ON JURISDICTION-STRIPPING: THE PROPER SCOPE OF INFERIOR FEDERAL COURTS' INDEPENDENCE FROM CONGRESS

Maxim O. Mayer-Cesiano[*]

INTRODUCTION

"So famous is the political theory of checks and balances, so well known to Americans, that he is a bold man who tries to say new things about it."[1] Though famous, the particular balance between Congress and the federal judiciary has always been an especially complex and dynamic one. Over at least the last 170 years,[2] Congress has made many efforts to strip federal courts of jurisdiction, whether aimed through legislation at the Supreme Court's appellate jurisdiction or at the federal inferior[3] courts' original jurisdiction, any one of which would alter that balance. The 107th Congress alone attempted to limit the jurisdiction of federal courts on no fewer than twelve occasions.[4] By their very nature, jurisdiction-stripping efforts always test the balance of power between the legislative and judicial branches, so it might seem at first glance that there is nothing new to say about Congress's most recent exploration of jurisdiction-stripping.

However, Congress has recently taken several highly unusual positions towards the courts that seem somewhat hostile to judicial independence. Recently, Congress has granted jurisdiction to federal

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[*] J.D. Candidate, 2006, University of Pennsylvania Law School; B.A., 2003, Columbia University. I am indebted to Prof. Frank Goodman for his wisdom and patience, from which this Comment and I benefited a great deal. I am similarly grateful to the editorial staff of the University of Pennsylvania Journal of Constitutional Law, particularly Adam L. Pollock. I would also like to express my unending gratitude to my parents, whose love and support I cherish. All errors herein are my own.

[1] Stanley Pargellis, *The Theory of Balanced Government, in* THE CONSTITUTION RECONSIDERED 37, 37 (Conyers Read ed., 1938).

[2] *See* Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 159 (1960) ("[A]s early as 1830, congressional legislation was introduced which proposed to eliminate the Supreme Court's appellate jurisdiction over state court decisions . . . .").

[3] The term "inferior," as used to describe courts, is a legal term of art, not a judgment of quality. It derives from the constitutional provision 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." U.S. CONST. art. III, § 1 (emphasis added).

[4] *See* William E. Dannemeyer, *Article III, Section 2*, WASH. TIMES, Oct. 7, 2003, *available at* http://www.washtimes.com/op-ed/20031006-085845-5892r.htm.

courts over particular individualized cases where there seems to be no constitutional basis and the motivation seems to be nothing more than political dissatisfaction with prior court holdings.[5] More importantly, Congress's recent jurisdiction-stripping efforts have differed from their traditional forays in that the new variety seeks to deny the federal courts' jurisdiction over matters regarding substantive constitutional rights. Two bills in particular are useful in examining this recent phenomenon: the Pledge Protection Act of 2004[6] and the Marriage Protection Act of 2004.[7] Both bills passed the House of Representatives and were sent to the Senate for consideration,[8] but they are not the only such bills to be considered by Congress recently. In 2005, Congress passed the Detainee Treatment Act, a bill stripping federal court jurisdiction over habeas petitions brought by Guantanamo Bay prisoners.[9] Other similar bills that the House has had in committee include the We the People Act of 2004,[10] the Constitution

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[5] *See, e.g., DeLay Says He's Not Giving Up Schiavo Fight*, ABC NEWS, Mar. 19, 2005, http://abcnews.go.com/GMA/print?*id*=595905 ("[A] House committee filed an emergency request with the U.S. Supreme Court, asking justices to reinsert Schiavo's feeding tube while the committee files appeals. The Supreme Court denied that appeal without comment, and in a statement issued Saturday, DeLay, R-Texas, called the court's decision a 'moral and legal tragedy.' 'A death row inmate has more of a process to go through than Terri Schiavo does,' DeLay said earlier on ABC News' 'Good Morning America' on Saturday. 'All we're doing in Congress is giving Terri Schiavo an opportunity to come to the federal courts and review what this judge in Florida has been doing, and he's been trying to kill Terri for 4 1/2 years.'"); *Terry Schiavo Dies, but Battle Continues*, MSNBC.COM, Mar. 31, 2005, http://www.msnbc.msn.com/id/7293186/print/1/displaymode/1098/ ("At a federal appeals court in Atlanta, one judge rebuked the White House and lawmakers Wednesday for acting 'in a manner demonstrably at odds with our Founding Fathers' blueprint for the governance of a free people—our Constitution.'").

[6] H.R. 2028, 108th Cong. § 2 (2004) ("No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, . . . or its recitation.").

[7] H.R. 3313, 108th Cong. § 2 (2004) ("No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C or this section.").

[8] *See* Vikram Amar & Alan Brownstein, *Conduct Unbefitting the Congress: The So-Called Pledge Protection Act Passed by the House of Representatives*, FINDLAW'S WRIT, Oct. 1, 2004, http://writ.findlaw.com/commentary/20041001_brownstein.html (noting the passage of the Pledge Protection Act by the House on September 23, 2004 and assessing the constitutionality of the bill); Mary Fitzgerald & Alan Cooperman, *Marriage Protection Act Passes*, WASH. POST, July 23, 2004, at A4 (reporting on the passage of the Marriage Protection Act by the House and discussing the constitutionality of the bill).

[9] Detainee Treatment Act of 2005 § 1005(e), Pub. L. No. 109-163, 119 Stat. 3136.

[10] H.R. 3893, 108th Cong. § 3 (2004) ("The Supreme Court of the United States and each Federal Court—(1) shall not adjudicate—(A) any claim involving the laws, regulations, or policies of any State or unit of local government relating to the free exercise or establishment of religion; (B) any claim based upon the right of privacy, including any such claim related to any issue of sexual practices, orientation, or reproduction; or (C) any claim based upon equal protection of the laws to the extent such claim is based upon the right to marry without regard to

Restoration Act of 2004,[11] and the Life-Protecting Judicial Limitation Act of 2003.[12] Taken together, these bills represent a trend that gives relevance to academic inquiry and debate on the subject of jurisdiction-stripping. Given that the issue of Supreme Court appellate jurisdiction has already rightfully been given a great deal of attention by scholars[13] (largely because of the high stakes involved in that area)[14] and Congress's control over the inferior courts is frustratingly explicit in the Constitution,[15] a modern inquiry into the constitutional issues that are at play when Congress seeks to strip original jurisdiction from inferior federal courts will be particularly helpful in understanding the propriety of Congress's jurisdiction-stripping attempts.

This inquiry will first survey the current state of the debate over limitations on Congress's jurisdiction-stripping powers in Part I, while critiquing some of the arguments for established views. In Part II, it will propose a new theory, which claims that Congress's power to strip jurisdiction over constitutional issues is constrained by explicit and implicit constitutional duties to guarantee the independence and integrity of any federal courts Congress elects to create. Finally, in Part III, two current controversial bills will test the consequences of this theory.

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sex or sexual orientation; and (2) shall not rely on any judicial decision involving any issue referred to in paragraph (1).").

[11] H.R. 3799, 108th Cong. § 101 (2004) ("Notwithstanding any other provision of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter to the extent that relief is sought against an element of Federal, State, or local government, or against an officer of Federal, State, or local government (whether or not acting in official personal capacity), by reason of that element's or officer's acknowledgement of God as the sovereign source of law, liberty, or government.").

[12] H.R. 1546, 108th Cong. § 2 (2003) ("The district courts of the United States, the District Court of Guam, the District Court of the Virgin Islands, and the District Court for the Northern Mariana Islands shall not have jurisdiction to hear or determine any abortion-related case.").

[13] *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION (4th ed. 2003) (discussing the nature and scope of the jurisdiction of the federal courts); Theodore J. Weiman, Comment, *Jurisdiction Stripping, Constitutional Supremacy, and the Implications of* Ex parte Young, 153 U. PA. L. REV. 1677 (2005) (analyzing current scholarship and arguing, based on *Ex parte Young* considerations, for a narrow reading of Congress's ability to strip the Supreme Court of appellate jurisdiction).

[14] *See* Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839, 843 (1976) ("[U]nless Congress provided broad appellate review in the Supreme Court, there would be 50 different and possibly inconsistent resolutions of federal issues.").

[15] The Constitution, famously, left the creation of inferior federal courts to the discretion of Congress in the phrase "such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

I. EXISTING VIEWS ON THE INDEPENDENCE OF INFERIOR COURTS

A. Traditional View and its Variants: Congress's Power to Create Implies a Power to Destroy and Therefore Some Power to Destroy Partially

It is beyond dispute that the Constitution explicitly requires the existence of a Supreme Court and that it does not explicitly require the existence of inferior courts.[16] Congress's discretionary power to create inferior courts—and, just as importantly, its power to choose not to—is at the heart of the traditional argument that Congress has a broad power to regulate the inferior federal courts as it sees fit.[17] This argument is usually made in one fell swoop, claiming that Congress's power to create the inferior courts automatically implies both a power to destroy inferior courts and a power to substantively regulate inferior courts, to the extent that substantively regulating the jurisdiction of inferior courts is analogous to partially destroying them.[18] (This argument will hereinafter be called "the Traditional View.") Analytically, this argument requires two logical steps: (1) that Congress has a broad power to destroy the inferior courts,[19] and (2) that implicit in the "greater" power to destroy is the "lesser" power to carve out exceptions to inferior federal courts' jurisdiction.[20]

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[16] *See id.*

[17] Congress's discretionary power to create inferior courts is not merely inferred from the permissive language in Article III. It is affirmatively enumerated in Article I as a power "[t]o constitute Tribunals inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9. There was a great deal of argument among the framers as to whether to require, permit, or prohibit the creation of inferior federal courts. The choice to permit them has been called by historians the "Madisonian Compromise." *See* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (discussing the Madisonian Compromise and its implications for federal court jurisdiction).

[18] Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 54–55 (1975) ("Arguing from Congress's discretionary power over the creation of the lower federal courts, some commentators have thus maintained that Congress has the authority to grant, withhold, or remove after vestment the jurisdiction of the lower federal courts over particular matters. They argue that if the lower courts need not have been established in the first instance, they may be abolished at any time by Congress and that, since they can be abolished, they can effectively be 'abolished' to a lesser extent by removing or denying jurisdiction over particular cases. In other words, the greater power of total abolition logically includes the lesser power of removing certain areas from their jurisdiction." (citation omitted)). *But see* sources cited *infra* note 77 (arguing that, because of other constitutional constraints, there is no power to destroy implied by the power to create).

[19] It is noteworthy that even if the power to destroy is not always implicit in the power to create generally, the combination of the permissive word "may" and the phrase "from time to time" in Article III seems to grant a special degree of permission to Congress to close down a court even after it is created. U.S. CONST. art. III, § 1.

[20] *See, e.g.*, HOWARD FINK ET AL., FEDERAL COURTS IN THE 21ST CENTURY: CASES AND MATERIALS 184 (2d ed. 2002) ("[I]n authorizing but not requiring Congress to create lower federal courts, the Constitution might naturally be read to imply that Congress could create a

Clearly, the second step depends upon the first, because whether a "lesser" power can be located within the "greater" power is meaningless without the existence of the "greater" power. Also, it is worth noting that the power traditionally viewed as the "lesser" power is regarded by some commentators as "really a greater power,"[21] because it enables substantive micromanagement of legal outcomes, whereas destroying the judiciary in its entirety would not.

In *Sheldon v. Sill*, the Supreme Court's first case to examine Congress's authority to strip jurisdiction from the inferior federal courts, these two steps were combined into a single inquiry, *viz.*, whether Congress has the power to destroy and the concurrent power to regulate.[22] Given that more than 150 years have elapsed, and a great many changes in the composition and role of the federal government have taken place since *Sheldon*, its vitality is disputable.[23] At least one recent opinion, although not a Supreme Court case, reaffirms *Sheldon*'s vitality, noting "federal courts require a specific grant of jurisdiction."[24]

1. *The Pure Traditional View*

Stated concisely, the Traditional View is that Congress may deprive the federal courts of any jurisdiction it pleases, except for the original jurisdiction given to the Supreme Court by the Constitution.[25]

'partial' system of such courts, with jurisdiction over some matters but not others."); LINDA MULLENIX ET AL., UNDERSTANDING FEDERAL COURTS AND JURISDICTION § 1.05[2] (1998) ("Congress's 'greater' power to abolish the lower federal courts is widely thought logically to include the 'lesser' power to limit the kinds or amount of cases that they can hear.").

[21] *See* Rotunda, *supra* note 14, at 842.

[22] Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.").

[23] *See, e.g.*, U.S. CONST. amend. XIV (substantially changing the balance of power between the federal government and the states); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (explaining how New Deal legislation expanded the scope of the federal government in relation to the states); LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY (1992) (exploring the Supreme Court's changing jurisprudence using the case studies of abortion and capital punishment); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002) (explaining the Rehnquist Court's jurisprudence on the value of competition in the context of promoting social order).

[24] Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc., 106 F.3d 1146, 1152 (4th Cir. 1997).

[25] *See* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 (1990).

Even though this view holds that Congress's power to strip jurisdiction is broad,[26] it should not be confused with a foolish claim that this power is infinite and somehow unchecked by the rest of the Constitution.[27] An important, though rather weak, check on Congress's authority is the doctrine set forth in *U.S. v. Klein*, which prohibits Congress from requiring a court to reach an unconstitutional result.[28] In an important sense, this holding can often beg the question of what an unconstitutional result is, particularly given that when Congress strips a court of jurisdiction, that court would be barred by statute from hearing the case, thus vitiating its power of review altogether and prohibiting it from reaching any result at all.[29]

Additionally, even in the absence of law speaking to the specific question, Congress's jurisdiction-stripping statutes clearly must conform to general constitutional restrictions on Congressional legislation.[30] For example, Congress may not create inferior federal courts only for those plaintiffs who swear an oath stating that they will not practice a particular religion in the United States.[31] Similarly, Congress could not constitutionally create a bill of attainder directing a particular outcome in a particular case.[32]

Courts have noted that jurisdiction-stripping has never been held to be a sufficiently potent doctrine to outweigh due process interests.[33] Indeed, in dicta, the Supreme Court has even alluded to the possibility that a statute barring a plaintiff's access to judicial review

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[26] *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (holding that Article III left Congress free to establish inferior federal courts as it deemed appropriate).

[27] *See infra* note 30 (showing that other constitutional rights may not be trumped with the jurisdiction-stripping power).

[28] *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871) (holding that Congress may not require the court to reach an unconstitutional result).

[29] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that review of constitutional questions is within the judicial competence).

[30] Even if one is fiercely committed to the proposition that a court created by a statute "can have no jurisdiction but such as the statute confers," *Sheldon*, 49 U.S. at 449, it is implicit that the statute conferring jurisdiction must satisfy the other attributes that the Constitution requires of Congress's statutes. Congressional powers "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." Williams v. Rhodes, 393 U.S. 23, 29 (1968).

[31] In this hypothetical case, Congress would be unable to create courts as described, because "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

[32] *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

[33] *See, e.g.*, Bartlett v. Bowen, 816 F.2d 695, 704 (D.C. Cir. 1987) ("In considering the constitutional issue, it is important to recall that, in the entire history of the United States, the Supreme Court has never once held that Congress may foreclose all judicial review of the constitutionality of a congressional enactment.").

altogether would likely be struck down.[34] However, due process interests have in the past been held to be satisfied by some rather minimal outside-the-courtroom methods,[35] so this check is not as limiting as it may seem at first glance.

More recently, the Supreme Court held that Congress's power is not broad enough to reopen final judgments.[36] Coupling this with another precedent—that some Article III court must have jurisdiction to determine ultimate facts regarding a constitutional challenge to legislation or government action[37]—one might infer that under certain circumstances, Congress is not at liberty to bar all Article III courts from hearing cases that may confer constitutional protections on a class of plaintiffs that may be protected under that right or interest.[38] In particular, if the Supreme Court has identified a fundamental right or fundamental interest under the Constitution but not clearly delineated the facts necessary to invoke protection under that right or interest, that situation would exist.[39] Recent scholarship similarly suggests that the congressional power to strip jurisdiction from federal courts is not as broad as was traditionally believed.[40]

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[34] *See* Bob Jones Univ. v. Simon, 416 U.S. 725, 746 (1974) ("This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different."). Similarly, the Supreme Court has held that the Executive may not entirely bar a citizen-detainee's access to judicial review. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[35] *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944) (holding that a congressionally provided protest procedure is an adequate judicial remedy for a litigant challenging a regulation, such that an inability to challenge the validity of the applied regulation in a provisionally created emergency court does not constitute a due process violation); *Hamdi*, 542 U.S. at 533–34 (holding that the normal courtroom protections that are typically afforded to prisoners challenging their detention need not be furnished in a challenge by a citizen alleged to be an enemy combatant).

[36] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

[37] *See* Crowell v. Benson, 285 U.S. 22, 56–60 (1932) (arguing that separation-of-powers concerns necessitate that an Article III court be granted jurisdiction to examine factual findings in order to guard against constitutional violations).

[38] This inference is my own and would not likely be accepted by those adopting the Traditional View of Congress's jurisdiction-stripping authority. This inference is present here only to note that the mere combination of different traditionally accepted views may broaden the scope of the Traditional View more than has been thought.

[39] For example, the Supreme Court has found that homosexual sex is not quite a fundamental right, but it is protected under the Fourteenth Amendment, described vaguely both in scope and in manner. *See* Lawrence v. Texas, 539 U.S. 558, 561 (2003) ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."). Clearly, more litigation is necessary to determine the specific parameters of this.

[40] *See, e.g.*, Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 133 (1995) ("[T]he relevant Supreme Court cases offer less support for complete congressional power than courts and commentators have assumed.").

2. *Hart's View: Traditional View Lite*

Perhaps the most widely read article on congressional power to control federal jurisdiction is Professor Hart's dialogue.[41] Hart's dialogue covers a very broad scope, but among his more potent contributions is the thesis that the Constitution regards state courts as adequate venues for constitutional questions.[42]

Similarly, the article also asserts that "a necessary postulate of constitutional government [is] that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained."[43] Notably, Hart never rigorously explains the necessity of this postulate nor locates it in any explicit constitutional text. Still, even Justice Scalia, who usually demands that checks on Congress comport with the original intent of the framers of the Constitution,[44] has implicitly acknowledged this postulate, at least in the limited scope envisioned by Hart.[45]

Many theorists have tried, without any widely agreed-upon success, to fill in Hart's blanks. Professor Fallon, for example, has argued that the Constitution implicitly requires judicial review in certain cases as a logical consequence of some of its more explicit requirements.[46] Overall, however, Hart's argument illustrates that the presence of state courts is generally a useful device for defeating due process objections to jurisdiction-stripping, wherever those due process objections may reasonably be raised.[47]

This approach is unsatisfactory, because the Constitution, at least on its face, leaves open the possibility that a state might not have courts of its own, and it is unreasonable to assume that the Constitu-

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[41] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). The dialogue is likely so widely read due to its inclusion in the standard Federal Courts casebook, which appeared concurrent to the law review article. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 312–340 (1953); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 338, 348–351 (5th ed. 2003) (modern reprint of Hart's dialogue).

[42] Hart, *supra* note 41, at 1363–64.

[43] *Id.* at 1372.

[44] *See generally* DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA (1996) (describing Scalia's jurisprudential philosophy and his faint-hearted originalism).

[45] *See* Webster v. Doe, 486 U.S. 592, 611–12 (1988) (Scalia, J., dissenting) ("[I]f there is any truth to the proposition that judicial cognizance of constitutional claims cannot be eliminated, it is, at most, that they cannot be eliminated from state courts, and from this Court's appellate jurisdiction over cases from state courts . . . involving such claims.").

[46] *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 370 (1993) (arguing that when the Constitution requires "individually effective remedies," then it also requires judicial review).

[47] *See* Hart, *supra* note 41, at 1401 (concluding that state courts are the primary guarantors of constitutional rights and their jurisdiction cannot be constitutionally regulated by Congress).

tion allows all of its due process guarantees to be guarded by bodies that it does not require to exist. Since this point is not obvious, I will expound on it here.

The only language in the Constitution referring to any courts in the states is that trials "shall be held in the State where the said Crimes shall have been committed."[48] Additionally, the Due Process Clauses of the Fifth Amendment[49] and Fourteenth Amendment[50] outline what is prohibited in the courts, not what is required; in both cases, states can conceivably avoid all the prohibited behavior and simultaneously have no civil courts of their own. Although there is an explicit guarantee of republicanism,[51] there is no such explicit guarantee of a judiciary sovereign to every state. The closest such reference is a permissive reference to "Judges in every state" in the Supremacy Clause[52] that by no means requires states to have their own judges. This is a broadly phrased requirement which, taken alone, leaves open two unusual theoretical possibilities: (1) that the only courts in the state are federal courts (hereinafter "the exclusively federal case"), and (2) that there are no courts at all in the state (hereinafter "the anarchic case").

The exclusively federal case is especially troublesome for Hart's argument because if those federal courts are stripped of substantive jurisdiction on constitutional questions, then there would clearly be no venue for judicial process of constitutional questions, even though such a venue is required by his postulate. Clearly, this particular in-

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[48] U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

[49] U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). Note that states would not be engaging in any of the behavior forbidden by this section if they had no courts at all.

[50] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."). Note again that states would not be engaging in any of the behavior forbidden by this section if they had no courts at all.

[51] U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

[52] 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.").

carnation of the problem is purely theoretical, as the Union has never had a state without its own courts and it is unlikely to have one in the foreseeable future. However, it yields an important insight that has practical consequences: the fact that the Constitution conceptually leaves room for this possibility could arguably lead to the proposition that the Constitution cannot fairly rest its important due process principles on the existence of a venue that is not required.

Although it is not essential to the success of this argument, it is worth noting that the anarchic case would be unconstitutional on other grounds. Surely, if the meaning of the clause guaranteeing republicanism to each state is to have real meaning, it would constitutionally require the federal government to offer the states some means to adjudicate and enforce the laws their legislatures have passed,[53] even if they fail to provide those means for themselves. Thus, the Constitution effectively accounts for scenarios in which a state lacks courts of its own.

Therefore, I contend that the claim in Hart's model—that the availability of state courts is an effective counterargument to a claim that federal jurisdiction-stripping violates due process—has a theoretical flaw. This is because the guarantee of due process rights is compulsory, while the existence of the state courts seems to be optional.

In short, the Traditional View has a very broad interpretation of Congress's power to regulate. However, there appear to be conceptual problems with the assumptions underlying the view, particularly under Hart's model.

B. Passive-Aggressive[54] Requirement View: Congress Was Indirectly Required to Create Inferior Courts, so it Therefore Has No Power to Destroy

Although there is a general consensus that the Constitution does not explicitly require the creation of inferior courts,[55] some scholars

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[53] The republicanism requirement in Article IV, Section 8 of the Constitution and the many explicit references to state legislatures probably entails that states are constitutionally required to have their own legislatures. *See* U.S. CONST. art. I, § 2; art. VI, cl.3; amend. XIV, § 3; amend. XVII (referring to state legislatures).

[54] *See Passive-Aggressive Personality Disorder*, MEDLINEPLUS MEDICAL ENCYCLOPEDIA, http://www.nlm.nih.gov/medlineplus/ency/article/000943.htm (last visited Nov. 1, 2005) ("Passive-aggressive personality disorder is a chronic condition in which a person seems to passively comply with the desires and needs of others, but actually passively resists them, becoming increasingly hostile and angry."). In no way do I mean to suggest that any constitutional framer or commentator literally suffered or suffers from this personality disorder; the labeling of this view as passive-aggressive is intended merely to suggest concisely that it holds that the Madisonian compromise indirectly required what it directly seemed merely to permit.

[55] *See supra* note 15.

believe that this requirement is implicit in the Constitution.[56] If one believes that inferior courts are required, then the Traditional View is automatically rendered untenable: Congress would not retain a power to destroy the inferior courts, so Congress could not derive from such power a power to *partially* destroy the inferior courts. Therefore, an inquiry as to the viability of this view is prudent.

Justice Joseph Story was the earliest adopter of what I have called the Passive-Aggressive Requirement View. His central observation was that the constitutional language vesting judicial power in the judiciary is mandatory in nature.[57] In *Martin v. Hunter's Lessee*,[58] he claimed that, since all of the judicial power must be vested somewhere,[59] and since the original jurisdiction of the Supreme Court is constitutionally limited[60] and cannot be altered by Congress,[61] the only logical possibility that remains is for Congress to fulfill its duty to vest all the judicial power somewhere by creating inferior federal courts and vesting them with the balance of the judicial power.[62] Justice Story then concluded that Congress could not lawfully opt out of vesting all of the judicial power.[63] Somehow, in spite of the fact that Justice Story was writing for a majority of the Court, this view has not been widely adopted by the judiciary; in fact, it is found in only one subsequent case.[64]

However, the view has not been as unpopular among academics. To begin with, Michael Collins, among others, looked to the histori-

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[56] The critical language underwriting this view is the use of the mandatory words "shall" and "all" in Article III. *See, e.g.*, U.S. CONST. art. III, § 1 ("The judicial Power of the United States *shall* be vested . . . .") (emphasis added); U.S. CONST. art. III, § 2, cl. 2 ("In *all* Cases affecting Ambassadors . . . the supreme Court *shall* have original Jurisdiction.") (emphasis added).

[57] *See* U.S. CONST. art. III, § 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."). According to this argument, the selection of the word "shall" as opposed to "may" is significant in part because of its mandatory nature.

[58] 14 U.S. (1 Wheat.) 304 (1816).

[59] *See id.* at 330–31 (establishing Story's argument).

[60] U.S. CONST. art. III, § 2, cl. 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.").

[61] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174–75 (1803) (holding that the Constitution sets a ceiling for congressional grants of federal jurisdiction).

[62] *See Hunter's Lessee*, 14 U.S. (1 Wheat.) at 331 ("[C]ongress are [sic] bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance.").

[63] *See id*; *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1584–90 (Boston, Hilliard, Gray, & Co. 1833) (reasoning that the Constitution entrusts Congress with a duty to vest judicial power, and that this leads to a duty to create lower courts).

[64] *See* Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949) (noting the earlier holding that Congress was compelled to confer jurisdiction on some federal court), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950).

cal record of the Madisonian Compromise and concluded that Story's view has some historical merit.[65] Beyond that, Akhil Amar has refined and broadened Story's theory extensively, creating what he calls a "two-tiered" theory of federal jurisdiction, in which areas of federal jurisdiction are divided into two groups: (1) unrestrictable federal judicial powers, and (2) powers assigned to the federal courts subject to those exceptions that Congress may elect to make.[66] Amar has also used this two-tiered view to analyze the allocation of federal power under the Judiciary Act of 1789.[67] Other scholars have also picked up on Amar's thesis and expounded upon it.[68] The most scathing criticism of Amar seems to be from Martin Redish,[69] though Redish is not alone in criticizing Amar.[70] Redish rightly pointed out one critique to the Subcommittee on the Constitution of the House Committee on the Judiciary:

> [I]f we are to take seriously Amar's out-of-context focus on the words, "shall be vested," his textual argument must logically lead to the conclusion that *every* category of cases enumerated in Article III, section 2 must be heard by *some* Article III court, regardless of whether or not it is preceded by the word, "all."[71]

In other words, if the "shall be vested" phrase is truly mandatory with respect to all the judicial power, then the balance of Amar's inquiry seems: (1) repetitive when it vests power,[72] and (2) contradictory

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[65] *See* Collins, *supra* note 17, at 54–58. There are varied scholarly views of the nature of the Madisonian Compromise. *See, e.g.*, Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 700 (1995) ("[C]ontroversy existed at the time of the Constitution's framing over whether a system of lower federal courts should be created . . . .").

[66] *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 272 (1985).

[67] *See* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); *see also* Judiciary Act of 1789, 1 Stat. 73 (1789).

[68] *See* William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction*, 7 CONST. COMMENT. 89 (1990); *see also* Robert J. Pushaw, Jr., *Congressional Power over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847 (defending Amar's view against the critics).

[69] *See* Martin H. Redish, *Text, Structure and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637–38 (1990) ("If no lower federal courts existed, and Congress at some point chose to exercise its authority under the exceptions clause to take cases within Amar's first tier out of the Supreme Court's appellate jurisdiction, Professor Amar's thesis breaks down.").

[70] *See, e.g.*, John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997).

[71] *Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 24 (2004) (testimony of Martin H. Redish, Professor of Law and Public Policy, Northwestern Law School).

[72] Amar argues that vested judicial power is mandatory in each of the Article III, Section 2 categories preceded by the word "all." Amar, *supra* note 66, at 240–42.

when it does not vest power. This seems to be a rather serious blow to Amar's argument.

Apart from Amar's version, there is a modern incarnation of Story's argument in the scholarship of Robert Clinton. He argues, similarly, that the vesting of the judicial power is mandatory,[73] but he does not set up a dichotomy analogous to Amar's that provides for the possibilities of redundancy or contradiction. Instead, he relies more heavily on historical analysis.[74] Some scholars argue, however, that original intent analysis, though generally popular now in constitutional jurisprudence, is a poor methodology to use in settling issues of federal jurisdiction, because the practical concerns of administering the modern federal judiciary are complex and extremely different from those foreseen by the founders.[75]

In short, a view stating that Congress was indirectly required to create the inferior courts, though useful and in many ways desirable, seems to be difficult to firmly establish.

C. *Point of No Return View: Congress Has the Power to Create, but No Power to Destroy Once it Has Created*

Yet another view of the extent of Congress's jurisdiction-stripping power holds that Congress's power to create the inferior courts was a one-way street. Under this view, although Congress could choose to create or not create the inferior courts, after choosing to create them, it did not retain the option of destroying them. If successful, this view would disrupt the argument for the Traditional View, because if Congress did not retain a power to destroy the inferior courts, then no power to destroy them partially could be inferred from such a right.

The primary proponent of this view is Lawrence Sager, who observes that certain work-term requirements of all Article III judges[76]

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[73] *See* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749–50 (1984) ("[T]he framers, by providing that '[t]he 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,' intended to mandate that Congress allocate to the federal judiciary as a whole each and every type of case or controversy defined as part of the judicial power of the United States by section 2, clause 1 of article III, excluding, possibly, only those cases that Congress deemed to be so trivial that they would pose an unnecessary burden on both the federal judiciary and on the parties forced to litigate in federal court." (quoting U.S. CONST. art. III, § 1)).

[74] *See generally* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986) (comparing the constitutional plan for federal court jurisdiction to the early statutes vesting judicial power).

[75] *See, e.g.*, Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 78 (1995).

[76] U.S. CONST. art. III, § 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."). This

create a major constraint on Congress's ability to antagonize an Article III body that it has created,[77] regardless of whether the creation of that body was voluntary or compulsory.

However, there is a means of shutting down the courts that Professor Sager has not considered. Even if Congress is to be bound by the life tenure and salary provisions, Congress could conceivably attempt to destroy the inferior courts in a very gradual, roundabout way: it could elect not to fill any vacancies on the court after judges retire or die. This would mean that eventually there would be no sitting judges on the inferior courts and Congress could close them down without running afoul of the life tenure or salary restrictions.

As a practical matter, if Congress attempted to do that alone, a President interested in preserving the courts could make recess appointments[78] to the courts to prevent vacancies; in other words, Congress acting alone would be unlikely to successfully destroy the inferior courts in this roundabout way. Notably, recess appointments cannot be overridden by two-thirds of Congress as a veto can, so the President is unusually powerful as against Congress in this area.[79]

An interesting viewpoint is offered by Barry Friedman, though it defies easy categorization. Friedman's argument is that the proper balance between Congress and the inferior federal courts is whichever balance is struck by the dynamic power struggle waged between the two.[80] Though similar to a Realist argument,[81] it seems to require

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clause establishes for all Article III judges life tenure subject to good behavior and a guarantee against pay cuts.

[77] *See* Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 64 (1981) (arguing that the life tenure and salary provisions in Article III preclude the alteration of the inferior federal courts). *But see* Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803) (upholding the constitutionality of the Republican-dominated Seventh Congress's repeal and elimination of the sixteen circuit judgeships created by the outgoing Federalist-dominated Sixth Congress).

[78] Recess appointments are temporary judicial appointments involving a brief fixed term, a lack of Senatorial advice and consent, and appointment solely by the President. *See* U.S. CONST. art. II, § 2, cl. 3; Michael Brus, *What is a Recess Appointment?*, SLATE, June 14, 1999, http://slate.msn.com/*id*/1002994/ (explaining recess appointments).

[79] Since recess appointment judges do not enjoy life tenure, yet sit as Article III judges, either the constitutionality of recess appointments or the remaining vitality of the plain meaning of this clause of Article III must be called into question. These issues have recently been explored in the judiciary through the disputed appointment of Judge William H. Pryor, Jr. *See generally* Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61 (2006) (providing an overview of the debate surrounding recess appointments); Warren Richey, *Battle over Recess Appointments*, CHRISTIAN SCI. MONITOR, Dec. 27, 2004, at 3 (explaining three cases that upheld the constitutionality of recess appointments, even when used when Congress is in session, but noting that these cases were not at the Supreme Court level and that no Supreme Court precedent on point exists yet).

[80] *See* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2–3 (1990) ("[T]he contours of federal jurisdiction are resolved as the re-

at least the Point of No Return View, because in order for the tug-of-war to function as the broker of the balance of power, both branches must exist. This view does very little to narrowly identify the correct constitutional balance; it also does little to address the theoretical extreme case of this tug-of-war, in which Congress generates a bill ("A") that strips the courts of jurisdiction to hear the bill ("B") that strips the courts of some substantive jurisdiction. If the courts strike both bills as unconstitutional and Congress follows by adopting a bill ("C") stating that henceforward, federal courts may not hear constitutional challenges to A, B, or C, then the tug-of-war could easily fall into an infinitely regressive cycle. In that case, we would long for an objective, constitutionally "correct" answer more definitive than the indeterminate answer provided by the real-world power struggle as it is played out.

II. A NEW THEORY: CONGRESS'S POWER TO CREATE IMPLIES A LIMITED POWER TO DESTROY PARTIALLY

The view I propose is, I hope, distinct from those offered by scholars so far in one particular way. Existing views have either (1) taken wholesale the propositions that Congress's power to create the inferior courts creates a power to destroy them and therefore a power to partially destroy them by abridging their jurisdiction,[82] or (2) somehow rejected that Congress has the power to destroy the inferior courts and therefore lost its power to partially destroy them by abridging their jurisdiction.[83] While accepting the proposition that Congress theoretically retains the power to destroy inferior courts in their entirety, to redistribute jurisdiction among specialty federal courts, and to limit less constitutionally problematic jurisdiction like amount-in-controversy, I reject the proposition that these powers logically entail a broad, flexible power to partially destroy the inferior courts.

The basis for this argument is the premise that when Congress vested the inferior courts with judicial power, they did not do so in a legal vacuum, nor did they create courts that would exist in a vacuum: they were constrained by constitutional guarantees that the framers designed to prevent the subordination of federal courts to Congress. In other words, the framers would be content to have Congress create

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sult of an interactive process between Congress and the Court on the appropriate uses and bounds of the federal judicial power.").

[81] *See generally* HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (1948) (expounding and analyzing the Realist school of political theory); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979) (same).

[82] *See supra* Part I.A ("Traditional View and its Variants").

[83] *See supra* Part I.B ("Passive-Aggressive Requirement View"); *supra* Part I.C ("Point of No Return View").

inferior federal courts or not; however, they would not allow Congress to create inferior federal courts that would be subservient to Congress. This important constraint on Congress's regulation of federal courts was then emboldened by *Marbury v. Madison*, which gave the judicial branch a specifically dominant role in judicial review of statutes and the Constitution.

A. Judicial Independence as a Backdrop

The heart of the foregoing argument is the structural necessity for strong judicial independence within the federal tripartite system.[84] Professor Sager has argued that the constitutional provisions guaranteeing life tenure and prohibiting cuts in compensation were motivated by judicial independence concerns,[85] which is consistent with the framers' overall goal of creating coequal branches of government with checks and balances.[86]

The Bill of Attainder Clause[87] of the Constitution, according to the Supreme Court, was also meant to proclaim that the judicial branch must enjoy some independence from the legislative process to do its job properly. In the Court's words, "the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[88] Coupling this idea with the historically early inclusion of judicial review in the category of judicial function, or synonymously "the province and duty of the judicial department,"[89] it is a small, moderate argumentative step to claim that Congress may not legislate within the proper province of judicial review.

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[84] For an extremely comprehensive discussion of judicial independence, see JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002), which surveys competing views on judicial independence, particularly those aspects that are the most troubling and sensitive.

[85] *See* Sager, *supra* note 77; *supra* notes 76–77 and accompanying text.

[86] When the U.S. Bankruptcy Courts were first constructed, the judges were appointed by the President with the advice and consent of the Senate to fourteen-year terms and could have their salaries adjusted by statute. The Court held, however, that judges exercising the judicial power of the United States must be protected by the life term and salary provisions guaranteed by Article III. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) ("[O]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.").

[87] U.S. CONST. art. I, § 9, cl. 3.

[88] United States v. Brown, 381 U.S. 437, 442 (1965).

[89] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Less obviously, Congress's power to administer the courts may sometimes interfere with the independent process of judicial review; for example, while Congress clearly cannot direct a court to give a particular verdict, it might conceivably threaten to close a court if it issues a verdict unfavorable to Congress's wishes. This threat is a difficult one to make credibly today, but in theory it would be that Congress would shut down any court yielding the unfavorable decision, perhaps replacing the court with other judges and repeating the process as long as necessary.[90] Clearly, this would render the courts totally subservient to Congress's political whim, and therefore would compromise their judicial independence.

For more than two hundred years, the power to interpret the Constitution has been an exclusive right of the judiciary.[91] It is widely believed that this exclusive power is one of the most essential ideas within the American system of checks and balances and that it necessarily extends to a role at odds with Congress's lawmaking powers.[92] Indeed, it has been recognized in one of the most cited footnotes in jurisprudence that when dealing with certain types of legislation—particularly legislation involving "discrete and insular minorities" who cannot effectively protect themselves using other political means—courts are meant to be extremely powerful, granting little deference to the validity of the legislation in question.[93] Additionally, if one

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[90] Although there are no contemporary events of this kind, a similar case of subverting the Court occurred in the early days of the Republic, though it was meant to prevent a future decision rather than to punish a past decision. In 1802, the incoming Republican Congress created one annual term of the Supreme Court, commencing in February, thus eliminating the Court's summer term. *See* Judiciary Act of 1802, ch. 31, § 1, 2 Stat. 156 (1802). The Congress probably eliminated the Court's sitting out of fear that the Court would invalidate the new Judiciary Act's elimination of the sixteen circuit judgeships created and appointed by the outgoing Federalist-dominated Congress. When the Court did meet the next year, and understanding the potential power of Congress, the Court upheld the constitutionality of the act. Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).

In the modern era, the only remotely analogous case of achieving a directly unconstitutional result through indirectly constitutional means was President Nixon's extremely controversial Watergate-era firing of Attorney General Elliot Richardson as a means towards firing the ostensibly independent special prosecutor, Archibald Cox. *See* Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A1.

[91] *See generally Marbury*, 5 U.S. at 137.

[92] *See, e.g.*, Chief Justice William Rehnquist, Washington College of Law Centennial Celebration, Plenary Academic Panel: The Future of the Federal Courts (Apr. 9, 1996) (transcript available at http://www.courttv.com/archive/legaldocs/government/rehnquist.html) ("The framers of the United States Constitution came up with two quite original ideas . . . . The second was the idea of an independent judiciary with the authority to declare laws passed by Congress unconstitutional . . . . [This] is one of the crown jewels of our system of government today.").

[93] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied

considers the changes in federal jurisdiction since 1789, the steady trend, even after considering the increase of the amount-in-controversy threshold, has been to increase the substantive jurisdiction of federal courts.[94] In broad terms then, the courts overall have had an influential—even if often unpopular—role in protecting the public from a legislative "tyranny of the majority"[95] and it has increasingly been trusted with more jurisdiction to do so over time.

As a logical matter, the right to a fair trial is intrinsically at odds with majoritarian will. It would be repugnant to due process goals to determine the fate of a defendant at the ballot box, for reasons ranging from a lay desire to exact cruel and unusual punishment against those we disdain to the simple fact that a median voter cannot be as well informed about the facts relevant to determining guilt as a judge or jury. Guarding due process concerns is similarly at odds with majoritarian will, because juries regularly return unpopular verdicts in high-profile cases. In order for majoritarian will and due process concerns to coexist, they must be separated as the framers intended: the courts must enjoy a substantial degree of judicial independence[96] from the political process in order to fairly adjudicate. Nothing short of that is sufficient to guarantee ordered liberty.

There is a mountain of evidence that a primary intent of the framers in creating an unelected, independent judiciary and indeed, a constitutional[97] democracy governed by rule of law[98] was to provide a

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upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

[94] *Compare* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (defining the first federal courts' original jurisdiction to include only diversity jurisdiction), *and* Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470 (1875) (adding federal question jurisdiction to the federal courts' original jurisdiction), *with* Act of October 21, 1976 § 703, Pub. L. No. 94–574, 90 Stat. 2721 (codified as amended at 5 U.S.C. § 703) (eliminating the $10,000 amount-in-controversy requirement in actions against the United States or any agency thereof), *and* Administrative Procedure Act, 5 U.S.C. § 701 (2000), *amended by* Act of October 21, 1976, 5 U.S.C. § 702 (amending the Declaratory Judgment Act and Administrative Procedures Act to eliminate the previously broad sovereign immunity defense in administrative actions, except that extraordinary relief imposing an intolerable burden on the sovereign or the public is in principle prohibited).

[95] The problem of the tyranny of the majority has been widely theorized. *See, e.g.*, JOHN STUART MILL, ON LIBERTY (Edward Alexander ed., Broadview Literary Texts 1999) (1859); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop eds. & trans., The Univ. of Chi. Press 2000) (1835); THE FEDERALIST NO. 51 (James Madison).

[96] Even conservative judges have written that the virtues of judicial independence in the proper functioning of the rule of law are so obvious as to be comically immutable. *See, e.g.*, The Honorable Alex Kozinski, *The Many Faces of Judicial Independence*, 14 GA. ST. U. L. REV. 861, 861 (1998) ("Judicial independence is one of those feel-good items like chicken soup and honorary degrees and Mom. Who is going to stand up and say we need less Mom?").

[97] The primary effect of enacting constitutional rights is to remove certain core issues from the domain of the political process. In other words, no matter how unpopular certain constitutional rights get, a constitutional democracy cannot let its integrity be jeopardized by popular referendum on the application of these rights.

counter-majoritarian check[99] on a potential tyranny of the majority.[100] Notably, even at the time of the founding, some framers believed that even the state courts were inadequate to guard such an important national interest to judge federal constitutional questions.[101]

The best way to chart an argument that inferior federal courts should enjoy more judicial independence than the conventional wisdom suggests is to move from a totally uncontroversial hypothetical position through gradual analytical steps to this thesis.

B. Hypothetical #1: Explicit Overturning

According to the Court, Congress may not pass a law explicitly overturning a Supreme Court decision of constitutional law.[102] If, for example, Congress were to enact a law declaring *Roe v. Wade*[103] overturned, such a law would simultaneously violate the reproductive rights guaranteed by *Roe v. Wade* and the judiciary's right to final judicial review, guaranteed by *Marbury v. Madison.* It is difficult to imagine a viable legal argument defending Congress's authority to pass such a law.[104]

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[98] Rule of law in a constitutional democracy implies, inter alia, equal application of the law, irrespective of political inclination.

[99] *See, e.g.*, THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.").

[100] *See, e.g.*, THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("If a majority be united by a common interest, the rights of the minority will be insecure.").

[101] Madison, for example, said during the constitutional convention that "[c]onfidence can (not) be put in the State Tribunals as guardians of the National authority and interests." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27 (Max Farrand ed., 1911).

[102] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 444 (2000) (holding that Congress may not substitute its own statutory standard for the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966)); City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (holding that Congress may not statutorily modify the free exercise standard laid out in *Employment Division v. Smith*, 494 U.S. 872 (1990)). *But cf.* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1360 (1997) ("According to what appears to be the dominant view [within the academy], nonjudicial officials, in exercising their own constitutional responsibilities, are duty-bound to follow the Constitution as *they* see it . . . .").

[103] 410 U.S. 113 (1973).

[104] Some theorists believe that the judiciary's power of ultimate judicial review on matters of constitutional law is an indispensable check against tyranny. *See* Mark V. Tushnet, *Following the Rules Laid Down*, 96 HARV. L. REV. 781, 784 (1983) ("Another view assigns a special role to the judiciary and to the constraints of power embodied in a written constitution. Because the division of power alone was insufficient to reduce the risk of tyranny to an acceptable level, the framers called upon the judiciary to serve a special function beyond its role in diffusing power: by commanding the judges to enforce constraints that the Constitution placed on the other branches, the framers provided a check on even the few instances of tyranny that they thought might slip through the legislative and executive processes.").

C. Hypothetical #2: Abortion Ban

The second case is similar, and the simplest: Congress passes a comprehensive ban on abortion flagrantly violating *Roe v. Wade*. Surely, any legal challenge to such a statute will invalidate the statute upon review, for violating *Roe v. Wade*.

D. Hypothetical #3: Combination Ex-Post Jurisdiction-Stripping Bill and Abortion Ban

The next illustrative case is one in which Congress passes a bill in two parts: (1) a jurisdiction-stripping bill that states that no federal court shall have jurisdiction over cases in which plaintiffs seek to assert the rights guaranteed to them by *Roe v. Wade*; and (2) a comprehensive abortion ban. Such a law would violate the plaintiffs' rights to due process. Less intuitively, it might also violate *Marbury*, because it has the purpose and many of the effects of overturning *Roe*, such that the judiciary's finality of judicial review is called into question.

A Hartian detractor here may argue that since the state courts remain open in this hypothetical, no problems exist; state courts could apply *Roe v. Wade* and overturn the unconstitutional statute. Such an argument seems at first compelling; after all, Congress did not have to create the inferior federal courts in the first place, so a world in which state courts would be the only judicial forum for such cases is easy to theorize as constitutional.

However, Congress did create the inferior federal judiciary, and the argument of the Hartian detractor implicitly concedes that such a law would make federal courts subservient to Congress, ineffective as a check on their power—which is a circumstance the framers found repugnant and sought to prevent. Also, since the Constitution does not require states to have courts, one wonders whether they can conceptually serve as an end-all to this argument; it is odd that an optional venue should serve as the last resort of a mandatory right.[105]

E. Hypothetical #4: Ex-Post Jurisdiction-Stripping Bill Alone

The next case is formally different, but analytically nearly identical. Here, Congress passes only the jurisdiction-stripping section of the above-mentioned law, but not the abortion ban. From the perspective of a litigant who believes her constitutional rights to be violated by some state action and seeks her day in court, it is irrelevant whether there is an abortion ban statute on the books or not. In either case the litigant seeks to avail herself of constitutional rights, not

[105] *See supra* notes 48–53 and accompanying text.

statutory rights. In effect, the law in this hypothetical seeks to ban abortion indirectly, by means of closing off one's ability to vindicate abortion rights. Notably, as in the other cases, a litigant could try to vindicate her abortion rights in state courts, but similarly to the above cases, a reliance on state courts for judicial review concedes that the inferior courts have been relegated to an impermissibly subservient status. A comparison between this case and the prior case therefore is a distinction without a difference.

F. Hypothetical #5: Ex-Ante Jurisdiction-Stripping

The final case is that in which there is not yet a settled Supreme Court doctrine for Congress to overrule. In this case, Congress might selectively pursue a "pre-emptive strike" on what it perceives as forthcoming judicial decisions.[106] In this case, Congress seeks to perpetuate the status quo and preemptively overrule a potentially undesirable case. Here, *Marbury* would be violated, because the judicial branch's right to judicial review is foreclosed, while the as-yet-unadjudicated right in controversy may or may not be violated. Lastly, in some cases the due process rights of the plaintiffs could potentially be violated, if the substantive area of law in question is one of exclusive federal jurisdiction (e.g., antitrust, patent, etc.).

G. Synthesis

There are two central lessons that these hypotheticals are meant to illustrate. First, the purpose and effect of a bill that purports to be a jurisdiction-stripping bill may sometimes more closely resemble a circuitous route around *Marbury v. Madison* towards overturning—ex-ante or ex-post—judicial decisions that are the exclusive and rightful territory of the courts. Equally important, the tempting counter-argument that the state courts are available to serve this judicial function too quickly concedes the point that such laws render the federal judiciary impermissibly subservient to Congress.

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[106] *See, e.g.*, Detainee Treatment Act of 2005 § 1005(e), Pub. L. No. 109-163, 119 Stat. 3136 [hereinafter, "DTA"] (stripping federal court jurisdiction over habeas petitions brought by Guantanamo Bay prisoners). Some have argued that the DTA was intended to eliminate jurisdiction over all claims *currently* pending in the federal courts. *See* Brief of Senators Graham and Kyl as Amicus Curiae in Support of Respondents at 7, Hamdan v. Rumsfeld, No. 05-184 (U.S. Feb. 23, 2006), *available at* http://www.scotusblog.com/movabletype/archives/Graham%20Brief.pdf (citing 151 CONG. REC. S14,263 (2005) (reprinting a prefabricated "debate," entered into the *Congressional Record* without actual floor debate, between Senators Graham and Kyl, in which they state that the DTA would apply to pending cases)). If true, then Congress had the intent to preemptively strike the Supreme Court's adjudication of a major detainee case, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005).

III. POTENTIAL EFFECTS OF PENDING LEGISLATION

A. *Marriage Protection Act: Full Faith and Credit, or Less Than Full if Full is Unavailable*

The Marriage Protection Act ("MPA")[107] seeks to bar federal judicial review of the Defense of Marriage Act ("DOMA").[108] DOMA is thought to raise novel constitutional issues under the Full Faith and Credit Clause.[109] If the Defense of Marriage Act is to be granted disparate interpretations by the various state courts, it would have far-reaching repercussions. The very nature of the Full Faith and Credit Clause demands that it have uniform meaning across the states. This is because the clause is designed to equalize respect for various states' laws across state lines, but the effect of DOMA is to create a gross disuniformity instead of equalization. Also, even though the constitutionality of DOMA has not been determined, some scholars have argued that it could be unconstitutional.[110]

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[107] H.R. 3313, 108th Cong. § 2 (2004).

[108] 28 U.S.C. § 1738(c) (2000) (eliminating the Full Faith and Credit Clause as applied to same-sex marriages in other states); 1 U.S.C. § 7 (2000) (defining the legal term "marriage" to only include a union between a man and a woman). Both statutes taken together comprise the Defense of Marriage Act.

[109] U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). Congress draws its authority to legislate in the domain of full faith and credit from the subsequent clause in the Constitution, which permits Congress to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.* Many have argued that this grants to Congress only a positive power—to effectuate or enable the full faith and credit. *See, e.g.*, Julie L. B. Johnson, *The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611 (1997); 3 STORY, COMMENTARIES, *supra* note 63, at §§ 1306–07 (explaining that given the opposite interpretation, "congress could possess the power to repeal, or vary the full faith and credit"). Therefore, because DOMA is a suspension of full faith and credit, its constitutionality may be suspect.

Others, however, suggest that this minor suspension of full faith and credit is consistent with our system of federalism, arguing that DOMA gives individual states the ability to experiment in their own policies without forcing the consent of sister states. *See* Kermit Roosevelt, *Union to Union*, PHILADELPHIA INQUIRER, Feb. 22, 2004, at C1 ("The Constitution imposes a general obligation but gives Congress the power to lift it, for the states are not only sovereigns but equal sovereigns. If one state moves too far beyond the national norm in an arena other states must recognize the other states can use their majority power in Congress to adjust their constitutional duties."); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[110] *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1986 (1997) (arguing that DOMA is unconstitutional and that the public policy exception to the Full Faith and Credit Clause as applied in the restatement on conflict of laws is unconstitutional); Matthew Spalding, *Will DOMA Protect Marriage?*, THE HERITAGE FOUNDATION, July 12, 2004, http://www.heritage.org/Research/Family/wm532.cfm ("Assuming the Supreme Court follows the logical trend of its own precedents and

Under existing doctrines, there would be no effective check on Congress's ability to strip jurisdiction with this statute, because the conventional wisdom holds that Congress may do what it wishes with the inferior courts.[111] Under my theory, a plaintiff seeking to sue over the constitutionality of DOMA with standing to challenge the MPA could argue that: (1) the MPA violates *Marbury*, because it preemptively forecloses the judiciary's ability to review the constitutionality of DOMA; and (2) the MPA violates both the Equal Protection and Full Faith and Credit Clauses, because it seeks to prohibit plaintiffs from vindicating these rights to the extent that DOMA violates them.

As a result, the MPA is an example of Congress's seeking to strip jurisdiction from the federal judiciary with respect to an issue that demands an independent judiciary. Not only is it likely that the state courts will reach divergent results that are irreconcilable without Supreme Court review, but the potential damage done to the integrity of the Full Faith and Credit Clause is substantial. What is especially troublesome about this measure is that much of the legislative debate seems to assume that courts are not entitled to independent judicial review if they will make unpopular decisions.[112]

B. Pledge Protection Act: Two Nations, Exactly One of Which is "Under God"

The Pledge Protection Act ("PPA")[113] bars federal judicial review of the "under God" clause of the Pledge of Allegiance.[114] Here, the clear constitutional issue is whether the "under God" clause violates the Establishment Clause of the First Amendment.[115] Only one case has made it to the Supreme Court on this issue to date, namely *Elk*

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jurisprudence of recent decades, it would be inconsistent for a majority of the Justices *not* to redefine marriage according to their previously stated opinions. As Harvard Law Professor Lawrence Tribe has stated, 'You'd have to be tone deaf not to get the message from *Lawrence* that anything that invites people to give same-sex couples less than full respect is constitutionally suspect.'").

[111] The one exception is the insinuation Justice Scalia has made in dicta that Congress may not strip the Supreme Court's appellate jurisdiction from the state courts. *See supra* note 45.

[112] *See, e.g., Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, supra* note 71, at 8 (statement of Phyllis Schlafly, Founder and President, Eagle Forum) ("The very idea that unelected, unaccountable judges could nullify both other branches of Government and the will of the American people is an offense against our right of self-government and must not be tolerated.").

[113] H.R. 2028, 108th Cong. § 2 (2004).

[114] *See* 4 U.S.C. § 4 (2000) (detailing the procedure for reciting the Pledge).

[115] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

Grove Unified School District v. Newdow,[116] and it was dismissed on standing grounds, such that the merits were never adjudicated.

As above, existing doctrines would not bar Congress from stripping jurisdiction from the federal courts here. A plaintiff can challenge the PPA as violative of *Marbury*, or as violative of the Establishment Clause, as it seeks to deny courts the ability to review the constitutionality of the Pledge of Allegiance and to deny plaintiffs the ability to avail themselves of their rights under the Establishment Clause.

As with the MPA, the PPA is an example of a jurisdiction-stripping bill that will move the constitutionally novel issue of the "under God" clause in the Pledge to a state court, where it may be judged on politicized grounds. Unlike the MPA, however, the greater danger of effecting disuniformity of law rests not with the constitutional principle,[117] but rather with the disuniformity of the Pledge of Allegiance. Surely, having different Pledges of Allegiance in different states undercuts the primary purpose of having a Pledge of Allegiance in the first place. There would be no way to prevent some states from requiring the "under God" phrase and other states from prohibiting it. The fact that the PPA might make an oath designed to promote national unity and patriotism into one that fragments the nation in this way is perhaps the smoking gun that sometimes hostility towards the federal judiciary can go too far.

CONCLUSION

There are analytical problems with the traditional argument that Congress's constitutional discretion to create the inferior federal courts means that it may do as it pleases with the inferior courts once they are created. The explicit and implicit parameters of judicial independence set forth in the Constitution suggest that Congress's authority is more limited than one might expect. Meanwhile, the availability of state courts may not be the *coup de grace* it is thought to be in this dispute, because: (1) to use that argument concedes that the inferior federal court has been made ineffective as a check against Congress, and such a subservient role is impermissible; and (2) the Constitution itself does not require the existence of state courts. Lastly, Congress's current jurisdiction-stripping efforts are especially

[116] 542 U.S. 1 (2004) (dismissing a challenge, on standing grounds, to the constitutionality of the recitation in public schools of the "under God" clause in the Pledge of Allegiance). Notably, Mr. Newdow has brought another case since then, with other clients who do not have standing problems, and has so far been successful in obtaining injunctions at the district court level. *See* Newdow v. Congress of the U.S., 383 F. Supp. 2d 1229 (E.D. Cal. 2005) (enjoining recitation of Pledge of Allegiance with the "under God" provision in California school classrooms).

[117] Though surely a disuniform interpretation of the Establishment Clause is undesirable.

repugnant in view of their important constitutional subject matter and implicit hostility towards national unity and uniformity of federal law under the federal judiciary.