress or the application of legislatures of two-thirds of the states, and such amendment becomes effective when ratified by three-fourths of the states. The process of amending the Constitution was not intended to be a simple matter, but rather one that required great deliberation. Much more was required than the simple majority vote necessary for ordinary legislation.

The proposed jurisdictional limitations also implicate another important structural provision of the Constitution, the one governing impeachment. As noted above, the Framers intended impeachment to be the *sole* check on the judiciary.[168] Impeachment was intended to be much harder to achieve than ordinary legislation. High crimes and misdemeanors must be proven, and a two-thirds vote by the Senate is required for conviction.[169]

Were Congress able to act by simple majority upon every disagreement with the judiciary's constitutional interpretations by divesting the courts of jurisdiction, both of these carefully constructed safeguards—constitutional amendment and impeachment—requiring supermajority action by Congress and the people would be wholly avoided. Such a result would impair the tripartite balance of power in our constitutional system and

would be inconsistent with the intentions of the draftsmen of the Constitution.

CONCLUSION

For the reasons here discussed, the Committee concludes that legislation to divest the federal courts of jurisdiction to hear constitutional claims, such as proposed in the pending bills, is probably unconstitutional and certainly unwise. The basic constitutional plan of separation of powers, and judicial constitutional review as an essential part of this plan, have served the nation well for two centuries. The plan should not be tampered with because some Supreme Court constitutional decisions are perceived to be out of step with public favor or even wrong.

We believe that, when faced with proposals to divest the federal courts of jurisdiction or to undermine their independence, Congress should be guided by the example of self-restraint exhibited by the 75th Congress when it rejected President Roosevelt's court-packing proposal. As the Senate Judiciary Committee put it in 1937:

> "Shall we now, after 150 years of loyalty to the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen even against the Government itself, create the vicious precedent which must necessarily undermine our system? . . .
>
> ". . . .
>
> ". . . Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves

any measure we may enact. We are not the judges of the judges. We are not above the Constitution.

". . . Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American Judiciary from attack as long as this Government stands."[170]

August 1981

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* Jack David is presently the Chair of the Committee.

APPENDIX

LIST OF PENDING BILLS TO LIMIT FEDERAL COURT JURISDICTION TO HEAR CONSTITIONAL CLAIMS

Bill No.	Sponsor	Subject
H.R. 72	Ashbrook	Prayer
H.R. 73	Ashbrook	Abortion
H.R. 114	Bennett	State Judgments
H.R. 311 §106	Hansen	Prayer
H.R. 326	Holt	Prayer
H.R. 340	Holt	School Desegegation
H.R. 408	Quillen	Prayer
H.R. 761	McDonald	School Desegregation
H.R. 865	P. Crane	Prayer
H.R. 867	P. Crane	Abortion
H.R. 869	P. Crane	School Desegregation
H.R. 900 §2	Hyde, *et. ano.*	Abortion
H.R. 989	McDonald	Prayer
H.R. 1079	Hinson	School Desegregation
H.R. 1180	Ashbrook	School Desegregation

H.R. 1335	Nichols	Prayer
H.R. 2047	Moore	School Desegregation
H.R. 2347	P. Crane	Prayer
H.R. 2365	Evans	Armed Forces
H.R. 2791	Evans	Armed Forces
H.R. 3225	Mazzoli, *et al.*	Abortion
S. 158 §2	Helms	Abortion
S. 481	Helms, *et ano.*	Prayer
S. 528	Johnson, *et al.*	School Desegregation
S. 583	Hatch	Abortion

FOOTNOTES

[1] 1 A. de Tocqueville, *Democracy in America* ch. VI, at 107 (Bradley ed. 1945).

[2] For example, bills in the 1950s to deprive the federal courts of jurisdiction to hear challenges to loyalty-oath requirements or subversive activities laws; bills to eliminate federal court jurisdiction over legislative apportionment cases in the wake of the landmark decision in Baker v. Carr, 369 U.S. 186 (1962); earlier proposals to divest the courts of jurisdiction over challenges to religious observances in public schools; and bills introduced in the 1950s and again in the early 1970s which, like some of the present bills, would have deprived the federal courts of jurisdiction to order busing as a means of remedying school segregation. For descriptions and discussions of prior proposals to limit federal court jurisdiction to hear constitutional claims, *see, e.g.*, Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585, 593 (1975); Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 498-99 (1974); Freund, *Storm Over the American Supreme Court*, 21 Modern L. Rev. 345 (1958); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 159 (1960); Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229, 230 (1973); Note, *Governance*, 13 Ga. L. Rev. 1513, 1522-25 (1979); Note, *The Nixon Busing Bills and Congressional Power*, 81 Yale L.J. 1542 (1972); Kaufman, *Congress v. The Court*, N.Y. Times, Sept. 20, 1981, § 6 (Magazine), at 44, 48, 54. *See also* Nagel, *Court-Curbing Periods in American History*, 18 Vanderbilt L. Rev. 925 (1965) (statistical analysis of bills to limit the courts' powers); Note, *Governance, supra* at 1517-18 (examples of legislation to limit courts' jurisdiction in other countries).

[3] U.S. Const. art. VI, cl. 2.

[4] 67 A.B.A.J. 1082 (1981). This action by the ABA's House of Delegates was supported by a well-reasoned report from its Special Committee on Coordination of Federal Judicial Improvements, which concludes:

> "The real issue, the only issue, is whether, as a matter of policy and of constitutional permissibility, this nation is going to adopt a device whereby each time a decision of the Supreme Court or a lower court offends a majority of both houses of Congress, the jurisdiction of the federal courts to hear that issue will be stripped away. We do not believe that is a system the Framers intended nor one that we should strive to institute."

Id.

[5] For example, Former Solicitor General Robert Bork, although critical of many modern Supreme Court decisions, argued that enactment of the present jurisdiction-stripping bills "would not be in keeping with the spirit of the Constitution nor would it be in keeping with its structure." 67 A.B.A.J. 1095 (1981). The Reagan Administration, so far as we are aware, has not yet taken an official position. A Justice Depart-

ment spokesman has said that the Justice Department "will not be announcing" its position on the bills. *Id.*

[6] Kaufman, *supra* note 2, at 44. *See also* Kaufman, *See the Founding Fathers Stir: Tampering With the Courts' Power Would Invite Instability*, L.A. Times, Mar. 25, 1981, § 2, at 7.

[7] H.R. 72, 326, 408, 865, 989, 1335, and 2347, 97th Cong., 1st Sess. (1981).

[8] S. 481, 97th Cong., 1st Sess. (1981).

[9] *E.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[10] S. 450, 96th Cong., 1st Sess. §§ 11-13 (1979).

[11] It is doubtful that these bills would have the intended effect of removing school prayer cases from the federal courts, since they would divest the federal courts of jurisdiction only to hear cases involving "voluntary" prayer. Therefore, under the bills, federal courts would have to decide the threshold question of whether a particular religious observance is "voluntary." One of the underpinnings of the Supreme Court's decisions on school prayer is that, particularly in dealing with impressionable schoolchildren, there is an element of subtle coercion in any religious observance led by a school authority and participated in by the majority of pupils, and participation in such an observance is therefore not entirely voluntary. Engel v. Vitale, 370 U.S. 421, 430-31 (1962); *see* Abington School Dist. v. Schempp, 374 U.S. 203, 228, 288-93 (1963) (concurring opinion). (However, the Court has held squarely that even absent coercion, government sponsorship of prayer in public schools violates the Establishment Clause of the First Amendment. Engel v. Vitale, *supra* at 430.) Furthermore, questions of fact that affect constitutional rights are exclusively within the province of the federal judiciary, and ultimately the Supreme Court, to decide. *E.g.*, Crowell v. Benson, 285 U.S. 22, 60 (1932) (Hughes, C.J.):

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

See id. at 58-61. *See also* United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872).

[12] U.S. Const. art. VI, cl. 2.

[13] H.R. 311, 97th Cong., 1st Sess. § 106 (1981).

[14] Harris v. McRae, 100 S. Ct. 2671 (1980); Belotti v. Baird, 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Connecticut v. Menillo, 423 U.S. 9 (1975); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

[15] Specifically, H.R. 73 and S. 583 would forbid the issuance by any federal court other than the Supreme Court of "any restraining order or temporary or permanent injunction" in cases involving "any Federal or State law" that "prohibits, limits, or regulates abortion," abortion clinics, or persons that provide abortions, and in cases involving any federal or state law that "prohibits, limits, or regulates the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions." H.R. 73, 97th Cong., 1st Sess. (1981); S. 583, 97th Cong. 1st Sess. (1981).

[16] H.R. 90, H.R. 3225, S. 158, 97th Cong., 1st Sess. (1981).

[17] The availability and timing of traditional judicial remedies may have consequences for the realization of substantive constitutional rights. *See, e.g.*, Oestereich v. Selective Service Bd., 393 U.S. 233 (1968) (pre-induction judicial review of Selective Service classifications); Freedman v. Maryland, 380 U.S. 51 (1965) (motion picture censorship).

[18] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26-31 (1971) (Burger, C.J.); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971) (Burger, C.J.); *see* Note, *The Nixon Busing Bills and Congressional Power*, *supra* note 2.

[19] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30-31 (1971).

[20] Thus, H.R. 340, 97th Cong., 1st Sess. (1981), provides that no federal court shall have jurisdiction to render a decision "the effect of which would be to require that pupils be assigned to a particular school on the basis of their race, color, religion, or national origin." H.R. 761, 97th Cong., 1st Sess. (1981), provides that no federal court shall have jurisdiction to render a decision "which would have the effect of requiring any individual to attend any particular school." Two identical bills, H.R. 1079 and H.R. 1180, 97th Cong., 1st Sess. (1981), provide that "no court of the United States shall have jurisdiction to require the attendance at a particular school of any student because of race, color, creed, or sex."

[21] At the time H.R. 2365 was introduced, a three-judge federal district court had ruled that exempting women from the application of the Military Selective Service Act, 50 U.S.C. App. §§ 451 *et seq.*, invidiously discriminated against males and therefore violated the equal protection component of the Fifth Amendment's Due Process Clause. The Supreme Court subsequently reversed this decision on appeal and upheld the constitutionality of a draft law that applies only to males. *See* Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa. 1980), *enforcement stayed*, 101 S. Ct. 1 (1980), *rev'd*, 101 S.Ct. 2646 (1981). *See generally* Committee on Federal Legislation, *If the Draft Is Resumed: Issues for a New Selective Service Law*, 36 Rec. A.B. City N.Y. 98, 105-10 (1981).

[22] *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976); Owens v. Brown, 455 F. Supp. 291 (D.C. 1978).

[23] Redish & Woods, *Congressional Power To Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 49-50, 81-92 (1975), which analyzes a line of authorities primarily based upon Tarble's Case, 80 U.S. (13 Wall.) 397 (1871). However, in contrast, Professor Hart suggests that "in the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones." He notes that Congress cannot limit the state courts' jurisdiction to hear claims under the Federal Constitution. "The state courts always have a general jurisdiction to fall back on. And the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution." Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1401 (1953).

[24] *The Federalist No. 47*, at 301 (New Am. Lib. ed. 1961).

[25] *Id. No. 48*, at 308.

[26] *E.g.*, Buckley v. Valeo, 424 U.S. 1, 120-24 (1976).

[27] U.S. Const. art. III, § 1; *see* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22-23 (1955); O'Donoghue v. United States, 289 U.S. 516, 529-31 (1933); Evans v. Gore, 253 U.S. 245, 249-50 (1920); Redish & Woods, *supra* note 23, at 78-79 & n.157 (1975).

[28] Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U.L. Rev. 1, 5 & n.3. 8-10, 29 (1951) (citing historical authorities); Kaufman, *supra* note 2, at 56. For example, Hamilton explained:

> "The inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. . . .
>
> "Next to permanency in office, nothing can contribute more to the independ-

ence of the judges than a fixed provision for their support. . . . And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."

The Federalist Nos. 78-79, *supra* note 24, at 470-72. *See also* text accompanying note 69 *infra* (quoting Madison).

[29] 5 U.S. (1 Cranch) 137 (1803).

[30] *Id.* at 177.

[31] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[32] *The Federalist No. 81*, *supra* note 24, at 483.

[33] Thus, Hamilton emphasized:

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

Id. No. 78, at 466.

[34] *Id.* at 468.

[35] *Id.* at 465.

[36] *Id.*

[37] *See generally* Committee on Federal Legislation, *Citizens' Standing To Sue in Federal Courts*, 34 Rec. A.B. City N.Y. 585 (1979).

[38] *See generally* 1 A. de Tocqueville, *supra* note 1, at 103, 106-07. Also note that the Court's doctrine of "constitutional avoidance"—by which it refrains from deciding constitutional questions where possible—is based in part upon "the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely." Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 72 (1961); *see also* Ashwander v. TVA, 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring).

[39] U.S. Const. art. III, § 2. As the Supreme Court explained in Flast v. Cohen, 392 U.S. 83, 95 (1968):

"In part those words ["cases" and "controversies"] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine."

The Court noted, for example, that no justiciable controversy is presented when parties seek an advisory opinion, and that the longstanding rule against such opinions implemented the separation of powers described by the Constitution and served to confine the judiciary to its proper role. *Id.* at 95.

[40] *The Federalist No. 78*, *supra* note 24, at 468-69.

[41] *Id. No. 79*, at 474.

[42] *Id. No. 81*, at 484.

[43] *Id.* at 485.

[44] *See, e.g.*, *id. No. 78*, at 466; Redish & Woods, *supra* note 23; Tweed, *supra* note 28. State courts might not have power to prevent unconstitutional actions by the federal government. *See* Redish & Woods, *supra* note 23, at 49-50, 81-92.

[45] R. Berger, *Congress v. The Supreme Court* 337 (1969).

[46] U.S. Const. art. VI, cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[47] *See* Ratner, *supra* note 2, at 160-61, 165 & n.41, 166-67, 184-85.

[48] *See, e.g.*, *id.*; Eisenberg, *supra* note 2, at 505-07; Sedler, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U. Pitt. L. Rev. 99, 113-14 (1958).

[49] C. Black, *Structure and Relationship in Constitutional Law* 74-76 (1969).

[50] O.W. Holmes, *Collected Legal Papers* 295 (1920).

[51] *The Federalist No. 22*, *supra* note 24, at 150:

"A circumstance which crowns the defects of the Confederation remains . . . the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation."

[52] *Id. No. 80*, at 476.

[53] *Id. No. 22*, at 150.

[54] I. M. Farrand, *Records of the Constitutional Convention* 124 (1911) (emphasis added). At the Constitutional Convention, the principal debate over Article III was whether to create federal courts of general original jurisdiction, or whether the state courts should try all federal causes in the first instance with a right of appeal to the Supreme Court on federal questions; both sides acknowledged the necessity of Supreme Court appellate jurisdiction to review state court decisions on federal issues. Ratner, *supra* note 2, at 161-65 & nn.15-25 (citing the debates); Eisenberg, *supra* note 2, at 505, 508-10. This debate continued in the First Congress after the Constitution was ratified. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 53, 65-68, 123-25 (1923).

[55] Ch. 20, § 25, 1 Stat. 85.

[56] 28 U.S.C. § 1257 (1976).

[57] Ratner, *supra* note 2, at 184-85.

[58] Warren, *supra* note 54, at 65 & n.39.

[59] *Id.* at 67-68.

[60] Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888); *see, e.g.*, Ames v. Kansas, 111 U.S. 449, 463-64 (1883); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378-412 (1821).

[61] Ratner, *supra* note 2, at 166; *see id.* at 166-67 & n.49.

[62] 14 U.S. (1 Wheat.) 304 (1816).

[63] *Id.* at 347-48. In previous proceedings in the case, the Supreme Court had reversed a decision of the Virginia Court of Appeals and remanded the cause with instructions to enter judgment for the appellant. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813). The Virginia court refused to obey the mandate, holding that the Supreme Court's appellate jurisdiction could not constitutionally extend to decisions by the courts of a sovereign state, but only to such inferior federal courts as Congress might establish under Article III. Hunter v. Martin, 18 Va. (4 Munf.) 1

(1814).

64 19 U.S. (6 Wheat.) 264 (1821).

65 *Id.* at 416-18. *See also* Dodge v. Woolsey, 59 U.S. (18 How.) 331, 350-51, 355 (1855), in which the Supreme Court opined:

> "[T]he framers of the constitution, and the convention which ratified it, were fully aware of the necessity for . . . a department . . . to which was to be confided the final decision judicially of the powers of that instrument, the conformity of laws with it, which either congress or the legislatures of the States may enact, and to review the judgments of the State courts, in which a right is decided against, which has been claimed in virtue of the constitution . . . .
>
> "Without the supreme court, as it has been constitutionally and legislatively constituted, neither the constitution nor the laws of congress passed in pursuance of it . . . would be in practice or in fact the supreme law of the land . . . ."

66 62 U.S. (21 How.) 506 (1858).

67 *Id.* at 517-18. Likewise, in Gordon v. United States, 117 U.S. 697, 700-01 (1858), the Supreme Court opined that

> "there was . . . an absolute necessity . . . that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers . . . . The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured."

68 319 U.S. 624, 638 (1943)

69 5 *The Writings of James Madison* 269 (Hunt ed. 1904), *quoted in* J. Choper, *Judicial Review and the National Political Process* 60-61 (1980).

70 *See, e.g., The Federalist No. 79, supra* note 24; J. Choper, *supra* note 69, at 67-70; United States v. Will, 101 S. Ct. 471, 482-83 (1980).

71 *See, e.g.*, note 33 *supra* and accompanying text (quoting Hamilton); J. Choper, *supra* note 69, at 60-128, 167-68; Eisenberg, *supra* note 2, at 506-07; Redish & Woods, *supra* note 23, at 76-79; Tweed, *supra* note 28, at 5; Warren, *supra* note 54, at 115 (quoting Madison).

72 C. Hughes, *The Supreme Court of the United States* 236 (1927).

73 F. Frankfurter, *Law and Politics* 52 (1939).

74 Chambers v. Florida, 309 U.S. 227, 241 (1940), *quoted in* Kaufman, *supra* note 6, at 7.

75 *E.g.*, Youngstown Co. v. Sawyer, 343 U.S. 579 (1952); Lynch v. United States, 292 U.S. 571 (1934); *see* Fink, *Undoing the High Court*, N.Y. Times, July 17, 1981, at A23.

76 Representative Barney Frank (D.-Mass.) made a similar point while speaking at the American Bar Association convention in August 1981. *See* Taylor, *The Bar Weighs in as a Friend of the Courts*, N.Y. Times, Aug. 16, 1981, § 4, at 7.

77 Freund, *supra* note 2, at 350; *see* Gompers v. United States, 233 U.S. 604, 610 (1914) (Holmes, J.).

78 *See* Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1006 (1965).

79 Committee on Federal Legislation, *Federal Diversity Jurisdiction*, 33 Rec. A.B. City N.Y. 493, 500 (1978).

80 The provision that the judicial power of the United States "shall be vested" in the Supreme Court and in such inferior federal courts as Congress may establish (art. III, § 1) would seem on its face to require that the entire judicial power (defined in art. III, § 2) be conferred upon the federal judiciary. Indeed, one early Supreme Court decision by Justice Story so opined. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-31 (1816) (Story, J.) (dicta). *See generally* Eisenberg, *supra* note 2, at 501-02 & nn.23-27. However, the Supreme Court later rejected this view. *E.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850).

81 28 U.S.C. § 1332 (1976).

82 28 U.S.C. § 1257 (1976).

83 Hart, *supra* note 23, at 1365; Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53, 53-54 (1962); Ratner, *supra* note 2, at 183-84.

84 Hart, *supra* note 23, at 1362-63 & *passim* (Professor Hart concludes that these dicta cannot be taken at face value); *cf.* Warren, *supra* note 54, at 51.

85 *See* Brest, *supra* note 2, at 594; Eisenberg, *supra* note 2, at 517-20; Hart, *supra* note 23, at 1365, 1371-74.

86 *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Van Alstyne, *supra* note 2, at 267-68; Note, *The Nixon Busing Bills and Congressional Power*, *supra* note 2, at 1547, 1556-57.

87 *See* notes 40-43 *supra* and accompanying text.

88 *See* Eisenberg, *supra* note 2, at 514-18. An attempt to define the legitimate scope of Congress' regulation of federal court jurisdiction in all cases is beyond the scope of this Report, which is concerned solely with Congress' authority to limit the courts' jurisdiction to hear constitutional claims. Congress' power to limit jurisdiction to hear claims that arise solely under congressional statute, and do not implicate constitutional rights, is probably much broader; indeed, denial of a judicial remedy to enforce rights that are claimed solely under a federal statute might be seen as a limitation of the substantive rights created by the statute. *Cf.* Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 42 (1918):

> "[F]or legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it."

89 Youngstown Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

90 U.S. Const. art. III, § 2.

91 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

92 Ratner, *supra* note 2, at 172-73 (citing authorities). Professor Ratner states:

> "The defeat of the amendment thus may reasonably be construed as a rejection by the Convention of plenary congressional control over the appellate jurisdiction of the Court and as indicating that the purpose of the clause was to authorize exceptions and regulations by Congress not incompatible with the essential constitutional functions of the Court."

Id. at 173.

93 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

94 Youngstown Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring), quoted in text accompanying note 89 *supra*; *Legal Tender Case*, 110 U.S. 421, 439 (1884); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

95 *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 20 (2d ed. 1973) (footnotes omitted):

> "The important provision that the appellate jurisdiction should be subject to

exceptions and regulations by Congress was contained in none of the plans [submitted to the Constitutional Convention]. It is foreshadowed in Randolph's draft for the Committee on Detail and then appears in a letter draft in Wilson's handwriting in substantially the form in which the Committee reported it. There was no discussion in the Committee."

[96] R. Berger, *supra* note 45, at 285-96; Merry, *supra* note 83, at 57-68; Warren, *supra* note 54, at 56, 61, 74-75, 78-79, 90, 94, 96-104, 112-115, 127. Article III, Section 2, grants the Supreme Court appellate jurisdiction in all cases within the federal judicial power "both as to Law and Fact"; this sentence continues with the Exceptions Clause.

[97] *The Federalist No. 81*, *supra* note 24, at 488. The issue was hotly debated because there were such varying practices in the states respecting review of trial court and jury factual determinations. R. Berger, *supra* note 45, at 286-89.

[98] R. Berger, *supra* note 45, at 289. The First Congress addressed this question in enacting the Judiciary Act of 1789. Warren, *supra* note 96. It also resolved the scope of review of jury findings in proposing the Seventh Amendment:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

[99] Hart, *supra* note 23, at 1364.

[100] *Id.* at 1365; *accord*, R. Berger, *supra* note 45, at 296; Brest, *supra* note 2, at 594; Merry, *supra* note 83, at 53-54, 56-67; Ratner, *supra* note 2, at 171-72. *Contra*, Van Alstyne, *supra* note 2, at 260; Wechsler, *supra* note 78, at 1005-06.

[101] Ratner, *supra* note 2, at 168-71.

[102] *See* authorities cited in note 83 *supra*.

[103] Colorado Central Mining Co. v. Turck, 150 U.S. 138, 141 (1893); American Constr. Co. v. Jacksonville Ry., 148 U.S. 372, 378 (1893); The Francis Wright, 105 U.S. 381, 385-86 (1881); United States v. Young, 94 U.S. 258, 259 (1876); Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865); Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847); Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799); Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796).

[104] For an excellent analysis of the cases, *see* Ratner, *supra* note 2, at 173-83.

[105] 74 U.S. (7 Wall.) 506 (1869).

[106] 80 U.S. (13 Wall.) 128 (1872).

[107] For a thorough discussion of the case and its background, *see* Van Alstyne, *supra* note 2, *passim*.

[108] Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

[109] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386.

[110] Van Alstyne, *supra* note 2, at 233-35.

[111] *Ex parte* McCardle, 73 U.S. (6 Wall.) 318 (1868).

[112] Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44; *see* Van Alstyne, *supra* note 2, at 238-41.

[113] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869).

[114] Note, *The Nixon Busing Bills and Congressional Power*, *supra* note 2, at 1555; *cf.* Van Alstyne, *supra* note 2, at 239-40, 248 & n.72.

[115] Glidden Co. v. Zdanok, 370 U.S. 530, 605 & n.11 (1962) (Douglas, J., dissenting).

[116] *See* Hart, *supra* note 23, at 1364-65.

[117] Van Alstyne, *supra* note 2, at 249-54; *see Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 105 (1869).

[118] 74 U.S. (7 Wall.) at 515 (citation omitted; emphasis added). The "previously exercised" jurisdiction referred to was the Supreme Court's power to review by writ of certiorari habeas corpus cases commenced in the lower courts, and to issue original writs of habeas corpus in such cases, under the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81 (1789).

[119] 75 U.S. (8 Wall.) 85 (1869).

[120] *Id.* at 105-06; *see* Van Alstyne, *supra* note 2, at 252.

[121] 75 U.S. (8 Wall.) at 96-103; *see* Ratner, *supra* note 2, at 179.

[122] 80 U.S. (13 Wall.) 128 (1872).

[123] *Id.* at 146.

[124] *Id.* at 146-47.

[125] U.S. Const. art. III, § 1.

[126] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330-31 (1816) (Story, J.) (dicta).

[127] *See also* J. Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 246 (1971).

[128] *See* note 80 *supra* and accompanying text.

[129] *See* Eisenberg, *supra* note 2, at 502-04; Redish & Woods, *supra* note 23, at 56-61.

[130] *See, e.g.*, Eisenberg, *supra* note 2, at 500-04; Ratner, *supra* note 2, at 158; Redish & Woods, *supra* note 23, at 46-47.

[131] Eisenberg, *supra* note 2, *passim*.

[132] Redish & Woods, *supra* note 23, *passim*.

[133] 407 U.S. 225 (1972).

[134] *Id.* at 239.

[135] *Id.* at 242.

[136] American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 166 (1969).

[137] U.S. Const. art. III, § 1; see text accompanying notes 27-28, 33, 70 *supra*.

[138] C. McGowan, *The Organization of Judicial Power in the United States* 16 (1967).

[139] *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971) (reviewing school desgregation remedies):

"This Court, in [Brown v. Board of Educ., 347 U.S. 483 (1954)], appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of 'trial and error,' and our effort to formulate guidelines must take into account their experience."

See also Mapp v. Ohio, 367 U.S. 643, 651-53 (1961) (applying the federal exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914), to state criminal trials).

[140] Craven, *Integrating the Desegregation Vocabulary — Brown Rides North, Maybe*, 73 W. Va. L. Rev. 1, 3 (1970) (footnotes omitted).

[141] U.S. Const. art. I, § 8, cl. 3; *see, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-97 (1824); Katzenbach v. McClung, 379 U.S. 294, 303-05 (1964).

[142] Hart, *supra* note 23, at 1371-72; Van Alstyne, *supra* note 2, at 263-64; *see* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-52 (1936); Feinberg v. FDIC, 522 F.2d 1335, 1342 (D.C. Cir. 1975); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); Faulkner v. Clifford, 289 F. Supp. 895, 898-901 (E.D.N.Y. 1968), *appeal dismissed*, 393 U.S. 1046 (1969).

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

[144] Feinberg v. FDIC, 522 F.2d 1335, 1341-42 (D.C. Cir. 1975); International Tel. & Tel. Corp. v. Alexander, 396 F. Supp. 1150, 1163-64 & n.31 (D. Del. 1975); *cf.* Cortright v. Resor, 325 F. Supp. 797, 808-10 (E.D.N.Y. 1971); Hart, *supra* note 23, at 1387.

[145] Oestereich v. Selective Service Bd., 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring) (citations omitted):

> "It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims."

See Bob Jones University v. Simon, 416 U.S. 725, 746 (1974); Yakus v. United States, 321 U.S. 414, 434, 441-44 (1944); Crowell v. Benson, 285 U.S. 22, 58-61 (1932); Feinberg v. FDIC, 522 F.2d 1335, 1337-42 (D.C. Cir. 1975); International Tel. & Tel. Corp. v. Alexander, 396 F. Supp. 1150, 1168 (D. Del. 1975); Faulkner v. Clifford, 289 F. Supp. 895, 898-901 (E.D.N.Y. 1968), *appeal dismissed,* 393 U.S. 1046 (1969).

[146] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-52 (1936); Feinberg v. FDIC, 522 F.2d 1335, 1342 (D.C. Cir. 1975); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied,* 335 U.S. 887 (1948).

[147] *See* Bell v. Hood, 327 U.S. 678, 684 (1946); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803); *cf.* Cortright v. Resor, 325 F. Supp. 797, 809-10 (E.D.N.Y. 1971).

[148] 50 U.S.C. App. §460(b)(3)(1964).

[149] Oestereich v. Selective Service Bd., 393 U.S. 233 (1968).

[150] 12 U.S.C. §1818(i)(1964).

[151] Feinberg v. FDIC, 522 F.2d 1335 (D.C. Cir. 1975).

[152] *See* cases cited notes 144-46 *supra.*

[153] Oestereich v. Selective Service Bd., 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring); *see also* Yakus v. United States, 321 U.S. 414, 434, 441-44 (1944).

[154] Hart, *supra* note 23, at 1371-83; Wechsler, *supra* note 78, at 1006; *compare* Lockerty v. Phillips, 319 U.S. 182 (1943), *with* Yakus v. United States, 321 U.S. 414 (1944).

[155] Standards developed under the Fourteenth Amendment Equal Protection Clause are applicable to the federal government under the Fifth Amendment Due Process Clause. *E.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[156] Van Alstyne, *supra* note 2, at 263-64; *cf.* Eisenberg, *supra* note 2, at 516; Sedler, *supra* note 48.

[157] Dunn v. Blumstein, 405 U.S. 330, 339 (1972) (first emphasis added); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (first emphasis added).

Most of the bills under consideration here would be subject to strict scrutiny under the "compelling governmental interest" test. The bills relating to public prayer (Part IA above) implicate the religious freedoms guaranteed by the First Amendment and would therefore be subject to such scrutiny. *See* Sherbert v. Verner, 374 U.S. 398, 403-06 (1963). Regarding the abortion bills (Part IB above), the Supreme Court has held that a woman's right to an abortion in the first trimester of pregnancy is a fundamental constitutional right that may be limited only where necessary to promote a compelling governmental interest. Roe v. Wade, 410 U.S. 113, 154-55 (1973). The bills relating to school desegregation (Part IC above) would abridge remedies for segregation in the public schools based on race, a constitutionally suspect classification that calls into play strict scrutiny under the compelling governmental interest test. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-93 (1964); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). *But cf.* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265-66 (1977) (facially neutral classification having racially discriminatory impact will be subject to strict scrutiny only if motivated by racial discrimination). Strict scrutiny under the compelling governmental interest test has also been applied to classifications affecting other fundamental rights. *E.g.*, Police Dep't v. Mosley, 408 U.S. 92, 97-99 (1972) (freedom of speech); Dunn v. Blumstein, 405 U.S. 330, 338-39 (1972) (right to travel); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, 670 (1966) (right to vote); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate).

Sex-based classification, the subject of the pending armed forces bills (Part ID above), is reviewed under a different test: whether the classification is substantially related to an important government interest. *E.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

[158] *E.g.*, McDonald v. Board of Election, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Railway Express v. New York, 336 U.S. 106, 109-10 (1949).

[159] Eisenberg, *supra* note 2, at 514-17; Van Alstyne, *supra* note 2, at 263-64. *See generally* text accompanying note 88 *supra.*

[160] Eisenberg, *supra* note 2, at 517-20; Hart, *supra* note 23, at 1371; Van Alstyne, *supra* note 2, at 267-68; Note, *The Nixon Busing Bills and Congressional Power, supra* note 2, at 1547; *see* United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1872) (impermissible for Congress to withhold jurisdiction "as a means to an end").

[161] *See* Hart, *supra* note 23, at 1371-72; *cf.* Cortright v. Resor, 325 F. Supp. 797, 808-10 (E.D.N.Y. 1971).

[162] *Compare* Boddie v. Connecticut, 401 U.S. 371, 376-78 (1971) (Due Process Clause does not permit denying persons access to judicial remedies that affect fundamental rights), *with* Shapiro v. Thompson, 394 U.S. 618, 631, 634 (1969) (Equal Protection Clause does not permit classification that has purpose and effect of impairing fundamental rights). *See also* United States v. Kras, 409 U.S. 434, 446-47 (1973).

[163] 289 F. Supp. 895 (E.D.N.Y. 1968), *appeal dismissed,* 393 U.S. 1046 (1969).

[164] 50 U.S.C. App. § 460(b)(3)(1964).

[165] 289 F. Supp. at 900-01.

[166] Nixon v. Administrator of General Services, 433 U.S. 425, 506 (1977) (Burger, C.J., dissenting).

[167] Kaufman, *supra* note 2, at 56, 96.

[168] *See* notes 40-43 *supra* and accompanying text.

[169] U.S. Const. art. I, § 3; *id.* art. II, § 4. *See generally* Committee on Federal Legislation, *Precis of Report on the Removal of Federal Judges Other Than by Impeachment,* 32 Rec. A.B. City N.Y. 239 (1977); *see also,* Kaufman, *Chilling Judicial Independence,* 34 Rec. A.B. City N.Y. 157 (1979).

[170] S. Rep. No. 711, 75th Cong., 1st Sess. 13-14 (1937).