CONGRESSIONAL POWER TO CONTROL THE JURISDICTION OF LOWER FEDERAL COURTS: A CRITICAL REVIEW AND A NEW SYNTHESIS

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I. INTRODUCTION

While Article III of the Constitution[1] provides Congress with the power to create lower federal courts,[2] its terms do not require their creation. Though there has been some controversy as to the extent of the congressional power that flows from this provision,[3] it has generally been accepted that Congress may adjust the jurisdiction of the federal courts in virtually any manner.[4] Included in this congressional power is the implied

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[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." U.S. CONST. art. III, § 1.

[2] When speaking of "lower federal courts" this Article primarily refers to the United States District Courts, created by Congress under the power granted by article III, § 1 of the Constitution. Although the various United States Circuit Courts of Appeals are also "lower federal courts," the focus of this Article is on the withdrawal by Congress of the jurisdiction of a federal court to hear in the first instance a suit contesting the constitutionality of a federal statute. The congressional withdrawal of jurisdiction over such a claim would prevent the court of appeals from hearing an appeal on the merits. *See* 28 U.S.C. § 1291 (1970).

This Article does not address the question of congressional control of Supreme Court appellate jurisdiction. That question has been commented on frequently and is beyond the scope of this analysis. For a discussion of that problem, see R. BERGER, CONGRESS v. THE SUPREME COURT (1969); Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

[3] *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330-31 (1816) (dictum); Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir.), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1949); Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974).

[4] *See* Palmore v. United States, 411 U.S. 389, 400-01 (1973); Glidden Co. v. Zdanok, 370 U.S. 530, 551 (1962) (dictum); Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943); Börs v. Preston, 111 U.S. 252 (1884); United States v. Union Pac. R.R., 98 U.S. 569 (1878); Sewing Machine Co. Case, 85 U.S. 553 (1873); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812); Ratner, *supra* note 2, at 158; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 68-69 (1923); Note, *The Constitutional Implications of the Jurisdictional Amount Provision in Injunction Suits Against Federal Officers*, 71 COLUM. L. REV. 1474 (1971).

Congress has succeeded at various times in the past in removing jurisdiction of federal courts over certain matters. *See generally* Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965). Members of Congress often attempt to do so by introducing various bills curbing the jurisdiction of the federal courts. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 360-65 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]. A few examples will illustrate the problem and place it in historical perspective.

The Norris-LaGuardia Act's restriction on the authority of the federal courts to issue a restraining order or a temporary or permanent injunction in any case "involving or growing out of a labor dispute," 29 U.S.C. § 101 (1970), and providing that "yellow dog" contracts "shall not be enforceable in any court of the United States," 29 U.S.C. § 110 (1970), was upheld in Lauf v. E.G. Shinner, Inc., 303 U.S. 323 (1938).

authority to withdraw jurisdiction completely.[5] That is, since Congress possesses discretionary power to create lower federal courts, it must also be empowered to abolish them. If Congress may literally abolish such courts, then it must also necessarily be able effectively to "abolish" them in more limited ways by withdrawing their jurisdiction over particular subject matters.[6]

This traditional view of unfettered discretionary power to eliminate lower federal court jurisdiction finds its genesis in the debates of the Constitutional Convention.[7] On the assumption that the state courts would be open to hear all federal claims, the framers reached a compromise drafting of article III which awarded Congress the option of choosing whether or not to create lower federal courts.[8] Some thirty years after this event

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Ten years later, Congress passed the Emergency Price Control Act of 1942 which created the "Emergency Court of Appeals." Act of Jan. 30, 1942, ch. 26, 56 Stat. 23. This court was given exclusive jurisdiction to determine the validity of any regulation or order issued pursuant to the Act. Section 204(d) of the Act—which provided that no other court, federal, state, or territorial, would have jurisdiction to decide the validity of any regulation or to enjoin any provision of the Act authorizing the issuance of such a regulation—was held constitutional in Lockerty v. Phillips, 319 U.S. 182 (1943); *see* HART & WECHSLER, *supra*, at 319-22; Eisenberg, *supra* note 3, at 524-25. *See also* Yakus v. United States, 321 U.S. 414 (1944).

Additional such examples can be found in the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 216, 251-62 (1970); *cf.* HART & WECHSLER, *supra*, at 322-24, the Health Programs Extension Act of 1973, 42 U.S.C. § 300a-7 (Supp. III, 1973), and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652d (Supp. 1975); *see* Note, *Congressional Power over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples*, 49 N.Y.U.L. REV. 131 (1974). For two unsuccessful attempts by the Nixon Administration, see Goldberg, *The Administration's Anti-Busing Proposals—Politics Makes Bad Law*, 67 NW. U.L. REV. 319 (1972); Note, *The Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542 (1972).

[5] *See* Palmore v. United States, 411 U.S. 389 (1973); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922); Gordon v. United States, 74 U.S. 188 (1868); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); HART & WECHSLER, *supra* note 4, at 12; Ratner, *supra* note 2, at 158; text accompanying notes 53-57 *infra*.

[6] It is important to note that despite Congress' apparent power to withdraw jurisdiction completely, there do appear to exist certain accepted limitations. For example, although Congress may withdraw jurisdiction completely, once it vests in the federal courts the jurisdiction to hear a case it cannot tell the court how to decide the case. United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); *cf.* Yakus v. United States, 321 U.S. 414, 460 (1944) (Rutledge, J., dissenting). Nor could Congress, we presume, successfully employ its article III power to direct that no Jews or Catholics bring their cases to federal court. The present Article deals primarily with hypotheticals in which Congress has completely removed lower federal court jurisdiction.

[7] *See* text accompanying notes 29-52 *infra*.

[8] G. GUNTHER & N. DOWLING, CASES & MATERIALS ON CONSTITUTIONAL LAW 58 (8th ed. 1970). *See also* C. MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 18-20 (1969) (1967 Julius Rosenthal Lecture, Nortwestern University School of Law). Hereinafter, this compromise formulation of article III and the rationale behind it will be referred to as the "Madisonian Compromise." Although introduced by

the Supreme Court inferred from the drafting of article III congressional power to limit the jurisdiction of lower federal courts to less than the maximum judicial power permitted in article III.[9]

Though widely accepted, this general view has not been universally adopted. Some courts[10] and commentators[11] have insisted that congressional power over lower federal court jurisdiction is not absolute and have offered competing theories of the extent of Congress' power. Early in the nation's history, for example, Justice Joseph Story maintained that article III gave Congress no discretionary control whatsoever.[12] Rather, he asserted, article III required that all national judicial power be vested in the federal courts.[13]

More recently, several other theories have been advanced by various courts[14] and commentators[15] to justify varying forms of

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both James Madison and James Wilson and conceived by John Dickinson, Madison's strong support for the creation of lower federal courts has led to the use of only his name. *See* text accompanying notes 29-58 *infra*. *See also* HART & WECHSLER, *supra* note 4, at 11-13; Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 10-13 (1948) (citing as "Great Compromise").

[9] Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). For a discussion of *Sheldon*, see text accompanying notes 53-57 *infra*.

[10] *See* Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir.), *cert. denied*, 405 U.S. 965 (1972); Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969); Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir.), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1949).

[11] *See* 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 243 (1971); B. SCHWARTZ, CONSTITUTIONAL LAW 13 (1972); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION §§ 1584-90 (1833); Eisenberg, *supra* note 3; Goldberg, *supra* note 4, at 346-48.

[12] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[13] Over 100 years later, the Court of Appeals for the District of Columbia adopted Justice Story's position. *See* Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir.), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1949).

[14] *See* Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); West End Neighborhood Corp. v. Stans, 312 F. Supp. 1060 (D.D.C. 1970); Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969).

[15] Professor Henry M. Hart, Jr. argued twenty years ago that a congressional limitation on lower federal court jurisdiction could be circumvented by way of a pre-existing "general grant of jurisdiction." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1386-1401 (1953) [hereinafter referred to in text as the "Dialogue" and cited as Hart]. In an approach similar to Justice Story's, Professor Julius Goebel maintained that the language of article III mandates the creation of lower federal courts and prohibits their abolition. 1 J. GOEBEL, *supra* note 11, at 246; *see* text accompanying notes 74-81 *infra*. And within the last year, Theodore

limitation on Congress' power over the jurisdiction of the lower federal courts. Many of those commenting on the subject have argued that the fifth amendment's due process clause must serve as a check on congressional power under article III to limit the jurisdiction of the lower federal courts. The exact nature and rationale of this due process limit on Congress' power, however, remain shrouded in uncertainty. Some courts[16] and commentators[17] have extended this constitutional limitation without adequately reconciling the requirements of the due process clause with the compromise reached at the Constitutional Convention which culminated in article III.

More importantly, these theories have neglected in their constitutional calculus the potentially significant effect of *Tarble's Case.*[18] There the Supreme Court overturned a habeas corpus order by a Wisconsin state court to a federal official ordering the release of an allegedly under-age soldier from the United States Army. In so doing, the Court reasoned that a state court had no power to interfere with the operations of federal officials.

Eisenberg asserted that while lower federal courts need not have been originally created, changing circumstances since 1789 have made their existence a necessity. Eisenberg, *supra* note 3; *see* text accompanying notes 101-41 *infra*.

[16] *See, e.g.*, Manosky v. Bethlehem-Hingham Shipyard, Inc., 177 F.2d 529, 532 (1st Cir. 1949); Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). The *Battaglia* court was faced with § 2(d) of the Portal-to-Portal Act, 29 U.S.C. § 252(d) (1970), which purported to withdraw from all federal and state courts jurisdiction to enforce the minimum wage provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1970). This provision was attacked as retroactively destroying vested rights in violation of the fifth amendment. Judge Chase of the Second Circuit, despite the command of the provision, upheld the constitutionality of the Act and section 2(d), stating:

> A few of the district court decisions sustaining section 2 of the Portal-to-Portal Act have done so on the ground that since jurisdiction of federal courts other than the Supreme Court is conferred by Congress, it may at the will of Congress be taken away in whole or in part. . . . [T]hese district court decisions would, in effect, sustain subdivision (d) of section 2 of the Act regardless of whether subdivisions (a) and (b) were valid. We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation. Thus, regardless of whether subdivision (d) of section 2 had an independent end in itself, if one of its effects would be to deprive the appellants of property without due process or just compensation, it would be invalid.

169 F.2d at 257 (citations omitted).

[17] *See, e.g.*, Hart, *supra* note 15, at 1386-1401; text accompanying notes 89-92 *infra*.

[18] 80 U.S. (13 Wall.) 397 (1871).

Though *Tarble's Case* addressed only a state's power to grant habeas relief, its rationale would seem to preclude any direct state judicial control of the actions of federal officers.[19] Though the issue remains in some doubt, substantial precedent has adopted this interpretation of *Tarble's Case*.[20] If still good law, this decision would seem to alter much of the basis of the Convention compromise leading up to adoption of article III. For contrary to the apparent assumption of the framers, *Tarble's Case* removes the state courts as a viable forum in certain cases. This Article will explore the complex tensions that arise among (1) the dictates of the article III compromise, (2) the implications of *Tarble's Case*, and (3) the due process requirements of the fifth amendment.[21]

The first portion of this Article will examine the various theories previously advanced regarding the extent of congres-

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[19] For a thorough discussion of *Tarble's Case* and its implications, see text accompanying notes 194-202 *infra*.

[20] *See, e.g.*, Kennedy v. Bruce, 298 F.2d 860 (5th Cir. 1962); Elliot v. Weinberger, 371 F. Supp. 960 (D. Haw. 1974); Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); United States *ex rel.* Fort v. Meiszner, 319 F. Supp. 693 (N.D. Ill. 1970); Alabama *ex rel.* Patterson v. Jones, 189 F. Supp. 61 (M.D. Ala. 1960); Alabama *ex rel.* Gallion v. Rogers, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd per curiam sub nom.* Dinkens v. Attorney General, 285 F.2d 430 (5th Cir. 1961); United States v. Owlett, 15 F. Supp. 736 (M.D. Pa. 1936); Parry v. Delaney, 310 Mass. 107, 37 N.E.2d 249 (1941); Wasservogel v. Meyerowitz, 300 N.Y. 125, 89 N.E.2d 712 (1949); Armand Schmoll, Inc. v. Federal Reserve Bank, 286 N.Y. 503, 37 N.E.2d 225 (1941), *cert. denied*, 315 U.S. 818 (1942); Hunter v. City of New York, 121 N.Y.S.2d 841 (Sup. Ct. 1953); Fox v. 34 Hillside Realty Corp., 87 N.Y.S.2d 351 (Sup. Ct. 1949), *aff'd*, 276 App. Div. 994, 95 N.Y.S.2d 598 (1950); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 439 (1970); Demet, *A Trilogy of Massive Resistance*, 46 A.B.A.J. 294 (1960); Note, *Jurisdictional Amount in Injunctive Suits in Federal District Courts*, 25 CAL. L. REV. 336 (1937); Note, *Limitations on State Judicial Interference with Federal Activities*, 51 COLUM. L. REV. 84, 95-96 (1951); Note, 53 CORNELL L. REV. 916, 926-29 (1968); Note, 34 GEO. WASH. L. REV. 171, 176-78 (1965); Note, *Injunctive Suits Against Federal Officers*, 1972 WIS. L. REV. 276, 284 n.55 (1972). *See also* text accompanying notes 166-216 *infra*.

[21] Although many commentators have totally ignored the relation of *Tarble's Case* to Congress' power to limit lower federal court jurisdiction, *see, e.g.*, Eisenberg, *supra* note 3; Hart, *supra* note 15, recognition of the relevance of *Tarble's Case* to this issue is by no means unique to this Article. *See, e.g.*, Cortright v. Resor, 325 F. Supp. 797, 810-11 (S.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); Note, *The Constitutional Implications of the Jurisdictional Amount Provision in Injunction Suits Against Federal Officers*, 71 COLUM. L. REV. 1474, 1480-82 (1971). Despite this limited recognition by courts and commentators, however, the full problems and ramifications of *Tarble's Case* and its effect on Congress' article III power have never been thoroughly considered. Nor has the current advisability of the rule in *Tarble's Case* received full examination.

sional power to control lower federal court jurisdiction.[22] Each will be shown to fail in satisfactorily resolving the dilemma presented when Congress has limited the federal courts and *Tarble's Case* has closed the state courts. The second portion will set forth a new synthesis of congressional power in this area.[23] The synthesis will first present the theoretical basis for a fifth amendment right to an independent judicial determination of constitutional claims.[24] The synthesis will then examine the power of state courts to assume jurisdiction of cases involving federal officers, with particular focus on *Tarble's Case*.[25] This examination will demonstrate that state courts lack the authority to control the actions of federal officials by writ of mandamus, writ of habeas corpus, or equitable injunctive powers. From this two-part foundation, the synthesis will conclude by advancing the proposition that the congressional power over lower federal court jurisdiction is not absolute but is limited by the due process clause of the fifth amendment in cases where, because of *Tarble's Case*, the doors of the state courts are closed.[26]

The apparent incompatibility between the Convention compromise and *Tarble's Case* will be reconciled to show that a due process limitation on congressional power is not only constitutionally required but also makes great practical sense in light of modern notions of federalism.[27] The Constitution and the federal system are best served by recognition of the modern validity of *Tarble's Case* and the resulting constitutional check on Congress' power over lower federal court jurisdiction.[28] On the other hand, this check is not absolute. Unless we are to allow the courts to "amend" the Constitution at will, we must accept the fact that, in cases where an independent judicial forum is provided, Congress may deny original jurisdiction to the federal courts and instead vest it in the state courts. However, recognition of the current validity of *Tarble's Case* will, by means of the due process clause, increase the obstacles Congress must overcome to circumvent the federal courts, and quite probably result

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[22] *See* text accompanying notes 29-141 *infra*.
[23] *See* text accompanying notes 141-257 *infra*.
[24] *See* text accompanying notes 141-165 *infra*.
[25] *See* text accompanying notes 165-216 *infra*.
[26] *See* text accompanying note 217 *infra*.
[27] *See* text accompanying notes 245-46 *infra*.
[28] *See* text accompanying notes 220-46 *infra*.

in an increase in the number of cases constitutionally required to be heard in federal court.

II. THE EXISTING THEORIES

Four basic approaches concerning the proper scope of congressional power over lower federal court jurisdiction have been suggested to date. The first approach emanates from the Constitutional Convention and is here referred to as the Madisonian Compromise. Justice Story and Professor Goebel advance variations of the second approach based upon the language chosen by the framers in drafting article III. The final two theories, those of Professor Henry Hart and Theodore Eisenberg, urge, in varying manners and degrees, external constitutional or political limitations on Congress' article III power.

A. *The Madisonian Compromise*

From the beginning of the debates in the Constitutional Convention regarding article III, the framers agreed that at least one national tribunal, a supreme court, would be necessary to exercise the judicial power of the new nation.[29] However, the proposal for the creation of national tribunals inferior to the "one supreme court," met strong opposition among various factions of the Convention.

Several proposals were introduced concerning inferior federal courts. Edmund Randolph of Virginia proposed the mandatory establishment of lower federal courts,[30] as did Charles Pinckney of South Carolina.[31] William Patterson of New Jersey presented a proposal providing for no inferior courts[32] and Alexander Hamilton of New York suggested that Congress be given the power to create such courts for the determination of all matters of general concern.[33] A proposal for the establishment of only lower courts of admiralty was introduced by John Blair of Virginia.[34] The Patterson and Randolph plans were referred to the Committee of the Whole.[35]

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[29] HART & WECHSLER, *supra* note 4, at 11.

[30] 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 104-05 [hereinafter cited as FARRAND]; Frank, *supra* note 8, at 10.

[31] 3 FARRAND, *supra* note 30, at 600; HART & WECHSLER, *supra* note 4, at 11.

[32] 1 FARRAND, *supra* note 30, at 244; Frank, *supra* note 8, at 10.

[33] 1 FARRAND, *supra* note 30, at 292; HART & WECHSLER, *supra* note 4, at 11.

[34] HART & WECHSLER, *supra* note 4, at 11.

[35] 1 FARRAND, *supra* note 30, at 104-05.

The Randolph plan, providing for "one supreme tribunal, and . . . one or more inferior tribunals,"[36] was adopted by the Committee of the Whole with little discussion.[37] Many of the delegates, however, remained fervently opposed to federal trial courts, believing that all litigation should be left to the state courts. The day following its passage, John Rutledge of South Carolina moved to reconsider the Randolph plan.[38] In support of his motion he urged that

> 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 Judgmts: that it was . . . creating unnecessary obstacles to their adoption of the new system.[39]

Sherman of Connecticut agreed, emphasizing the great and unnecessary expense in setting up a parallel system of courts.[40]

James Madison objected, arguing that appellate review would inadequately remedy biased trials in state courts. Additionally, he contended that the sheer number of appeals from the state courts to the "supreme bar" would be totally unmanageable: "[I]nferior [federal] tribunals . . . dispersed throughout the Republic with *final* jurisdiction in *many* cases" were needed, he believed, to insure the future of the nation.[41] "An effective Judiciary establishment commensurate to the legislative authority [is] essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move."[42]

The opponents of such courts believed them to be unnecessary, however, because state trial courts would be available as forums to hear the assertion of federal rights, making the creation of federal trial courts an expensive repetition.[43] Rutledge was of the opinion that the right of appeal from state courts to

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[36] *Id.* Randolph observed that state courts could "not be trusted with the administration of the national laws." 2 *id.* 46.

[37] 1 *id.* 104-05.

[38] *Id.* 124-25; HART & WECHSLER, *supra* note 4, at 11; Frank, *supra* note 8, at 10.

[39] 1 FARRAND, *supra* note 30, at 124; HART & WECHSLER, *supra* note 4, at 11.

[40] 1 FARRAND, *supra* note 30, at 125; HART & WECHSLER, *supra* note 4, at 11. *See also* 1 FARRAND, *supra* note 30, at 125 (remarks of King).

[41] 1 FARRAND, *supra* note 30, at 124.

[42] *Id.*

[43] *Id.* 125 (remarks of Sherman).

the Supreme Court was sufficient to protect national interests and that federal trial courts would constitute an "unnecessary encroachment" on state court jurisdiction and state sovereignty.[44] Rutledge's motion for reconsideration and elimination of the clause mandating establishment of lower federal courts carried the Convention, five states to four with two divided.[45]

Madison and James Wilson subsequently offered a compromise solution.[46] While the Randolph plan had mandated Congress to create lower federal courts, Madison and Wilson moved to give Congress the option to create or not create such courts.[47] This distinction caused four states to change their position toward inferior federal courts and the compromise motion carried, eight states to two with only one divided.[48] The Madisonian Compromise had been struck.

The course of events that culminated in this "Great Compromise"[49] has been interpreted by some to mean that not only the very existence of lower courts but also the scope of their jurisdiction was to be in Congress' discretion:[50] "[I]t seems to be a necessary inference from the express decision that the creation of inferior federal courts was to rest in the discretion of Congress that the scope of their jurisdiction, once created, was also to be discretionary."[51]

Arguing from Congress' 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.[52] 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

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[44] *Id.* 124.
[45] *Id.* 125.
[46] *Id.*
[47] *Id.*
[48] *Id.* 124-25.
[49] Frank, *supra* note 8, at 28.
[50] HART & WECHSLER, *supra* note 4, at 12.
[51] *Id.*
[52] *See* notes 4 & 50 *supra*.

includes the lesser power of removing certain areas from their jurisdiction.

The Supreme Court further advanced this logic in 1850 in *Sheldon v. Sill*,[53] where the petitioners challenged the validity of the assignment of claims clause in the Judiciary Act of 1789.[54] The provision vested diversity jurisdiction in the lower federal courts but excepted suits based upon assigned promissory notes. In upholding the provision, the Court concluded that implied in the congressional power to create inferior federal courts was the power to limit their jurisdiction to less than the maximum judicial power allowed under article III. Justice Grier, speaking for the Court, reviewed the two possible interpretations of article III and chose, in his opinion, the only logical one:

> It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it made no such distribution, one of two consequences must result,—either that each inferior courts created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions.[55]

The first of these possibilities was untenable, he maintained, because it had never been asserted during the sixty years of the Republic and could not be reasonably supported even if asserted.[56] From the second possibility, he believed it logically followed

> that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can

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[53] 49 U.S. (8 How.) 441 (1850).

[54] Section 11 of the Judiciary Act of 1789 prevented circuit courts from taking cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.

The provision has been altered somewhat and now appears as 28 U.S.C. § 1359 (1970).

[55] 49 U.S. (8 How.) at 448.

[56] *Id.* at 449.

> 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.[57]

Thus, the compromise reached as to the creation of the inferior courts was interpreted to extend also to the conferral of jurisdiction upon them.

The possibility that Congress would decide not to create lower federal courts was naturally inherent in the Madisonian Compromise. Thus it presumably was Madison's view—as it clearly was Rutledge's—that in such an event state courts would be able to provide adequate remedies to litigants with federal claims. The Madisonian Compromise was based, therefore, on the assumption that lower federal courts need not exist because state courts could always stand in their stead to provide adequate remedies and dispense justice as needed.[58]

B. *Theories Based on the Language of Article III*

1. Justice Story and "Shall Be Vested"

Disregarding any possible light shed by the debates in the Constitutional Convention, Justice Story early advocated that the phrase "shall be vested" in section 1 of article III lent itself to only one reasonable interpretation. He maintained that these words clearly meant that the entire federal jurisdictional power had to be vested in some federal court. In *Martin v. Hunter's Lessee*[59] he pointed out that since article III vested national judicial power wherever the Supreme Court lacked original jurisdiction, it logically followed that "Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States,

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[57] *Id.*

[58] As will be seen below, *see* text accompanying notes 219-40 *infra*, the fundamental underpinning of the Madisonian Compromise may today very well be flawed. State courts may be powerless to dispense justice in suits seeking injunctive relief against federal officers. While not apparent at the time of the Compromise, the manifestation of that doctrine changes the impact of the Compromise on the extent of congressional power over lower federal court jurisdiction. If, as contended here, state courts are not a viable alternative to lower federal courts for the adjudication of constitutional claims against federal officers, the Madisonian Compromise is inadequate in assuring a litigant's right to a forum for his constitutional claim. Thus the Compromise may well fall to the extent its conclusions are inconsistent with the requirements of due process.

[59] 14 U.S. (1 Wheat.) 304 (1816).

and of which the supreme court cannot take original cognizance."[60] He asserted that the strong words chosen by the framers in drafting article III mandated the first Congress to vest the entire national judicial power in federal courts:

> The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be vested) in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. . . .
>
> If, then, it is the duty of congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative to one part, is imperative as to all.[61]

Although the establishment of the Supreme Court was required by article III, Justice Story admitted that "whether it is equally obligatory to establish inferior courts, is a question of some difficulty."[62] But, if such courts were not established, he reasoned, the dictates of article III that the national judicial power shall vest might be frustrated:

> If congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases, the judicial power could nowhere exist. . . . It would seem, therefore, to follow, that congress are 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]

Justice Story assumed that state courts had no power to hear initially federal causes of action.[64] Rather, state courts could only hear federal matters that arose in state causes of action. Thus since the Supreme Court in most cases possessed only appellate jurisdiction, Justice Story asserted that if lower federal courts did not exist a federal cause of action would never be heard. There-

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[60] *Id.* at 331 (emphasis supplied).
[61] *Id.* at 328-30.
[62] *Id.* at 330.
[63] *Id.* at 330-31 (emphasis supplied).
[64] *Id.* at 338-40.

fore, the required creation of lower federal courts logically followed from the Constitution's mandate that the national judicial power be vested somewhere in the federal judiciary.

Justice Story found further support in the strong language chosen by the framers for section 2 of article III:

> This construction will be fortified by an attentive examination of the second section of the third article. The words are "the judicial power *shall extend*," &c. Much minute and elaborate criticism has been employed upon these words. It has been argued that they are equivalent to the words "may extend," and that "extend" means to widen to new cases not before within the scope of the power. For the reasons which have already been stated, we are of the opinion that the words are used in an imperative sense; they import an absolute grant of judicial power.[65]

Justice Story later restated his position in his *Commentaries on the Constitution*.[66] Addressing himself to arguments that Congress had been given discretion by the framers to create inferior federal courts, he stated:

> If congress possess any discretion on this subject, it is obvious, that the judiciary, as a co-ordinate department of the government, may, at the will of congress, be annihilated, or stripped of all its important jurisdiction; for, if the discretion exists, no one can say in what manner, or at what time, or under what circumstances it may, or ought to be exercised.[67]

As has been noted by various commentators, Story's position ignores the history of article III during the Constitutional Convention.[68] Some criticize Justice Story's interpretation of the words "shall be vested" as imperative in nature.[69] As has been pointed out, the framers clearly intended to grant Congress the

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[65] *Id.* at 331.

[66] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION §§ 1584-90 (1833).

[67] *Id.* § 1584.

[68] *See, e.g.*, HART & WECHSLER, *supra* note 4, at 313; C. WARREN, THE MAKING OF THE CONSTITUTION 325 (1937). One commentator suggests that Justice Story desired federal question jurisdiction for the lower federal courts and that his dicta in *Martin* were, apparently, an appeal to Congress—an appeal that failed. G. GUNTHER & N. DOWLING, CASES & MATERIALS ON CONSTITUTIONAL LAW 58 (8th ed. 1970).

[69] HART & WECHSLER, *supra* note 4, at 13 n.46.

discretionary power to create lower federal courts.[70] Hence it is virtually inconceivable that the phrase "shall be vested" was intended to require the creation of lower federal courts. Perhaps the greatest flaw in Justice Story's theory, however, is his assertion that the command that the judicial power "shall be vested" in *some* federal court is met only when lower federal courts exist. Story rests his theory on the assertion that lower federal courts must exist to hear federal claims because state courts lack the authority to do so. But that assertion is clearly erroneous; state courts generally do have jurisdiction to hear federal claims, or at least are capable of receiving such jurisdiction.[71] Therefore, as long as the Supreme Court has appellate jurisdiction over state courts, the command "shall be vested" is met by the existence of the Supreme Court and lower federal courts are not needed.[72]

The lack of general support for Justice Story's position in the 160 years since its first exposition is thus understandable.[73] It is premised on apparently incorrect assumptions about the nature of federal supremacy and seems to be in direct conflict with the language and intent of article III.

2. Professor Goebel and "Ordain and Establish"

Unlike Justice Story, Professor Julius Goebel bases his theory of article III on events of the Constitutional Convention.[74] Focusing on words not emphasized by Justice Story, Goebel examines the revisions made by the Committee of Style to the first section of article III. When the Convention first submitted the section to the Committee of Style it read: "The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the

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[70] *See* text accompanying notes 41-52 *supra*.

[71] *See* Claflin v. Houseman, 93 U.S. 130 (1876).

[72] It should be noted that if one accepts Story's theory that article III requires that some federal court have jurisdiction in all the areas enumerated therein (a dubious assumption), Congress could refuse to create lower federal courts only if it invested full appellate jurisdiction in the Supreme Court, and did not limit state court power to hear causes of action involving federal judicial power.

[73] *But see* Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir.), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1949); 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 613-16 (1953).

[74] 1 J. GOEBEL, *supra* note 11, at 240.

Legislature of the United States."[75] The Committee on Style, however, redrafted the provision to read: "The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."[76] This slight revision made by the Committee had a great impact, according to Professor Goebel.[77] He maintains that the words "ordain and establish," when viewed in light of their meaning at the time of the drafting of article III, demonstrate that the Convention intended that lower courts be created:

> The effect of eliminating the words "as shall, when necessary" was to deprive Congress of power to decide upon the need for inferior courts and so to give full imperative effect to the declaration that "The judicial power . . . shall be vested in one supreme court, and in such inferior courts. . . ." That the Committee intended to convey the sense of an imperative is apparent from the choice of the most forceful words in the contemporary constitutional vocabulary—"ordain and establish"—to direct what Congress was to do. . . . These were the words of fiat used by the people of the United States in the preamble of the new Constitution. The selection of these words to replace the less affirmative "constitute" could only have been deliberate. We believe that their function was to assure that federal inferior courts must be created, and further that designation of state tribunals would not do.[78]

Therefore, according to Professor Goebel, no discretion was given to Congress in creating lower federal courts, but rather "The discretion left to Congress was the authority to settle the institutional pattern at the lower level of judicial administration and to arrange how the jurisdiction conferred by section 2 of Article III was there to be disposed."[79] And, furthermore, the words "may from time to time" had their own special meaning. That phrase was intended to "secure the right of Congress to make such occasional rearrangements in the structure once set

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[75] *Id.* 246; 2 FARRAND, *supra* note 30, at 603.
[76] 1 J. GOEBEL, *supra* note 11, at 246; 2 FARRAND, *supra* note 30, at 600.
[77] 1 J. GOEBEL, *supra* note 11, at 246.
[78] *Id.*
[79] *Id.*

up as it might wish. In other words, the intendment of the new language was that considerations of public convenience, and not of necessity, were to govern Congress."[80]

Professor Goebel's position is susceptible to much the same criticism as that levied on Justice Story's theory.[81] Although he does refer to the history of the drafting of the article, Professor Goebel, like Justice Story, maintains that Congress had no choice but to create lower federal courts. But also like Justice Story, he asserts this despite the fact that the Convention debates clearly indicate the framers compromised by awarding Congress discretionary power as to their creation. Nor are his arguments concerning the wording of article III especially convincing. Though etymologists might argue the point, it remains to be seen that the words "ordain and establish" are significantly more imperative than the phrasing of the original draft.

C. *Professor Hart's "Dialogue"*

The modern touchstone of any serious thinking in the area of congressional control of federal jurisdiction is Professor Henry M. Hart's famous "Dialogue" published in 1953.[82] Despite or perhaps because of this fact, the "Dialogue" has not been subjected to extensive critical review. This is true even though

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[80] *Id.*

[81] *See* text accompanying notes 68-73 *supra*. Professor Bator criticizes Goebel's arguments, dismissing them as "uncharacteristically thinly supported and unpersuasive." HART & WECHSLER, *supra* note 4, at 13 n.46. Professor Bator asserts that Goebel's argument based on the framer's editing of the drafts of article III deserves little attention. Goebel bases his position, Bator states, "simply" on the proposition that " 'ordain' is more imperative than 'constitute'; and that the words 'may from time to time' were intended merely to authorize Congress to make minor adjustments in court structure." *Id.* Bator suggests that Goebel may have been "partly misled" by "his apparent assumption that the Circuit Courts created by the First Judiciary Act received the whole of the federal judicial power . . .; in fact these courts were granted only a small proportion of the judicial power defined by Article III." *Id.*

[82] Hart, *supra* note 15. Professor Hart's article has come to be known as the "Dialogue", *see, e.g.*, HART & WECHSLER, *supra* note 4, at 330, and will be so referred to here. Professor Paul Bator of Harvard revised the chapter of *Hart & Wechsler* containing the reproduction of the "Dialogue" and updated and added extensively to the "Dialogue's" footnotes. *See id.*

The "Dialogue" is organized into eight major sections. For the most part, each section relates to a category of congressional limitation that may be imposed on federal courts. The sections under examination here are "I. Limitations as to Which Court Has Jurisdiction," and "VII. Denial of Jurisdiction: Plaintiffs Complaining of Extra-Judicial Governmental Coercion." It is in the latter section that Professor Hart introduces his theory of "the general grant of jurisdiction" as an escape device from a congressional limitation on federal court jurisdiction. *See* text accompanying notes 89-92 *infra*.

the "Dialogue" may suffer from substantial analytical flaws that seriously detract from its effectiveness.

While the theory advanced by Professor Hart is generally regarded as preeminent on the subject, it is surprisingly difficult to restate. This difficulty stems from what seem to be internal inconsistencies in analysis.

The "Dialogue" takes the form of an enthusiastic exchange between two imaginary scholars, *Q* and *A*. Questions by the inquisitive but somewhat naive *Q* are answered in varying degrees of detail and clarity by *A*. The "Dialogue" begins with an exchange concerning congressional power over inferior federal court jurisdiction. In a nutshell, it describes one of Hart's two lines of argument:

> *Q*. Does the Constitution give people any right to proceed or be proceeded against, in the first instance, in a federal rather than a state court?
>
> *A*. It's hard to see how the answer can be anything but no, in view of cases like *Sheldon v. Sill* and *Lauf v. E. G. Shinner & Co.*, and in view of the language and history of the Constitution itself. Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court.[83]

Professor Hart argues, in this opening exchange, that Congress can prevent litigants from bringing their claims in a federal court because another forum, the state courts, is available. Hart seems to be implying (as he later makes clear)[84] that the fifth amendment's due process clause may require an independent judicial forum for the adjudication of constitutional claims. He recognizes at this point in his analysis, however, that that requirement may just as easily be filled by a state court as by a federal court. Perhaps anticipating a basic problem with such a simple hypothesis, the "Dialogue" continues:

> *Q*. But suppose the state court disclaims any jurisdiction?
>
> *A*. If federal rights are involved, perhaps the state courts are under a constitutional obligation to vindicate them.[85]

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[83] Hart, *supra* note 15, at 1363-64 (footnote omitted).

[84] *Id.* 1372-73.

[85] *Id.* 1364 (footnote omitted).

In other words, Professor Hart believes that state courts are constitutionally compelled to recognize jurisdiction when a claim before them is federal in nature.[86]

The inherent flaw in this opening exchange is Professor Hart's failure to consider the possible ramifications of *Tarble's Case* and the line of cases following it, which hold that state courts lack jurisdiction to entertain cases seeking to enjoin federal officials. Hence, regardless of whether a state court could refuse of its own volition to hear such a case (a possibility which *A* apparently denies in his response above),[87] under *Tarble's Case* it may be constitutionally powerless to assume jurisdiction.[88]

Later in the "Dialogue" Hart's second line of argument appears. In the central thrust of his theory, he focuses *Q* and *A* on the situation in which Congress has withdrawn the jurisdiction of the lower federal courts to review an extrajudicial coercion of private individuals. He states the hypothetical in the following terms:

> *Q.* All right, then, now comes the sixty-four dollar question we've been avoiding. What happens if the Government is hurting people and not simply refusing to help them? Suppose Congress authorizes a program of direct action by Government officials against private persons or private property. Suppose, further, that it not only dispenses with judicial enforcement but either limits the jurisdiction of the federal courts to inquire into what the officials do or denies it altogether.[89]

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[86] Note that Professor Hart says that *perhaps* state courts have such a duty. His equivocation is left unexplained. Note also that he does not discuss what would result if state courts did not have such a duty.

[87] Text accompanying note 85 *supra*.

[88] Professor Bator, in revising the "Dialogue's" footnotes, asks:

> [W]hat if Congress withdraws jurisdiction only from the lower federal courts: is this an unconstitutional suspension if the state courts are left free to issue the writ? (Of course the state courts would be free to do so only on the assumption—surely warranted—that in such an event the dubious rule of Tarble's Case, . . . that the state courts may not issue the writ to federal prisoners, would not survive.).

HART & WECHSLER, *supra* note 4, at 357 n.48. Thus, unlike Professor Hart, Professor Bator seems to recognize the need in the "Dialogue" to consider the possible implications of *Tarble's Case*. Professor Bator may dismiss *Tarble's Case* too hastily, however. In any event, he acknowledges a possible problem only in relation to the habeas situation. As will be seen below, it is by no means clear that *Tarble's Case* is logically limited to matters of habeas corpus. *See* text accompanying notes 214, & 219-27 *infra*.

[89] Hart, *supra* note 15, at 1386-87.

Despite the position *A* advanced in the opening exchange that Congress had plenary power because state courts are available,[90] *A* now answers differently. Although *A*'s original position apparently would apply to this hypothetical, *A* announces that the answer to this question is "easy . . . so long as there is any applicable grant of general jurisdiction."[91] He elaborates:

> Obviously, the answer is that the validity of the jurisdictional limitation depends on the validity of the program itself, or the particular part of it in question. If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction.[92]

This answer necessarily presupposes two things. First, *A* presumes that despite the fact that jurisdiction over the particular subject matter has been explicitly removed, the court will ignore it long enough to decide the merits of the case. If the program itself is found constitutional, the limitation on the court's power to review the program will be valid. In effect, this means that the limitation is *always* invalid, since the sole purpose of the limitation is presumably to prevent the very inquiry into the validity of the program's merits which Hart suggests is permitted. A limitation that is valid only when it is not necessary is not really a limitation at all. This conclusion that the federal court may disregard a congressional limitation on its jurisdiction is difficult to understand in light of *A*'s opening remark that a litigant has no constitutional right to a federal forum as long as a state court is available.[93] If Congress has no obligation to provide a federal forum as long as state courts are available under *A*'s earlier position, why should a federal court use a general grant of jurisdiction to decide the merits of a case where Congress has withdrawn its power to do so? If, as Hart suggested earlier,[94] a state court has full power—indeed, a duty—to review the constitutionality of federal legislation and to invalidate it if neces-

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[90] Text accompanying notes 83-85 *supra*.
[91] Hart, *supra* note 15, at 1387.
[92] *Id.*
[93] Text accompanying notes 83-85 *supra*.
[94] Text accompanying note 85 *supra*.

sary, how can there exist a constitutional power in the federal court to disregard the congressional limitation on its jurisdiction? After all, so long as they do no violence to the requirements of due process or some other constitutional provision, it would seem that the dictates of article III must be obeyed.

Second, *A*'s "answer" to *Q*'s "sixty-four dollar question" presumes that when limiting lower federal court jurisdiction Congress is nevertheless leaving all general grants of jurisdiction intact. This is conceptually difficult to accept. When Congress limits lower federal court jurisdiction over a particular matter, it necessarily is suspending all available general grants of jurisdiction with respect to that particular matter. In other words, the so-called "general" grant of jurisdiction is no longer "general." It has, in effect, been amended by subsequent legislation (that is, by the limitation in question) so as to be "general" for all cases *except* the type described in the limitation itself. This must be true, or the limitation Congress has imposed is no limitation at all. It must be assumed that when Congress acts it intends to accomplish an end—that it would not enact a jurisdictional limitation that does not limit. Any limitation on jurisdiction must necessarily amend all applicable grants of jurisdiction or Congress has performed a nullity.

Furthermore, were we to accept Hart's reasoning, his emphasis on the need for an initial general grant of jurisdiction is puzzling. If Hart is correct that the Constitution itself compels the federal courts to disregard the limitation, then what possible difference does it make whether Congress has provided a general grant of jurisdiction? If it is the Constitution that compels federal courts to ignore the limitation, it is of no consequence whether Congress has provided a general grant of jurisdiction; once the command to a federal court to hear a case assumes a constitutional dimension, Congress' desire to have the court hear that case would seem wholly irrelevant, for obviously the Constitution supersedes congressional desires.

Feeling that he has satisfactorily resolved all doubt as to Congress' authority to limit jurisdiction when a general grant of jurisdiction is available, Hart attempts to tie together the loose ends of his analysis. What happens, *Q* asks, when Congress withdraws jurisdiction from the federal courts and no general grant of jurisdiction is available for the court to employ as a

springboard?[95] As though the answer were evident from the course of the "Dialogue," *A* answers:

> *A.* I've given all the important answers to that question, haven't I? I would have thought the rest was clear. Why, it's been clear ever since September 17, 1787.
>
> . . . .
>
> . . . The state courts. In the scheme of the Constitution, they are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.[96]

This closing exchange is consistent with the opening round between *Q* and *A*.[97] However, both exchanges seem puzzlingly inconsistent with the argument Hart advances midway through the "Dialogue" regarding general grants of jurisdiction as an escape device for the federal courts.[98] For if, as Hart recognizes at both the beginning and end of the "Dialogue," state courts are always available to hear federal claims, why do federal courts ever have authority to resist a congressional limitation on their jurisdiction?[99]

The most significant problem with Professor Hart's theory, however, is his total neglect of the potential impact of *Tarble's Case*. Once this case is plugged into his equation, the theory becomes subject to serious question. *Tarble's Case* may well prevent state courts from hearing a case seeking to enjoin or otherwise directly control the actions of a federal officer. In such a case, Hart's theory is of no use. Because it fails to deal with the problem of *Tarble's Case*, Hart's theory is not especially helpful in providing an answer to the dilemma under examination here.[100]

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[95] Hart, *supra* note 15, at 1401.

[96] *Id.*

[97] Text accompanying notes 83-85 *supra*.

[98] Text accompanying notes 89-92 *supra*.

[99] There are situations in which Congress has attempted to limit state, as well as federal court jurisdiction. *See, e.g.*, Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-62 (1970). As the Second Circuit in Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948), correctly recognized, such a total limitation on judicial review of the assertion of constitutional rights may well violate due process. *See* text accompanying note 217 *infra*. However, in light of the clear dictates of the Madisonian Compromise—*i.e.*, that federal court jurisdiction could always be limited because state courts would always be available to hear federal claims—it would seem logical (at least in disregard of the full implications of *Tarble's Case*) for only the limitation on state court jurisdiction to fall in such a case.

[100] It should be emphasized that several potentially significant arguments exist which

D. *The "Changing Circumstances" Theory*

The most recent theory advanced on the subject of congressional power over lower federal court jurisdiction is Theodore Eisenberg's.[101] Unlike Professor Hart and proponents of the Madisonian Compromise, Eisenberg refutes the basic proposition that Congress may abolish lower federal courts.[102] Because they may not be abolished, he maintains, it logically follows that Congress cannot "selectively curtail jurisdiction or resort to certain remedies."[103]

Eisenberg admits that based solely on the debates in the Constitutional Convention, Professor Hart's theory is more convincing than either Justice Story's or Professor Goebel's.[104] In other words, at the time of the drafting of article III the words chosen by the framers meant exactly what they said: Congress was vested with discretion to establish and abolish lower federal courts. Eisenberg argues, however, that times and circumstances have changed. To lend "contemporary validity" to the theory based on the Compromise, the theory, he says, "must come to terms with circumstances affecting the framers' decision and their view of the national judiciary's functions."[105] Therefore, he maintains that

> [i]f, because of changing circumstances, the framers' aspirations for the national judiciary cannot be fulfilled today without lower federal courts, then there is a conflict between the Hart and Wechsler view of the decision to leave creation of lower courts to Congress' whim and the constitutional definition of the judiciary's role.[106]

Eisenberg concludes that lower federal courts must exist and cannot be abolished, arguing that the framers envisioned the national judiciary's role in a certain way.[107] This role might well have been fulfilled early in the nation's history without the need

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would limit or exclude the effect of *Tarble's Case* in such situations. *See* text accompanying notes 219-46 *infra*. Professor Hart's analysis, however, excludes any reference to *Tarble's Case* whatsoever, and hence does not raise these arguments.

[101] Eisenberg, *supra* note 3.

[102] *Id.* 501-13.

[103] *Id.* 501. *But see* notes 129-34 *infra* & accompanying text.

[104] Eisenberg, *supra* note 3, at 504.

[105] *Id.*

[106] *Id.*

[107] *Id.* 505.

for lower federal courts. However, he insists, present circumstances are such that the role envisioned by the framers can only be achieved with the existence of lower federal courts. Basically, history has amended the language and intent of article III.

The national judiciary, Eisenberg believes, was intended to perform various roles. It was to provide a check on the other two branches of government.[108] It was to achieve uniformity of decisions in questions of national concern.[109] It was to counteract local biases and prejudices of state courts by providing a forum to foreign citizens, out-of-state litigants, and the federal government itself.[110] Its ultimate role, however, was "to be able to hear and do justice in all cases within its jurisdiction."[111]

In a style reminiscent of Professor Hart's "Dialogue," Eisenberg asks the obvious question and answers it to his satisfaction:

> One is tempted to ask how the framers could both intend the federal judiciary to be capable of hearing all cases within its jurisdiction and at the same time not explicitly incorporate inferior federal courts into the constitutional scheme. The answer is that the founding fathers felt that the right to appellate review by the Supreme Court would be sufficient to ensure that all litigants with cases within the federal constitutional jurisdiction would have their cases heard by a national tribunal.[112]

He finds no problem in such an intent on the part of the framers:

> The framers' apparent willingness to limit the federal role to an appellate role in the form of Supreme Court review was perfectly understandable at the time. Without question, the Supreme Court was then capable of providing a forum for all federal cases. . . . Since the Court's jurisdiction was not discretionary, any litigant whose case fell within the federal judicial power and

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[108] *Id.*

[109] *Id.*

[110] *Id.* 506.

[111] *Id.*

[112] *Id.* 508 (footnote omitted). As further support for this contention, he points out that the Constitution did not provide for discretionary jurisdiction in the federal courts. Therefore, he maintains, while "[t]he federal forum may have been limited to appellate review, . . . it was to be available in all cases." *Id.* 509.

> who was determined to have a federal forum hear his case could have had such a forum even in the absence of lower federal courts.[113]

But today, he asserts, circumstances are different and, practically speaking, the Supreme Court is unable alone to hear all cases within the jurisdiction of the national judiciary: "Since the early days of the republic, however, the number of federal cases has increased dramatically. . . . The Supreme Court is clearly no longer capable of providing a federal forum to hear the merits of every case involving a federal question."[114] In light of current practicalities, he asserts, "If Congress were to abolish the lower federal courts, this aspect of the national judiciary's role would fall upon the Supreme Court in the form of review of state court decisions."[115] And if Congress were allowed to abolish the lower federal courts, "[t]he inevitable result would be that few litigants with federal claims could be heard in a federal court even on appeal."[116] The role envisioned by the framers would therefore be frustrated.[117]

Eisenberg's primary goal is laudable. The existence of lower federal courts insures that constitutional rights will be protected. Lower federal courts represent "more than mere federal trial forums for cases falling within the article III jurisdictional

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[113] *Id.* 509-10 (footnote omitted). Eisenberg points out that in the first four years of the Court no cases were argued before it and that between 1789 and 1801, the Court disposed of fewer than ninety cases.

[114] *Id.* 510 (footnotes omitted). Eisenberg points out that in the 1972 term the Court disposed of 3,748 cases.

[115] *Id.* 510.

[116] *Id.* (footnote omitted).

[117] In this way, Eisenberg insists that the lower federal courts are indispensable to the scheme contemplated by the framers in article III. The practicalities of the day make the lower federal courts more than mere trial forums. Because it is impossible for the Supreme Court to decide every federal case, he argues, it is the responsibility of the lower federal courts to enforce the law made by the Supreme Court. And also, because Supreme Court review is more and more selective, the lower courts necessarily have become, he states, "the primary vindicators of federal rights." *Id.* 511 (footnote omitted). Changed circumstances require their creation and forbid their abolition:

> It is thus no longer reasonable to assert that Congress may simply abolish the lower federal courts. When Supreme Court review of all cases within Article III jurisdiction was possible, lower federal courts were perhaps unnecessary. As federal caseloads grew, however, lower federal courts became necessary components of the national judiciary if the constitutional duty of case by case consideration of all federal cases was to be fulfilled. It can now be asserted that their existence in some form is constitutionally required.

Id. 513 (footnote omitted).

grant."[118] Rather, they are the enforcers of Supreme Court decisions and the "primary vindicators of federal rights" where that Court has remained silent.[119] Federal courts do offer greater experience, familiarity, and sensitivity toward federal interests and constitutional issues.[120] Insuring that federal courts adjudicate federal constitutional claims makes profound practical sense when the only other alternatives are to have such claims and interests decided by state courts, less familiar with federal law and more localized in experience and perception, or have them heard by no court at all.

But however laudable Eisenberg's primary goal may be, his theory is sorely inadequate in various respects and cannot be relied upon to solve the dilemma confronting us here. First, his theory is historically inaccurate in light of the clear language and intent of article III as illuminated by the course of events during the Constitutional Convention.[121] Eisenberg maintains that the Madisonian Compromise was "not central to the constitutional scheme."[122] In support of this remark, he points to the "existence of lower federal courts since the first Congress."[123] The force of this point is considerably weakened when it is recalled that, although lower courts have existed since 1789, they did not

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[118] *Id.* 511.

[119] *Id.* (footnote omitted).

[120] *See* Preiser v. Rodriguez, 411 U.S. 475, 513-14 (1973):

> [B]y enactment of [42 U.S.C. § 1983] . . . Congress recognized important interests in permitting a plaintiff to choose a federal forum in cases arising under federal law. . . . This grant of jurisdiction was designed to preserve and enhance the expertise of federal courts in applying federal law; to achieve greater uniformity of results; and, since federal courts are "more likely to apply federal law sympathetically and understandingly than are state courts" . . . to minimize misapplications of federal law. (footnotes omitted).

The Court earlier, in Mitchum v. Foster, 407 U.S. 225, 242 (1972), stated:

> [T]he 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." (footnotes omitted).

See generally Note, 1974 WIS. L. REV. 1180, 1182-84.

[121] *See* text accompanying notes 29-48 *supra*.

[122] Eisenberg, *supra* note 3, at 504; *see* note 106 *supra*.

[123] Eisenberg, *supra* note 3, at 504. In further support of his point that the Madisonian Compromise was not essential, Eisenberg argues that "[n]either the final arrangement nor any of the five judiciary plans submitted to the [Constitutional] Convention gave federal courts authority to decline to hear a case." *Id.* 508 (footnote omitted). That the federal courts *themselves* were not given authority to decline to hear a case, however, seems wholly irrelevant to the framers' desire to provide *Congress* the discretion to limit the jurisdiction of the federal courts.

receive general federal question jurisdiction until 1875.[124] Hence such courts were virtually worthless to litigants of federal claims until 1875. Litigants of federal claims were left to proceed in state courts, as the framers had intended under the compromise drafting of article III.

Second, his assertion that new conditions can amend the clear language and intent of the Constitution is subject to doubt. "Changing circumstances" might be considered in the interpretation of such broadly phrased constitutional provisions as the due process and commerce clauses.[125] These clauses were expansively drafted in order to be susceptible to evolving interpretations as time would require. The debates clearly disclose, however, that the framers did not intend, nor does the language permit, such broad interpretations of article III. "Changing circumstances" cannot amend and alter the meaning of clear and rigidly drafted language in the Constitution. Of course, most of the provisions of the Constitution are broadly phrased, with at best a hazy understanding of the framers' intent, thus permitting flexible interpretations to take account of changing social conditions.[126] But the terms of article III are not so broadly phrased,[127] nor is there any substantial doubt as to the framers' intent. Unless the judiciary is to be permitted virtually absolute power to disregard the outer rational limits of constitutional language in altering the law to meet new conditions—an un-

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[124] Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, *as amended* 28 U.S.C. § 1331 (1970). Technically, general federal question jurisdiction was first granted by the Judiciary Act of 1801, ch. 4, § 11, 2 Stat. 89; but it was quickly repealed, Act of Mar. 8, 1802, ch. 8, 2 Stat. 132. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 5 (1970); Eisenberg, *supra* note 3, at 528 n.168.

[125] Eisenberg, *supra* note 3, at 504. As support for his argument, Eisenberg cites United States v. Classic, 313 U.S. 299, 316 (1941); and Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1934). He asserts that "[t]hese cases support the propriety, perhaps even the necessity of reinterpreting early constitutional formulations in light of changed circumstances." Eisenberg, *supra* note 3, at 504, n.35. *But see* note 127 *infra*.

[126] The interpretation of the sixth amendment's right to counsel provision, for example, experienced an evolution affected by changing conditions. *Compare* Betts v. Brady, 316 U.S. 455 (1942), *with* Gideon v. Wainwright, 372 U.S. 335 (1963) *and* Argersinger v. Hamlin, 407 U.S. 25 (1972).

[127] Eisenberg does argue that "[a]n equally rational reading of Article III" is Justice Story's view, requiring the creation of lower federal courts. Eisenberg, *supra* note 3, at 502. It does not appear, however, that Eisenberg actually adopts this historical view, since if he did there would have been no need to devise his intricate theory of changing circumstances. In any event, as noted above, text accompanying notes 70-73 *supra*, Story's theory is defective in its inaccurate assumption that state courts possess no original jurisdiction to hear federal causes of action.

wise result, we would submit—the "changing circumstances" theory cannot be employed to alter the existing understanding of article III.

The seventh amendment, for example, provides that in all cases where the "value in controversy" exceeds twenty dollars, the right to a jury trial at common law must be preserved. It might be argued that use of a twenty dollar floor does not today accomplish the framers' goal of precluding a jury trial in minor civil cases, for twenty dollars at the time of the drafting of the seventh amendment meant something quite different from twenty dollars today. But despite such an argument, we could not read an inflationary spiral into the terms of the seventh amendment. The seventh amendment is strict and unbending in its dictates on this matter. If we are to alter it, even in order to accomplish the framers' goal, we must do so through the amendment process. Similarly, the language and history of article III are so clear that any alteration, even to accomplish the framers' purposes, must come by amendment and not by interpretation in light of "changing circumstances." Hence, even if we were to accept Eisenberg's questionable argument that the original purposes of the framers cannot be achieved by a literal application of article III,[128] this would provide no basis for disregarding the explicit language and intent of a constitutional provision.

Though Eisenberg's arguments, if accepted, would seem logically to lead to an absence of any power on Congress' part to limit the jurisdiction of the lower federal courts; he does not reach this conclusion. On the contrary, he asserts, "While Congress does not have unfettered control over lower court jurisdiction such that it could in effect abolish the courts by obliterating their jurisdiction, it is also clear that some degree of congres-

[128] Eisenberg asserts that the framers intended the national judiciary to fulfill the goals of checking the other branches and attaining uniformity of decision. *See* Eisenberg, *supra* note 3, at 505. Absent the limitations of *Tarble's Case*, however, there would seem to be no reason why state courts could not theoretically perform the function of checking the majoritarian branches. It is true that there is less likelihood of uniformity in state courts than in federal courts, but it is questionable whether the lower federal courts are really able to achieve anything approaching the uniformity envisioned by the framers. After all, they were contemplating true uniformity, derived by lodging final decisional power in one judicial body. This is a far cry from the plethora of conflicting decisions today coming out of the district and circuit courts. Thus the state courts today can theoretically perform one of the framers' goals as well as the federal courts, and not even the federal courts themselves can adequately perform the other.

sional control, consistent with the Constitution, is valid."[129] Congress has "some Article III authority" to limit lower federal court jurisdiction; but such power is limited, he maintains, to "prudent steps which help avoid case overloads."[130] He terms this the power to enact "neutral" statutes limiting jurisdiction to promote efficiency and avoid case overloads. The obvious example of the exercise of this power by Congress is the $10,000 jurisdictional amount requirement.[131] Neutral statutes promoting efficiency are necessary and permissible, he believes, because "The availability of a federal lower court forum for each case should be sacrificed only when providing such a forum would seriously undermine the judicial system. An overabundance of federal forums with unrestricted jurisdiction to hear all federal cases could in fact undermine the judiciary."[132] This is true, he feels, because the expense of such an expanded system makes it impractical and would result in a larger caseload which in turn would necessitate the appointment of more judges.[133] The appointing of more judges, he maintains, would decrease the prestige attached to a federal judgeship, thereby decreasing the quality of federal courts.[134] For these reasons, jurisdictional limitations designed to make the judicial machinery operate better are permissible.

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[129] Eisenberg, *supra* note 3, at 514.

[130] *Id.* 516.

[131] In practice, the current jurisdictional scheme satisfies the above principles remarkably well. . . . The cases which fall under the Article III jurisdictional grant but which today receive federal court consideration only on review by the Supreme Court are consistent with the suggested principle. They fall into three main classes: (1) state criminal prosecutions; (2) federal question and diversity cases with less than $10,000 in controversy; and (3) those cases in which a federal question may be lurking in the background but which do not arise under the Constitution or laws of the United States within the meaning of 28 U.S.C. § 1331.

Id. (footnote omitted). If these cases could be brought in federal court, he asserts, "the courts would be swamped or the judiciary would have to be expanded to a dangerous extent." *Id.* 517 (footnote omitted).

[132] *Id.* 515.

[133] *Id.*

[134] Eisenberg believes that an increase in the number of judges would mean a decrease in the prestige attached to being a judge. He cites Judge Friendly as stating that prestige is needed if the federal bench is to continue to attract qualified lawyers as federal judges. *Id.* Judge Friendly stated: "Any deterioration in the quality of the district judges individually or of their performance collectively would destroy the very values the federal court system is meant to attain." H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 30 (1973).

The exception Eisenberg carves out of his theory for "neutral statutes" that promote efficiency is of questionable logical force. This is especially true in light of his primary position that lower federal courts cannot be abolished. He insists that the primary role intended for the national judiciary by the framers was "to hear and do justice in all cases within its [article III] jurisdiction."[135] He rejects the alternative of appellate review by the Supreme Court of state court decisions involving federal questions. However, his "neutral scheme" exception necessitates that federal questions be determined by state courts with the extreme unlikelihood of review by the Supreme Court. Once having argued the constitutional necessity for a federal forum for such cases, he retreats from that position and permits a non-constitutionally required exception.

Eisenberg fails to recognize that violence to constitutional rights may be achieved just as much by a neutral scheme promoting efficiency as by legislation spurred by "substantive disagreement" with judicial decisions. Neutral schemes promoting efficiency are permissible, he maintains, because they are not the product of a congressional motive to hinder the performance of the judicial function. He believes that "in practice it has not been difficult to distinguish legislation motivated by efficiency considerations from political reaction."[136] Motive, however, is generally unimportant when the protection of constitutional rights is at issue.[137] A good faith intent on the part of Congress can be as injurious to constitutional rights as a bad faith political intent. A $10,000 jurisdictional amount limitation on claims, for example, while prima facie free of political overtones or bad faith, may in certain cases nevertheless result in the denial of protection of constitutional rights. For when a litigant is challenging the constitutionality of the actions of a federal officer, often the only available jurisdictional source is the federal question provision of

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[135] Eisenberg, *supra* note 3, at 506.

[136] *Id.* 519 (footnote omitted).

[137] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973). In *Frontiero*, plaintiff attacked government regulations on the ground that they created a suspect classification. The government defended on the ground that the differential treatment promoted "administrative convenience." *Id.* at 688. The Court dismissed that contention, stating: "[O]ur prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, 'The Constitution recognizes higher values than speed and efficiency.'" *Id.* at 690 (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)).

the Judicial Code, which imposes a minimum of $10,000.[138] If, as contended here,[139] state courts are unavailable to hear such cases, this "neutral" congressional limitation on the federal court's jurisdiction will deprive the litigant of any judicial forum to adjudicate the claimed constitutional infringements. To the litigant of such a claim, Congress' good faith in promoting efficiency and reducing the overloaded dockets of federal courts is little consolation.

Furthermore, the arbitrariness of his "neutral scheme" exception finds no basis in the Constitution despite his assertion that it is constitutionally permissible.[140] Rather his argument seems to come down to this: such congressional power should be allowed because it will improve the judicial system, not because the Constitution requires it. Nothing in the Constitution, especially article III, establishes efficiency and manageable case dockets as standards for congressional power. Nor can such factors be read into the due process clause of the fifth amendment as the sole standard on which to judge congressional power over federal jurisdiction.

The final criticism of Eisenberg's approach provides the foundation for the theory presented in this Article. As is true of Professor Hart's theory,[141] Eisenberg fails to consider the impact *Tarble's Case* would have when one of his permissible "neutral" statutes caused a litigant seeking to enjoin a federal officer to proceed in state court. It is difficult to see how such a statute could be constitutionally permissible when the result would be to leave such a litigant forumless. As is true of the other existing theories on the subject of congressional control of lower federal court jurisdiction, Eisenberg's failure to consider the impact of *Tarble's Case* leaves his theory incomplete.

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[138] 28 U.S.C. § 1331 (1970). Several other sources of jurisdiction have been urged in addition to the general federal question grant. Primary among these are section 10 of the Administrative Procedure Act, 5 U.S.C. § 702-06 (1970), and the mandamus provision, 28 U.S.C. § 1361 (1970). Neither of these, however, has been firmly established as a source of jurisdiction in federal officer cases.

[139] *See* text accompanying notes 166-216 *infra*.

[140] Eisenberg, *supra* note 3, at 518. He states that "neutrality, efficiency, and some weighing of interests" are "useful guidelines for Congress' exercise of its power" over lower federal court jurisdiction. He, therefore, equates "*useful*" guidelines with *constitutional* standards of congressional action.

[141] *See* notes 97-100 *supra* and accompanying text.

III. THE NEW SYNTHESIS: RECONCILING THE MADISONIAN COMPROMISE WITH *TARBLE'S CASE*

The traditional approaches to the subject of congressional power over lower federal court jurisdiction have been shown to be insufficient in providing a satisfactory resolution of the dilemma faced by a litigant who seeks to have legislation declared unconstitutional when Congress has removed federal jurisdiction over such cases. The theory advanced here will attempt to provide a logical constitutionally based resolution to the dilemma, founded on the principle that the due process clause of the fifth amendment limits congressional power in this area.

A. *The Right to an Independent Judicial Resolution of Constitutional Claims*

The foundation upon which the synthesis here advanced is based is the proposition that a litigant has a fifth amendment right to an independent judicial hearing, state or federal, of a constitutional claim.[142]

In *Crowell v. Benson*,[143] Chief Justice Hughes stated a principle of enormous import: "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."[144] The Chief Justice thus recognized that when constitutional rights are in jeopardy the Constitution itself requires that a court be made available to the litigant, and Congress cannot prevent the litigant from obtaining a remedy.[145]

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[142] The argument advanced here is limited to constitutional claims because Congress arguably has power to prevent the adjudication of claims based upon statutorily created rights. Unlike rights emanating from the Constitution, statutory rights exist at the discretion of Congress. Since Congress need not have created such rights, one can argue that it completely controls those rights, and may determine whether they can be vindicated in an independent judicial forum. Though this argument seems to make sense, its applicability is lessened by the developing judicial doctrine that significant statutory rights may not be denied without due process of law. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261-64 (1970). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[143] 285 U.S. 22 (1932).

[144] *Id.* at 60.

[145] Professor Louis Jaffe has maintained that *Crowell* supports his view that:

> When adjudication seriously touches property or interests traditionally of great moment, due process may require judicial process. . . .
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> . . . [W]hen a person is the object of an administrative order which will be

The *Crowell* decision built upon another decision handed down by the Court ten years earlier. In *Ng Fung Ho v. White*[146] aliens claiming to be citizens were issued an administrative order of deportation. On a writ of habeas corpus, the Supreme Court held that due process entitled the claimant to an independent judicial determination on the issue of citizenship. Four years after *Crowell*, the Court in *St. Joseph Stock Yards Co. v. United States*[147] was confronted with a rate order by the Secretary of Agriculture which a three-judge district court had sustained over the plaintiff's contention that it violated due process. The Court affirmed, but Chief Justice Hughes took the opportunity to emphasize that an "independent judgment upon the facts" was constitutionally necessary.[148] Justice Brandeis concurred, stating: "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied . . . . To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality."[149]

More recently courts have based the right to an independent judicial forum within the ambit of the due process clause of the fifth amendment. In *Boyd v. Clark*[150] a three-judge district court panel was faced with the prospect that the jurisdictional amount requirement of section 1331 of the Judicial Code would cut the plaintiffs off from a claim of governmental unfairness with no

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enforced by a writ levying upon his property or person, he is at some point entitled to a judicial test of legality . . . .

L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 388 (1965). It is hard to imagine a better example than a federal program that purportedly violates the litigant's constitutional rights.

It may seem inappropriate to employ *Crowell* to support a theory of due process, when the case itself purported primarily to turn on considerations of separation of powers. However, the distinction between these bases is often unclear, and often may well overlap. *See* note 163 *infra*. As Professor Jaffe has noted, although *Crowell* "emphasizes separation-of-powers considerations . . . [it] does have a strong overtone of due process." L. JAFFE, *supra*, at 639.

[146] 259 U.S. 276 (1922).

[147] 298 U.S. 38 (1936).

[148] *Id.* at 51-52. Professor Davis has suggested that, with the possible exception of *Ng Fung Ho*, the *Crowell* line of cases establishing the doctrine of constitutional fact is all but dead. K. DAVIS, ADMINISTRATIVE LAW TEXT 540 (3d ed. 1972). Professor Davis may well be correct. *Cf.* Hart, *supra* note 14, at 1375-79. *But cf.* Jacobellis v. Ohio, 378 U.S. 148 (1964). But this in no way undermines the present contention that courts must be available to serve as the final arbiters of constitutional rights.

[149] 298 U.S. at 84 (Brandeis, J., concurring).

[150] 287 F. Supp. 561 (S.D.N.Y. 1968), *aff'd on other grounds*, 393 U.S. 316 (1969).

situs of adjudication. Judge Edelstein, dissenting, believed that result incompatible with the fifth amendment's guarantee of due process.[151] Another court, in *Murray v. Vaughn*,[152] insisted that "[b]oth the Fifth Amendment and Article III, § 2 of the Constitution might well be abused if no avenue is opened for review by the courts of [a constitutional] claim."[153]

The Second Circuit in *Battaglia v. General Motors Corp.*[154] recognized that this right to an independent resolution limited Congress' power "to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court."[155] Congress could not exercise its article III power, the court maintained, in a manner that would "deprive any person of life, liberty, or property without due process of law or . . . take private property without just compensation."[156]

These and other courts have stated the broad proposition that the fifth amendment requires an independent resolution of constitutional claims. These courts, however, have failed to develop the underlying rationale for that fundamental principle.

The initial assumption that must be made to support this proposition is the rather obvious one that neither the executive nor Congress has authority to violate constitutional rights. From this premise, the next step is the conclusion that if constitutional rights are to retain any protection from attack by the majoritarian branches of government, those branches cannot themselves be the final arbiters of the meaning and scope of constitutional protections. If the very parties accused of threatening the exercise of constitutional rights retain final power to decide whether they have in fact violated those rights, the rights have, for all practical purposes, been rendered worthless.[157] To en-

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[151] *Id.* at 568 (dissenting opinion).

[152] 300 F. Supp. 688 (D.R.I. 1969).

[153] *Id.* at 695.

[154] 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

[155] *Id.* at 257.

[156] *Id.*

[157] The Supreme Court has recognized that a judge who retains a direct interest in the outcome of a litigation is incapable of fairly adjudicating a case. Tumey v. Ohio, 273 U.S. 510 (1927). Similarly, executive or legislative bodies obviously have an interest in the determination whether their own acts or programs are unconstitutional.

The Court has many times pointed out that the article III protections of tenure and compensation for federal judges are meant to assure the independence of the judiciary, O'Donoghue v. United States, 289 U.S. 516 (1933); are in the public interest, Evans v. Gore, 253 U.S. 245 (1920); and were designed to give judges maximum freedom from

trust final power to interpret constitutional rights to the majoritarian branches effectively eliminates those rights,[158] thus violating our initial, incontestable premise: that the majoritarian branches have no power to violate constitutional rights.[159]

Even if we were to engage in the unlikely assumption that in many cases executive or legislative officials actually could fairly and properly determine which of their acts are unconstitutional, the appearance of fairness is as vitally important to the continued legitimacy of government as is fairness itself. Even if the constitutional decisions of executive or legislative representatives were as objective as those of independent decision-makers, there could be no way to assure the public that the decisions of non-

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coercion and influence by the executive and legislative branches, United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955). *See generally* Palmore v. United States, 411 U.S. 389, 406 (1973) (Douglas, J., dissenting); Chandler v. Judicial Council of the Tenth Circuit of the United States, 382 U.S. 1003, 1005 (1966).

[158] For instance, the Supreme Court in a recent decision held that a provision of the Omnibus Crime Control Act of 1970, 18 U.S.C. § 2511(3) (1970), was unconstitutional because it permitted the Attorney General, rather than an independent judicial officer, to determine whether search warrants should issue in cases involving national security surveillance. United States v. United States District Court, 407 U.S. 297 (1972). The Court on other occasions has reiterated the principle that a detached, independent judicial officer must issue a search warrant. *See* Heller v. New York, 413 U.S. 483 (1973); Shadwick v. City of Tampa, 407 U.S. 345 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971). In *Coolidge*, the Court stated that "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality [to make the determination of whether there is probable cause to issue warrants] with regard to their own investigations—the 'competitive enterprise' that must rightly engage their single-minded attention." *Id.* at 450.

[159] It might, of course, be argued that under some circumstances courts are called upon to determine the constitutionality of their own actions and, therefore, are not neutral and detached. The most obvious example is that in which a court engages in summary contempt proceedings and is, in the final analysis, the "judge" of the validity of its own actions. A simple answer is that, unlike the executive and the legislature, courts do not have the same investment and interest in their actions; courts do not create programs and take a vested interest in their operation. When they do, as in the contempt area, it is now wisely held that in most cases the judge who was the victim of the contempt may not conduct defendant's contempt trial. *See* Taylor v. Hayes, 418 U.S. 488 (1974); FED. R. CRIM. P. 42(b); *cf.* North Carolina v. Pearce, 395 U.S. 711, 723-26 (1969). However, it could be argued that courts do "create" "rights," *see, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966), and, to the extent they do, are very much interested in what happens to their creations. Whether this is the type of interest that should cause concern is open to question. It must be remembered that the framers created the judiciary to be a check on the other two branches of government. The other two branches, unlike the judiciary, can take the initiative and create rights, liabilities, and programs themselves while courts are limited by the very structure of the judicial system. To the extent that they do create rights and have a vested interest in preserving their creations, appellate review serves as an internal check not present in the executive or legislative branches. In this way, the danger of courts' losing the requisite impartiality is hopefully diminished. *See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 550-51 (1969).

independent officials had been reached fairly and impartially.

This concern for the appearance of fairness was manifested in *Glidden Co. v. Zdanok*.[160] There petitioners questioned the power of judges of the Court of Claims and the Court of Customs and Patent Appeals to sit on the lower federal courts by designation. Arguing that they had been denied the protection of judges with tenure and compensation guaranteed by article III, petitioners sought reversal of judgments against them because of the participation of those judges in the decision-making process.[161] Justice Harlan's plurality opinion noted at the outset that

> [n]o contention is made that either Judge . . . displayed a lack of appropriate judicial independence, or that either sought by his rulings to curry favor with Congress or the Executive. . . . and were it not for the explicit provisions of Article III we should be quite unable to say that either judge's participation even colorably denied the petitioners independent judicial hearings.[162]

Despite this apparent absence of any allegation of specific impropriety, the Court assumed that if the judges in question were not article III judges and therefore lacked the independence of the protections of article III, the litigants could rightfully complain of their presence in the adjudication of their cases.[163]

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[160] 370 U.S. 530 (1962).

[161] *Id.* at 532-33.

[162] *Id.* at 533.

[163] Justice Harlan ultimately concluded that the Court of Claims and the Court of Customs and Patent Appeals are article III courts. *Id.* at 584.

As is the case with our reliance on *Crowell*, it may seem strange to rely in a due process analysis on a doctrine, such as that of *Glidden*, which purports to turn on principles of separation of powers. However, the basis of the legislative court doctrine expounded upon in *Glidden*, though starting with separation-of-powers concepts, may ultimately reach a twilight zone of due process. In *Glidden* the Court recognized that there could exist substantial overlap in matters capable of being heard by article III courts and those by article I courts. But the plurality opinion of Mr. Justice Harlan left open the question to what extent "Congress may commit the execution of . . . 'inherently' judicial business to tribunals other than Article III courts." *Id.* at 549. The opinion made no effort to define this term. A similar phrase had been employed by the Court in *Ex parte* Bakelite Corp., 279 U.S. 438, 453 (1929), where, in holding that the Court of Customs and Patent Appeals was not an article III court (a conclusion rejected by *Glidden*), it stated: "The matters made cognizable therein include nothing which inherently or necessarily requires judicial determination." One commentator has suggested that this inherently judicial area includes those "cases in which the parties have a constitutional

Were it not for the potential obstacles posed by *Tarble's Case* and its progeny, the provisions of article III and the terms of the Madisonian Compromise would present no problems for the concept of an independent judicial forum. The tenure and salaries of state judges can no more be impinged by Congress than can those of federal judges.[164] As will be seen in the following sections, however, the conceptual and practical difficulties presented by *Tarble's Case* and its progeny are quite real and have too often been ignored in determining the appropriate scope of Congress' article III power.[165]

B. *The Power of State Courts over Federal Officers*

When an individual contests the constitutionality of a federal program, he often must seek injunctive relief against a federal official to restrain the exercise of statutory duties under the program and thereby halt the program's operation.[166] Since a litigant of such a constitutional claim has a due process right to an independent judicial hearing of that claim,[167] he ordinarily has the choice to proceed, under the Madisonian Compromise, in either state or federal court.[168] However, it will be argued here that, despite the apparent impact of the Madisonian Compromise on this choice of forum, it should be found that state courts lack power under *Tarble's Case* to enjoin federal officers.

State court jurisdiction over federal officials varies depend-

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right to a judicial hearing." Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 917 (1930). In this sense, then, it may be that the separation-of-powers requirement read into article III and the dictates of due process tend to overlap.

[164] *See* Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971) (congressional power over state courts and judges limited by Constitution).

[165] *See* text accompanying notes 166-246 *infra*.

[166] It might appear that the availability of a declaratory judgment under various state statutes is an exception to this proposition. To the extent that it is, it does not undermine the basic argument. It is only when state interference is of a substantial nature, truly interfering with the operation of a federal program, that state court power is forbidden by *Tarble's Case*. *See* notes 247-50 *infra* and accompanying text. To provide that declaratory judgment with "teeth," however, some type of injunctive relief is usually also sought. *See* Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1481 (1962). It is this injunctive relief that is of initial and primary concern here. It is the factor which is at the heart of the new synthesis.

[167] *See* text accompanying notes 142-65 *supra*.

[168] This assumes, of course, that Congress has not explicitly directed that one or the other forum be exclusively employed. In such a case, because the litigant has an independent judicial forum, he is afforded due process. *See* note 244 *infra*.

ing upon the remedy sought by a plaintiff and the nature of the federal officer's actions under attack.[169] State courts clearly have power to impose personal liability upon federal officers. Such power is manifested in state criminal prosecutions,[170] suits for damages,[171] and actions to recover property.[172] Thus federal officers are not immune from state criminal prosecutions for the violation of valid state penal laws, nor are they immune from certain state civil suits brought by private individuals. But these suits are in response to actions by a federal officer outside the scope of his authority or apart from the performance of his statutory duties. Such state court power is invoked upon a federal officer for acts done as a civilian for which any other individual would be liable. Any resultant impingement of the official duties of federal officers is, at most, indirect.

At the other extreme is the clear law providing that federal officers cannot be issued writs of mandamus[173] or habeas corpus[174] by state courts. From early in the nation's history it has been undisputed that state courts are without such power. State court power to grant injunctive relief against federal officers lies somewhere between the above two extremes.[175]

1. The Mandamus Power

In 1821, the Supreme Court denied a state court the power to mandamus a federal officer. In *McClung v. Silliman*,[176] the

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[169] *See generally* 1 J. MOORE, FEDERAL PRACTICE, ¶ 0.6(5), at 249-50 (2d ed. 1974); Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1386 (1964); Bishop, *The Jurisdiction of State and Federal Courts Over Federal Officers*, 9 COLUM. L. REV. 397 (1909).

[170] *See* Colorado v. Symes, 286 U.S. 510 (1932); Maryland v. Soper, 270 U.S. 9 (1926); Oklahoma v. Willingham, 143 F. Supp. 445 (E.D. Okla. 1956). Federal officers, however, have the right to remove state court criminal proceedings to federal court, 28 U.S.C. § 1442 (1970); *see* Bock v. Perkins, 139 U.S. 628 (1891).

[171] *See* Scranton v. Wheeler, 179 U.S. 141 (1900); Etheridge v. Sperry, 139 U.S. 266 (1891); Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1866); Teal v. Felton, 53 U.S. (12 How.) 284 (1851); Kendall v. Stokes 44 U.S. (3 How.) 86 (1845); Raisler v. Oliver & Co., 97 Ala. 710, 12 So. 238 (1893); Williams v. McDaniel, 80 Ga. App. 614, 56 S.E.2d 926 (1949).

[172] *See* Scranton v. Wheeler, 179 U.S. 141 (1900); United States v. Lee, 106 U.S. 196 (1882); Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1 (1817). *But see* Stanley v. Schwalby, 162 U.S. 255 (1896) (such actions may not be brought in state courts if United States is indispensable party).

[173] *See generally* 1 J. MOORE, *supra* note 169, ¶ 0.6(5), at 243-46; Arnold, *supra* note 169, at 1391-93; Bishop, *supra* note 169, at 415-16.

[174] *See generally* 1 J. MOORE, *supra* note 169, ¶ 0.6(5), at 241-43; Arnold, *supra* note 169, at 1386-91; Bishop, *supra* note 169, at 403-10.

[175] *See* Arnold, *supra* note 169, at 1386.

[176] 19 U.S. (6 Wheat.) 598 (1821).

plaintiff had sought a writ of mandamus from the federal circuit court in Ohio to order the federal land registrar to issue a certificate of purchase to him. The power of the federal court to issue the writ had been denied in *McIntire v. Wood*[177] and plaintiff therefore brought a mandamus action for the same relief in Ohio state court. The Supreme Court of Ohio upheld the lower state court's jurisdiction to issue the writ, but the United States Supreme Court held that the federal officer's conduct could

> only be controlled by the power that created him; whatever doubts have from time to time been suggested, as to the supremacy of the United States, in its legislative, judicial or executive powers, no one has ever contested its supreme right to dispose of its own property in its own way.[178]

McClung was relied upon in a series of New York cases over 120 years later. The line of decisions began with *Armand Schmoll, Inc. v. Federal Reserve Bank*,[179] in which the plaintiff brought suit in state court to compel the Federal Reserve Bank of New York City to perform a duty allegedly required of it under federal law. The New York Court of Appeals dismissed the suit for lack of jurisdiction, stating:

> The right of a state court, in many cases, to vindicate and protect rights granted by a federal statute or to give redress for wrongs committed by a federal officer under color of authority granted by federal statute, cannot be doubted. . . . It is to be noted, however, that . . . there are fields from which the state courts are excluded.[180]

The court refrained from assuming power to direct federal officials in the performance of their functions: "Assumption of such power would hamper orderly government and ignore the division of the fields of government of state and nation created by the Constitution."[181]

The court was careful to draw the precise issue at hand and to limit the scope of its decision. The question before it was not

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[177] 11 U.S. (7 Cranch) 504 (1813).
[178] 19 U.S. at 605.
[179] 286 N.Y. 503, 37 N.E.2d 225 (1941), *cert. denied*, 315 U.S. 818 (1942).
[180] *Id.* at 508, 37 N.E.2d at 226.
[181] *Id.* at 509, 37 N.E.2d at 226-27.

whether federal statutory rights could be litigated in a state court but rather

> whether the manner of performance of a specific federal government statutory function by a federal statutory agency can be the subject of a decree of a state court. This case does not involve any encroachment upon the state's authority by a federal agency; or any power given by the Congress to a state court to interpret a state law; or a suit against individual federal officers who are allegedly infringing upon the rights of an individual in violation of their duties.[182]

The decisions since *Armand Scholl* reaffirm the general proposition that state courts have no power to issue writs of mandamus to federal officials.[183] The most prominent commentator on the subject of state court power over federal officers, after reviewing the mandamus cases, stated emphatically that "there is no good reason to predict that *McClung* will not govern whenever a plaintiff makes the mistake of labeling his papers 'mandamus.' "[184]

2. The Habeas Power

While the Supreme Court's first indication of a restrictive view of state court power over federal officials came in a mandamus case, *McClung v. Silliman*,[185] the Court's major pronouncement of policy came after the Civil War in *Tarble's Case*.[186] Although *Tarble's Case* involved a state court's power to issue a writ of habeas corpus for an individual held in federal custody, its statements against state court interference with the operation

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[182] *Id.* at 508, 37 N.E.2d at 226.

[183] *See* Wasservogel v. Meyerowitz, 300 N.Y. 125, 89 N.E.2d 712 (1949); Hunter v. City of New York, 121 N.Y.S.2d 841 (Sup. Ct. 1953); Fox v. 34 Hillside Realty Corp., 87 N.Y.S.2d 351 (Sup. Ct. 1949), *aff'd*, 276 App. Div. 994, 95 N.Y.S.2d 598 (1950).

The court in *Armand Schmoll* seemingly drew a distinction between federal officers who were infringing the rights of a person "in violation of their duties" and "in accordance with their duties." This distinction began to fade in later cases since the distinction could only be made by way of a hearing in state court.

[184] Arnold, *supra* note 169, at 1392. *But see* Northern Pac. Ry. v. North Dakota *ex rel.* Langer, 250 U.S. 135, 151-52 (1919). *Langer* is a mysterious case, the Court permitting a state court to issue a writ of mandamus to a federal officer without raising the *McClung* decision.

[185] 19 U.S. (6 Wheat.) 598 (1821).

[186] 80 U.S. (13 Wall.) 397 (1871).

of the federal government have profound impact outside the habeas situation.

Tarble's Case was preceded by the pre-Civil War decision of *Ableman v. Booth*.[187] In *Ableman*, the Wisconsin Supreme Court had twice ordered the release of a federal prisoner by issuing writs of habeas corpus to the federal officers holding him. Chief Justice Taney, speaking for a unanimous Court, declared that state courts were without power to issue writs of habeas corpus for federal prisoners even though they were allegedly held in violation of federal law.

The Chief Justice was well aware of the state of affairs facing the nation at the time. A civil war was on the horizon, the Confederacy was forming, and Fort Sumter was to be bombarded within three years after the decision was handed down. It was this state of affairs that led him to maintain that the answer to the asserted state court power was abundantly clear:

> [N]o one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found.[188]

The basis for denying state court power was the sovereignty of the two governments. There could be "no such thing as judicial authority," Taney maintained, unless it was "conferred by a Government or sovereignty."[189] It was clear to him that the federal government had not granted such power, and clearly the state could not grant itself such power, "for no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government."[190] The Chief Justice found the reason for this in the Constitution itself:

> The Constitution was . . . formed . . . mainly to secure union and harmony at home [and] it was felt by the

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[187] 62 U.S. (21 How.) 506 (1858).
[188] *Id.* at 515.
[189] *Id.*
[190] *Id.* at 515-16.

> statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities.[191]

This removal of state court competence over federal officials was necessary, the Court felt, to insure uniformity of interpretation of federal laws and to prevent local prejudices from being embedded in federal law.[192] And even though the Civil War was imminent, the Court emphasized the importance of a federal judiciary with exclusive power to direct the course of federal affairs. This was so or else "the supremacy . . . so carefully provided in . . . the Constitution . . . could not possibly be maintained peacefully . . . ."[193]

Of course, the events following *Ableman* carried out the worst fears behind the decision. The supremacy of the Constitution over state power was chiseled into the law by a long and bitter conflict on the battlefield rather than by peaceful judicial pronouncements. Looking back on the long struggle and reconstruction, the Supreme Court handed down the decision in *Tarble's Case*. With the events of the past 50 years setting the stage for the decision, the Court declared a philosophy of federal-state relations that would have a great impact on the development of the reconstructed union.

In *Tarble's Case*, a Wisconsin state court had issued a writ of habeas corpus to the United States Army ordering the release of an allegedly under-age enlistee. The Court denied such power to the state courts, basing its holding, as in *Ableman*, upon the sovereignty of the federal government and the supremacy of its laws under the Constitution. It was essential, the Court felt, that neither of the two governments "intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other."[194] The enactments of the federal gov-

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[191] *Id.* at 517.
[192] *Id.* at 517-18.
[193] *Id.* at 518.
[194] 80 U.S. (13 Wall.) at 406.

ernment must be supreme, the Court insisted, because that was "essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments."[195]

Having thus analyzed the relationship between the two governments, the Court broadly asserted that "within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority."[196] The Court stressed the degree of interference state habeas power would entail, resulting in great injury to the public.[197] The Court feared that if granted such power, state courts could invariably halt the operation of the federal government. "In many exigencies the measures of the National government might . . . be entirely bereft of their efficacy and value."[198] An appeal to the Court would be an inadequate safeguard because habeas proceedings are summary and the delay incident to the appeal process would be great.[199] Meanwhile the damage would have already taken place: "It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty."[200]

The Court in *Tarble's Case* spoke in broad terms and defined a doctrine that would be carried beyond the habeas situation by

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[195] *Id.* at 407.

[196] *Id.*

[197] *Id.* at 408-09.

[198] *Id.* at 409.

[199] *Id.*

[200] *Id.* One last decision supports the proposition advanced here and provides further indication of the great interference such state court power causes. In United States *ex rel.* Fort v. Meiszner, 319 F. Supp. 693 (N.D. Ill. 1970), the petitioner, a federal prisoner, sought to enjoin the execution of a writ of habeas corpus *ad prosequendum* issued by the Circuit Court of Cook County, Illinois. Judge Robson of the federal district court enjoined the state court and, relying upon *Ableman* and *Tarble's Case*, stated: "It is a well-worn doctrine that a state court lacks any jurisdictional authority to issue state process upon a federal officer who is acting pursuant to federal law." *Id.* at 695. Judge Robson spoke of the weight of the two decisions despite their age: "These decisions have not been challenged or even questioned during the century that has elapsed since they were rendered, but they have been cited as respected authority on issues concerning the supremacy of federal law over conflicting state law in a number of subsequent Supreme Court decisions." *Id.* at 695-96. The court concluded that the Illinois court "lacked jurisdiction to issue a writ of habeas corpus . . . upon a federal marshal having custody of the petitioner under an order issued by a federal court." *Id.* at 696.

later courts.[201] Other courts have relied upon *Tarble's Case* for the proposition that state courts lack power to interfere in the workings of the federal government by enjoining the actions of federal officials.[202]

3. The Injunctive Power

At first glance, it seems reasonable that, since the touchstone of *McClung* and *Tarble's Case* was state court interference with federal action, the reasoning of those cases should readily carry over to and therefore forbid state court injunctive power over federal officials. But the development of the law in the area has not been so clear. While various commentators have argued in the past that the rationale of the mandamus and habeas situations should not apply to injuctive power,[203] it is submitted here that a stronger case exists for forbidding injunctive power than for disallowing habeas power.

It has frequently been noted that the Supreme Court has not decided the question whether state courts have jurisdiction

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[201] *See, e.g.*, Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); Perez v. Rhiddlehoover, 247 F. Supp. 65 (E.D. La. 1965); Parry v. Delaney, 310 Mass. 107, 37 N.E.2d 249 (1941).

[202] A series of cases exists, however, that is out of line with the weight of authority holding that state courts lack power to interfere with federal officials. *See* Missouri *ex rel.* Burnes Nat'l Bank v. Duncan, 265 U.S. 17 (1924); First Nat'l Bank v. Missouri, 263 U.S. 640 (1924); First Nat'l Bank v. Fellows *ex rel.* Union Trust Co., 244 U.S. 416 (1917); Perez v. Rhiddlehoover, 247 F. Supp. 65 (E.D. La. 1965).

In *First National Bank v. Missouri*, the state sued the defendant bank because it opened a branch in violation of state law but pursuant to federal law. Suit was brought in state court. On appeal to the Supreme Court, three Justices stated their opinion that *Tarble's Case* barred the state court action, 263 U.S. at 666-67 (Van Devanter, J., dissenting). The majority of the Court, however, disagreed, stating that while national banks were federal instrumentalities, they were still subject to general laws of the state not inconsistent with federal policy or law.

In *Perez*, the district attorney of a Louisiana parish sought to enjoin federal voting examiners from registering voters who did not meet certain requirements of state law. The defendants removed the action to federal court. The court held that the state court had jurisdiction, finding that in the Voting Rights Act, Congress specifically required the federal examiners to comply with state law. The court interpreted this as impliedly authorizing actions in state courts to determine whether state laws are being followed. 247 F. Supp. at 73-74. This reasoning is unjustifiable. Federal supremacy is *necessarily* threatened whenever a state court asserts power to direct the actions of federal officials. Furthermore, the determination of whether the applicable state law "does not unduly interfere with federal authority or threaten federal supremacy" is precisely the function that should be performed by federal courts.

[203] *See* Arnold, *supra* note 169, at 1386.

to enjoin federal officers.[204] In *Keely v. Sanders*,[205] however, the Court by way of dictum stated that "no State court could, by injunction or otherwise, prevent Federal officers from collecting Federal taxes."[206] The weight of reasoned opinion emanating from the state and lower federal courts supports the general denial of such state court power. Most decisions note the questionable status of the law;[207] few cases maintain the existence of unfettered power in the state courts.[208]

A series of decisions from the South in the early 1960's supports the argument that state courts lack power to enjoin federal officers. Many suits were brought in various friendly state courts by individuals seeking to hinder the operation of the many civil rights statutes enacted by Congress during the Ken-

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[204] *See, e.g., id.* 1397.

[205] 99 U.S. 441 (1879).

[206] *Id.* at 443.

[207] Wheeldin v. Wheeler, 373 U.S. 647, 664 (1963) (Brennan, J., dissenting); McGaw v. Farrow, 472 F.2d 952, 955 (4th Cir. 1973); Murray v. Vaughn, 300 F. Supp. 688, 695 (D.R.I. 1969).

[208] *See, e.g.*, Spock v. David, 469 F.2d 1047, 1050 (3d Cir.), *stay denied*, 409 U.S. 971 (1972).

In Pennsylvania Turnpike Commission v. McGinnes, 179 F. Supp. 578 (E.D. Pa. 1959), *aff'd per curiam*, 278 F.2d 330 (3d Cir.), *cert. denied*, 364 U.S. 820 (1960), the state commission claimed that one of the defendants, a federal taxpayer, had defrauded it of one million dollars. The commission alleged that the money had been remitted to the defendant McGinnes, the district director of the Internal Revenue Service, in payment of federal taxes. The commission further alleged that the funds were to be returned to the taxpayer by IRS, asserting that, if IRS were allowed to return the funds, the taxpayer would spend them before the commission could bring suit and levy upon them. The commission, therefore, sought to enjoin McGinnes from refunding the moneys and to obtain an order directing their payment to the commission.

The suit was first initiated in federal district court but was dismissed for lack of original jurisdiction. 268 F.2d 65 (3d Cir. 1959), *rev'g* 169 F. Supp. 580 (E.D. Pa. 1958), *cert. denied*, 361 U.S. 829 (1959) (claim did not "arise under" federal law within meaning of 28 U.S.C. § 1331 (1970)). The commission thereupon proceeded in state court and defendant removed the action to federal court and moved for its dismissal for lack of jurisdiction. Since upon removal a federal district court's jurisdiction is derivative from the state court's jurisdiction, *see* Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377, 382 (1922), the court examined the jurisdiction of the state court from which the action had been removed:

> The question of whether a State court has jurisdiction to enjoin a Federal officer in the performance of his duty has not been squarely passed upon by the Supreme Court. . . . However, those cases which do touch on this delicate issue indicate a doubt as to the existence of such a jurisdiction.

179 F. Supp. at 580.

The court relied on the language in *Tarble's Case* concerning the requirement of non-interference by one sovereign in the affairs of another sovereign. *See also* Parry v. Delaney, 310 Mass. 107, 37 N.E.2d 249 (1941).

nedy and Johnson Administrations. One such statute under attack in state courts was Title III of the Civil Rights Act of 1960.[209] In *Alabama ex rel. Gallion v. Rogers*,[210] the board of registrars of Montgomery County, Alabama, sought to enjoin the Attorney General of the United States from inspecting state voting records on the ground that the statute was unconstitutional. The Alabama Attorney General obtained a temporary injunction and restraining order from the Circuit Court of Montgomery County. The order forbade Attorney General Rogers and his "agents, servants, employees and attorneys" to inspect or copy the county board's records "under the color of authority purportedly given . . . by the 'Civil Rights Act of 1960'."[211]

The state court action was removed to federal district court by the Government and there Judge Johnson emphatically denied any such power in the state courts. After finding that nothing in Title III of the Act vested concurrent jurisdiction in state courts, the court denied the existence of any implied power to do so. Relying upon *Tarble's Case* and *Keely v. Sanders*, the court stated:

> Such action by the state courts in matters exclusively within the jurisdiction of the federal courts cannot be tolerated without there being created frustration of national purposes. . . .
>
> . . . Aside from the fact that the jurisdiction conferred by Section 305 of the Act is exclusively vested in the United States district courts, the state court action in issuing its injunction . . . was in violation of the basic legal principle that state courts are without jurisdiction to review the discretion or enjoin the acts of federal officers.[212]

The Fifth Circuit Court of Appeals affirmed the court's decision with little comment.[213]

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[209] 42 U.S.C. § 1974-74e (1970).

[210] 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd per curiam*, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961).

[211] *Id.* at 851.

[212] *Id.* at 852.

[213] 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961). Later that year, the same federal district court was faced with an injunction granted by the same state court in defiance of the *Rogers* decision. Alabama *ex rel.* Patterson v. Jones, 189 F. Supp. 61 (M.D. Ala. 1960). In *Jones* the United States Civil Service Commission had filed a "letter of Charges" against the Director of the Alabama state highway department for his participa-

Thus although there has been no definitive determination of whether *Tarble's Case* and *McClung* apply as well to limit state court injunctive power, substantial precedent exists for the proposition that it does. Given the primary basis of *Tarble's Case*, it is difficult to understand why there should be any question regarding the lack of state court injunctive power over federal officials. If interference by one sovereign in the affairs of another sovereign is the touchstone for restricting state court power,[214] it is evident that injunctive power should be denied to state courts. Mandamus power was rejected in *McClung* and habeas power in *Tarble's Case* basically because the Supreme Court felt that in each situation such power permitted state courts to interfere in the exercise and enforcement of federal statutes, a power deemed repugnant to the federal system. Such interference clearly results to a much greater degree when a state court exercises injunctive powers over federal officers. Rather than requiring an act to be performed, which is the result of the mandamus power, a state court can impede and even halt the operation of essential federal functions by the use of the injunctive power. Any argument that state courts should have injunctive power over federal officers must fall when the impact of such power is considered in light of *McClung* and *Tarble's Case*.

The Supreme Court, surprisingly, has yet to address the issue specifically.[215] This absence of a Supreme Court decision

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tion in political activities in violation of the Hatch Act. The plaintiff highway department obtained an injunction from the Circuit Court of Montgomery County forbidding the Commission from filing the charges. The Commission removed the action to federal district court, where Judge Johnson reprimanded the same state court for the second time within a year: "It is quite apparent from the appropriate authorities—recently cited by this Court several times—that a State court does not have the authority to review the exercise of discretion by federal officers in the performance of their official duties." *Id.* at 63-64.

One year later the Fifth Circuit took the occasion to reaffirm the position advanced by Judge Johnson in *Rogers* and *Jones*. Kennedy v. Bruce, 298 F.2d 860 (5th Cir. 1962).

[214] *See generally* 1 J. MOORE, *supra* note 169, ¶ 0.6(5), at 240; Arnold, *supra* note 169, at 1386.

[215] *See* Brooks v. Dewar, 313 U.S. 354 (1941), where the Court reviewed a state court injunction against a federal officer on its merits but refused to decide the question of state court power because the case could be decided on other grounds: "Since jurisdiction and the procedure of the court below are sustained by decisions of this Court, we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence, where, as here, the bill fails to make a case upon the merits." *Id.* at 360.

The issue has only been referred to in a footnote by a dissenting Justice. In Wheeldin v. Wheeler, 373 U.S. 647 (1963), Justice Brennan stated that "it is unsettled whether

on the question, however, should not be deemed dispositive.[216] Rather, the weight of the existing state and lower federal court authority appears to be firmly against the existence of such power.

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the state courts have jurisdiction to entertain an action to enjoin a federal officer acting under color of federal law, . . . so that denial of federal court jurisdiction over claims such as petitioner's might leave an injured party totally remediless." *Id.* at 664-65 n.13 (Brennan, J., dissenting).

[216] Noting that the Supreme Court has not decided the question, Bator proposes an analytical framework for the Court when and if the time comes:

> When the Supreme Court is called on to resolve the issue, what weight should it accord to the following consideration: (a) the similarity and dissimilarity of mandamus, habeas corpus, and injunction; (b) the fact that Congress has provided for removal from state courts of certain actions against federal officials; (c) the fact that prior to 1875 the lower federal courts had no general jurisdiction of actions arising under the Constitution or laws of the United States and that, with some exceptions, their jurisdiction in such cases is now limited to cases that involve the jurisdictional amount . . .; (d) the fact that since 1937 Congress has forbidden district courts to grant an interlocutory or permanent injunction restraining the enforcement or operation of an act of Congress on the ground of its unconstitutionality unless the suit is heard by three judges, at least one of whom is a circuit judge; and that a direct appeal has been provided from the three judge court to the Supreme Court . . .; and (e) the fact that Congress has not legislated against state court injunctions?

HART & WECHSLER, *supra* note 4, at 430 (footnotes omitted).

When the Supreme Court does resolve the question of state court power to enjoin federal officers, it should decide that state courts completely lack such power. The similarity in the danger of state interference common to mandamus, habeas, and injunctive relief calls for common treatment. All three have great potential for inflicting lasting injury to federal programs. Therefore, in answering the injunctive power question, the Court should follow its prior decisions in *McClung*, *Ableman*, and *Tarble's Case*.

The fact that Congress has provided for removal of state actions against federal officials should not sway the court. The initial action in state court will cause enough interference that subsequent removal will be "too little too late." Cases such as Alabama *ex rel.* Gallion v. Rogers and Kennedy v. Bruce show that interference occurs when the state court action commences and that removal often comes after the harm has been inflicted.

That lower federal courts were not given federal question jurisdiction until 1875 does not weaken the argument against state court power. The granting of broad federal question jurisdiction is a manifestation of Congress' belief that after the Civil War federal interest adjudication belonged in federal courts and not state courts. *See* note 236 *infra*.

That Congress has imposed the three-judge requirement on federal courts enjoining federal officers also lends support for the argument that state courts should be denied the power. If the exercise of the power over federal officials in connection with constitutional attacks on federal statutes is so sensitive that Congress requires three federal judges, one state judge clearly should not possess equal power.

Finally, that Congress has not legislated against state injunctive power should not be accorded any weight. Silence by Congress in the face of decisions such as *McClung*, *Ableman*, and *Tarble's Case* should not be interpreted to mean that Congress feels no legislation is necessary. Inferring action by Congress from its silence and inaction is dangerous. *See* Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). *But see* Flood v. Kuhn, 407 U.S. 258 (1972).

C. *The Reconciliation: The Modern Validity of* Tarble's Case *and Its Relation to Congressional Power over Lower Federal Court Jurisdiction*

The fundamental conclusion reached to this point should now be clear: There exists a due process right to an independent judicial determination of constitutional rights; so long as the state courts remain open, as contemplated by the Madisonian Compromise, congressional limitations on lower federal court jurisdiction do not violate this precept of due process. If, however, for some reason the state courts no longer remain as a viable alternative for the adjudication of constitutional rights, an exclusion of federal court jurisdiction effectively denies access to an independent judicial forum. Thus in these cases Congress' power under article III is limited by the terms of the fifth amendment, just as any provision in the body of the Constitution may be limited or altered by a constitutional amendment. Since under the logic and holding of cases like *Tarble's Case* state courts have no power to control directly the acts of federal officers,[217] a congressional preclusion of federal court review of the constitutionality of acts of federal officers violates the fifth amendment rights of one who would sue to control the acts of those officers.

Several lower federal courts have reached a conclusion similar to the one just described.[218] In all candor, however, though this ultimate conclusion is a correct one, the issue is significantly more complex than the reasoning in the preceding paragraph and in the court decisions recognizes. On several bases it is possible to argue that *Tarble's Case* has either little or no effect on Congress' present day power to limit the jurisdiction of the lower federal courts. No analysis of the problem would be complete without thorough examination of these arguments.

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[217] Text accompanying notes 166-216 *supra*.

[218] *See, e.g.*, Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); West End Neighborhood Corp. v. Stans, 312 F. Supp. 1066 (D.D.C. 1970); Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969); Boyd v. Clark, 287 F. Supp. 561, 564-69 (S.D.N.Y. 1968) (Edelstein, J., dissenting), *aff'd mem.* 393 U.S. 316 (1969). *But see* Lynch v. Household Finance Corp., 405 U.S. 538 (1972) (dictum); McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973); Spock v. David, 469 F.2d 1047 (3d Cir.), *stay denied*, 409 U.S. 971 (1972).

1. The Validity of *Tarble's Case* Reconsidered

One such argument has already been considered at length.[219] This is the contention that *Tarble's Case* was purely a habeas case and in no way limits the injunctive power of state courts to control the actions of federal officers. As noted previously, the concern that led to the decision in *Tarble's Case*—namely, the fear of undue state interference with the conduct of federal affairs—applies with equal if not greater force to the area of injunctive power.

There are more serious concerns, however. First, it could be argued that *Tarble's Case* was decided in the context of a pre-existing adequate remedy in the federal courts, a point specifically noted by the Supreme Court in its opinion,[220] and therefore the decision was never intended to stand if no viable alternative existed in the federal courts. Second, it could be argued that in any event the decision in *Tarble's Case* totally misconceived the concept of federal supremacy and the intended role of the state courts within the federal system and, therefore, should be overruled. If either of these arguments were accepted, of course, the theory developed here, premised as it is on the unavailability of an adequate forum in the state courts, would fall. It is our contention, however, that neither is accurate.

It is true, as mentioned above, that the Court noted in *Tarble's Case* that

> [t]he United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of *habeas corpus* in all cases, where a party is illegally restrained of his liberty by any officer of the United States . . . . And there is no just reason to believe that they will exhibit any hestitation to exert their power, when it is properly invoked.[221]

Despite this language, however, the overwhelming thrust of the Court's opinion leads to the inescapable conclusion that the exis-

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[219] Text accompanying note 214 *supra*.
[220] 80 U.S. (13 Wall.) at 411.
[221] *Id.*

tence of an adequate federal remedy was irrelevant to the decision. The Court emphasized throughout that "[t]here are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres."[222] An analogy employed first by the Court in *Ableman* and later quoted approvingly in *Tarble's Case* is instructive. The State of Wisconsin, said the Court, "had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned."[223] If the courts of Michigan had in such a hypothetical situation been unconstitutionally closed by the legislature, certainly the Wisconsin state courts would have had no greater authority to interfere with the Michigan processes. Since the Court viewed the state-federal judicial hierarchy as identical to the relationship of one state's courts to those of another, it seems clear that the reference at the close of its opinion to the existence of an adequate federal remedy was nothing more than gratuitous "icing on the cake," unnecessary to the Court's central decision.[224]

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[222] *Id.* at 406. One portion of the Court's opinion in *Tarble's Case* may create doubt as to the strict demarcation the Court seemed to be drawing between state and federal power. The state court, Justice Field stated, may require the marshal to produce the process or orders under which the prisoner is held, "in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority." *Id.* at 409-10. This language, especially the Court's reference to the officer's "good faith," could conceivably be construed to allow the state courts significant power to question the reasons for the federal detention. But such an interpretation would fly in the face of the Court's extended discussion of the "distinct sovereignty" theory, under which the state courts have no power to control or review the actions of a separate sovereign. The excerpt in question, then, seems to mean only that the state court has power to ascertain that the detention actually is by the United States, and not merely by someone falsely claiming to act on behalf of the United States. "But," as the Court adds, "after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further." *Id.* at 410. In this context, it is important to emphasize that according to the Court, if it appears in the habeas application that the prisoner "is confined under the authority, or claim and color of the authority, of the United States . . . the writ should be refused." *Id.* at 409.

[223] *Id.* at 406 (quoting Ableman v. Booth, 62 U.S. (21 How.) 506 (1858)).

[224] It might be argued that in light of the constitutional mandate that habeas corpus not be suspended, U.S. CONST. art. I, § 9, *Tarble's Case* must be read as presuming the existence of an adequate remedy in federal court. Since the body of the Constitution provides simultaneously that habeas corpus may not be suspended and that Congress need not create lower federal courts, it must be assumed that the framers contemplated

One may respond, however, that the Court's analogy points up the fundamental fallacies in its opinion: The right of a state court to regulate the actions of federal officials, it may be said, is substantially different from its power to interfere with the internal operations of another state. This brings us to the second argument, that *Tarble's Case* was simply an incorrect decision and should be rejected. The entire basis of the Madisonian Compromise was that state courts would always be open to hear cases not given by Congress to the federal courts.[225] The Supreme Court has recognized that the supremacy clause[226] requires state courts to enforce federal statutory and constitutional rights.[227] *Tarble's Case*, it might be argued, is thus in direct opposition to both the Madisonian Compromise and the supremacy clause as interpreted by more recent Supreme Court decisions. If Congress feels there is substantial danger of state interference with federal programs in specific instances, the argument proceeds, it can simply legislate to exclude state judicial review.

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at least the potential exercise of habeas corpus power by the state courts. However, as developed more clearly below, *see* text accompanying note 253 *infra*, the external assumption of the framers that state courts would be available is at no point contained in the body of the Constitution and merely represents the prevalent philosophy of federalism at the time. *Tarble's Case*, in denying state court power to exercise habeas corpus against federal officials, does not disregard the dictates of the Constitution. Rather, it merely rejects the external philosophy of federalism, which changed gradually from the time of the framers, and then drastically after the Civil War, to contemplate virtually no state power to interfere with the federal government.

[225] Text accompanying note 58 *supra*.

[226] U.S. CONST. art. VI.

[227] Testa v. Katt, 330 U.S. 386 (1947). At least one commentator, however, has recently questioned whether *Testa* was intended to impose an obligation on state courts under the supremacy clause to hear constitutional as well as statutory claims:

> First, the *Testa* doctrine and cases which have adopted it arose under remedial, penal, or criminal statutes. The Supreme Court has not indicated whether the doctrine is properly applicable to suits arising directly under constitutional provisions, and it is not clear that *Testa* would extend to an area so heavily imbued with a uniquely federal interest. Second, *Testa* can be read as allowing reversal of a state court decision declining jurisdiction over a case arising under federal law only if the state's refusal is for discriminatory reasons.

Weinberger, *The Jurisdictional Amount Requirement of Section 1331 in Suits Against Federal Officers: Due Process Tensions*, 46 COLO. L. REV. 157, 204 (1974).

On the other hand, although *Testa* dealt with a statutory cause of action, its broad language seems to imply that the supremacy clause's dictate applies to constitutional actions as well. The Court cited approvingly what it called the teaching of Claflin v. Houseman, 93 U.S. 130 (1876), "that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people . . . ." 330 U.S. at 391. As to Weinberger's second point, a state court's refusal to enforce a federal constitutional right for the sole reason that it is a federal cause of action would seem to be exactly the kind of discrimination in which a state may not engage.

First of all, it should be emphasized that despite critical commentary[228] the Court has shown no indication that it plans to reject *Tarble's Case*. And, of course, as long as *Tarble's Case* rightly or wrongly stands, the analysis of Congress' power to limit federal court jurisdiction described here retains validity. More importantly, the inadvisability of the decision in *Tarble's Case* is by no means clear.

In a sense, *Tarble's Case* represents the culmination of a struggle between the forces supporting widespread state sovereignty and those in favor of a strong and supreme national government, a struggle which climaxed in the Civil War. Almost immediately after the union began as a two-sovereign entity, the adequacy of state courts as forums for shaping the young nation came under question.[229] As the sense of federalism grew into the view of a necessarily strong, centralized government, the basic underpinning of the Madisonian Compromise started to erode. Early problems arose concerning state interference in federal matters in cases such as *McCulloch v. Maryland*[230] and peaked in *McClung v. Silliman*.[231] The question whether state courts should be permitted to wield power and take an active role in federal policy-making was only one facet of the basic conflict between those who believed that the fundamental power should lie in the states and those who believed it should lie in the national government. The conflict reached its height in the 1850's in cases such as *Ex Parte Pleasant's*,[232] *Ableman v. Booth*,[233] and *Passmore Williamson's Case*.[234] Then, finally, came the inevitable resolution: the Civil War.

Various cases arose during the conflict involving state court intervention in federal affairs.[235] After the War, Congress

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[228] *See* HART & WECHSLER, *supra* note 4, at 427-28; Arnold, *supra* note 169, at 1390-91.

[229] *See* Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 347-59 (1930).

[230] 17 U.S. (4 Wheat.) 316 (1819).

[231] 19 U.S. (6 Wheat.) 598 (1821); *see* text accompanying notes 176-84 *supra*.

[232] 19 F. Cas. 864 (No. 11,225) (C.C.D.C. 1833). *See generally* Warren, *supra* note 229, at 355.

[233] 62 U.S. (21 How.) 506 (1858). *See* text accompanying notes 187-93 *supra*. *See generally* Warren, *supra* note 229, at 355.

[234] 26 Pa. 9 (1855). *See generally* Warren, *supra* note 229, at 355.

[235] *See generally* H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1973). The state court interference occurred on both sides of the Mason-Dixon Line both before and during the war:

enacted vast amounts of legislation of various kinds and constitutional amendments which promoted the supremacy of the federal government.[236] There was a new atmosphere surrounding state-federal relations.[237] In this post-war atmosphere the Su-

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Lawsuits lodged in states' courts against national military and civil security, conscription, and revenue officers accentuated the most worrisome aspect of these conditions . . . . Other times, when despite writs from state judges to release individuals, national officers persisted in an arrest or imprisonment or retained alleged minors in the Army, state contempt citations were issued against them. Noncomplying national officers faced prison and money fines . . . . Defendants included cabinet Secretaries Cameron, Seward and Stanton, as well as Army lieutenants. Suits against the latter were especially shrewd hits. Few junior officers could shrug off threats of heavy fines, and none wished to suffer imprisonment.

Id. 240-41. Hyman tells of one such situation. A Kansas state judge issued a writ against the United States Army and the commanding officer of the garrison at Fort Leavenworth. When the commanding officer refused to appear before the court on the ground that the court lacked jurisdiction, the judge threatened to hold him in contempt and ordered the state militia to arrest him. The commanding officer thereupon called for federal reinforcements. Calmer tempers ruled the situation, however, and a dangerous clash between the United States Army and "loyal" state militia was avoided. *Id.* 363-64.

[236] Hyman points out:

The result of such reactions was legislation, beginning with the March 3, 1863 habeas-corpus-indemnity-removal law, that in Frankfurter's and Landis's estimate made the Civil War and Reconstruction "a turning point in the history of the federal judiciary." Thereafter, between 1863 and 1875, successive Congresses wove the federal courts more intimately than ever before "into the history of the times."

Even today, when lawmen have scholarly resources available virtually undreamed of a century ago, the improved allocation of jurisdiction between national and state courts is an enormously difficult technical task and a tender political assignment. In the midst of the Civil War, the Lincoln Administration felt impelled to examine, for the first time since 1789, basic nation-state court jurisdictional divisions. Lincoln's lawmakers achieved a remarkable improvement in the harmony and utility of the federal courts.

H. HYMAN, *supra* note 235, at 242.

[237] 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88 (1971). Professor Fairman states:

When *Tarble's Case* arose the entire matter of State-federal relations was moving into a new setting. The Fourteenth Amendment had just been adopted: national citizenship was made primary; States were bound under federal sanction to accord a wide but as yet not precisely defined body of rights to the individual.

Id. 1425.

See F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1928):

The Civil War gave impulse to . . . powerful new economic forces; it also released political ideas of nationalism no less important in their practical consequences. The supremacy of national authority, the extension of federal activities, the resort to federal agencies, were vindicated both in theory and practice to the mind of the dominant North. The Federal Government not the individual states had won the war.

Id. 57. For a general discussion of the wide variety of federal legislation emanating from

preme Court handed down its decision in *Tarble's Case*, which represented another manifestation of the prevalent philosophy of government relations over which a war had been fought. As Professor Warren views this period,

> Until the Civil War, there was a steady and impartial promotion of this policy of non-interference between federal and state courts. Since 1875, and the broad extension of jurisdiction vested by the Judiciary Act of that year, the decisions of the Supreme Court, in cases of inter-judicial clash, have shown somewhat of a trend towards upholding the federal courts.[238]

In addition to the changed opinion of the state courts' role in federal policy-making, the feeling of initial distrust that many framers had toward a centralized government and its judicial power underwent change. As one commentator states:

> The jealousy with which the States at first regarded the national government has, to a large extent, passed away. The facilities of intercommunication have removed inconveniences which in early days attended litigation in the Federal courts. The mutual relations between the State and Federal courts have come to be regarded as the subject of critical and scientific study rather than of partisan or local debate.[239]

And this, he asserts, results in the view that

> there is not now any substantial difference of opinion as to the desirability of giving the Federal courts power to bring every subject relating to the functions of the Federal government, and the performance of their duties by Federal officers, in the first instance within the jurisdiction of the Federal courts.[240]

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the experience of the Civil War and its theoretical underpinnings, see *id.* 57-102. Another commentator states:

> 42 U.S.C. § 1983 was passed in the post Civil War era when a new structure of law was emerging to establish the role of the federal government as a "guarantor of basic federal rights against state power." The legislators believed that the state courts, particularly in the South, were not enforcing these rights, and were even being used to harass and injure individuals.

Note, 1974 WIS. L. REV. 1180, 1182 (footnotes omitted).

[238] Warren, *supra* note 229, at 345.

[239] Bishop, *supra* note 169, at 417-18.

[240] *Id.* 418.

The philosophy of federalism had thus shifted dramatically from the time of the Madisonian Compromise. The federal government had become clearly supreme in all respects, and as a result state court power to regulate the actions of federal officers was severely limited.[241]

There is no reason to think that the total federal supremacy established after the Civil War has lost vitality under current conditions. Perhaps the southern civil rights cases discussed above[242] most dramatically point up the modern soundness of the reasoning in *Tarble's Case*. State judges who are either unfamiliar with or antagonistic to federal programs, especially if they are at the lower levels of the state judicial system, may do much to disrupt and injure federal schemes of national scope.[243]

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[241] In what may seem somewhat of a paradox, another manifestation of pre-Civil War states' rights was the insistence by many state advocates that state courts could not be required to adjudicate federal causes of action. Testa v. Katt, 330 U.S. 386 (1947); Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551, 1552 (1960). The tension involved in *Ableman* and *Tarble's Case*, on the other hand, was with state court attempts to enforce federal constitutional rights against federal officers. Though as a technical matter this seems to represent a contradiction in state attitudes, as a practical and political matter both state positions represent a consistent attitude of defiance to total federal supremacy.

In *Testa*, the Supreme Court held that "the fundamental issues over the extent of federal supremacy had been resolved by war." 330 U.S. at 390. Hence in most cases, state courts would be required to enforce federal rights. The "federal supremacy" of *Testa* may seem to contradict the federal supremacy of *Tarble's Case*: The former appears to require state courts to enforce federal statutory and constitutional rights; the latter prohibits state courts from enforcing constitutional rights against federal officers. Yet here, too, the consistency is more practical than technical. Both doctrines evince the shift in the philosophy of federalism that culminated after the Civil War: total federal supremacy. State courts are not to be permitted to interfere with federal programs, either by refusing to enforce federal rights where the federal government has so directed, or by directly controlling the actions of federal officers. The facts of *Testa*, it should be noted, in no way involved an attempt by a state court to control directly the actions of federal officials.

[242] *See* text accompanying notes 209-13 and note 213 *supra*.

[243] One commentator proposes a "compatability test" to be applied to cases in which state courts seek to assume jurisdiction over federal officers. Note, *The Constitutional Implications of the Jurisdictional Amount Provision in Injunction Suits Against Federal Officers*, 71 COLUM. L. REV. 1474, 1486 (1974). Believing that concurrent state court jurisdiction must be "admitted," the commentator also recognizes that the "danger of hostility within states to a particular federal affirmation" must be "ameliorated." *Id.* Calling for an infusion of "flexibility" into the situation, he proposes a formulation that "attempts to balance the conflicting needs involved, with each specific determination of jurisdiction based upon whether the exercise of state authority would produce a demonstrable incompatibility with some substantial federal policy. In case of such incompatibility, federal exclusivity would necessarily be implied." *Id.*

Although commendable, this test is unworkable in a practical sense. Any balancing test would prove to be vague and unpredictable in operation. Furthermore, the danger that *Tarble's Case* was concerned with would still exist. A strict rule prohibiting state court interference in federal affairs would be much more workable.

Application of *Tarble's Case* effectively prevents this potential for harm.

It is true that if Congress really desired, it could, in enacting a federal scheme, make clear that jurisdiction to review the acts of federal officers executing the legislation is to be vested exclusively in the federal courts. In light of the potential danger inherent in state court power to enjoin federal officers, however, it would seem reasonable to expect Congress to make an affirmative assertion permitting state court jurisdiction if it concludes that the interests of federalism do not demand a limitation on state power in a particular case.[244] *Tarble's Case* can thus be read to create a presumption that state courts, under the supremacy clause, are powerless to control directly the actions of federal officers. This presumption, premised on the practical realities and fundamental philosophy of our federal system, can be overcome only by a carefully considered, conscious decision by Congress that, in a specific area, state court power over the actions of federal officers is permissible.

Viewing *Tarble's Case* as currently good law appropriately "organizes" the federal system in two ways. First, it eliminates the potential for undue interference with broad federal programs by state judges of limited perspective or antagonistic motives.[245]

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[244] *Tarble's Case* is not clear whether state court jurisdiction would have been valid had Congress specifically authorized it. However, if Congress has made an explicit determination that state court control presents no danger to the execution of its programs it would seem that no interest in federal supremacy would be served by judicial preclusion of state court power.

[245] It is true, of course, that federal as well as state judges might improperly disrupt the delicate workings of a federal program. The danger is considerably less, however, for several reasons. First, since federal judges are selected by the President and approved by the Senate, the federal government possesses substantial power to assure a floor of competency in the federal courts, something which is obviously not the case in the appointment of state judges. Second, because of the broad experience they obtain in working day to day with problems of predominantly federal concern, federal judges may well have a broader perspective than many of their colleagues on the state bench and may be more sensitive to interests of federal concern. *See* Meltsner, *Southern Appellate Courts: A Dead End*, in SOUTHERN JUSTICE 136, 137-38 (L. Friedman ed. 1965):

> State judges who wish to remain in office and to retain the society of their fellows . . . do not officially recognize the social consequences to the region and the nation of maintaining serfdom in place of slavery. They have shown a shocking eagerness to avoid even the appearance of fairness . . . .

Compare Fingerhood, *The Fifth Circuit Court of Appeals*, in SOUTHERN JUSTICE 214 (L. Friedman ed. 1965), *with* J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961). *See generally* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 163-68 (1969).

Second, it logically leads to the conclusion, advocated here, that certain limitations on federal court jurisdiction are unconstitutional, thus preserving the presumably more qualified and better equipped[246] federal courts to protect the constitutional rights of private individuals against attack by the federal government.

2. The Limits of the New Synthesis

It is important at this point to sort out exactly how far this "new synthesis," premised on the continued vitality of *Tarble's Case*, impinges on Congress' power to limit the jurisdiction of the lower federal courts. It may be helpful in this context to contrast our approach, in both practical and theoretical terms, with the implications of the "changing circumstances" theory described earlier.[247] The approach taken here would hold unconstitutional a congressional limitation on lower federal court jurisdiction only in situations involving two elements. First, a constitutional challenge must be involved;[248] and second, that challenge must be one that would result in a direct judicial command such as injunction, mandamus, or habeas corpus, controlling the actions of a federal officer or agent. The primary area of constitutional cases not covered by this approach, then, is that involving actions of state or local officials. Thus, for example, if Congress were to enact a statute precluding federal judicial review of local ordinances prohibiting school busing to attain racial integration, the approach advocated here would not prevent that result, for without the limits of *Tarble's Case* and its progeny state courts are under a duty to enforce federal constitutional rights[249] and thus the federal legislation would not have deprived a litigant of an independent judicial forum. State court exercise of power in such a case would not interfere with federal officials.[250]

Third, the decisions of a federal district judge may be immediately stayed and/or reviewed by a higher federal court. Actions of state judges, on the other hand, must first be taken through the entire state judicial system before there is an opportunity for federal review, and even at that point the review can come only from the Supreme Court (assuming it is not a matter that can be dealt with collaterally by the federal courts, such as habeas corpus).

[246] *See* note 245 *supra*.

[247] Text accompanying notes 101-41 *supra*.

[248] Note 142 *supra*.

[249] *Cf.* Testa v. Katt, 330 U.S. 386 (1947).

[250] A different case would exist, of course, if Congress placed the task of busing school children under the supervision of federal officials.

It is conceivable that the logic of *Tarble's Case* and its progeny should be extended to

The "changing circumstances" theory, on the other hand, would remove Congress' power to limit federal court jurisdiction even in the busing hypothetical.[251] Perhaps if we were writing on a clean slate, we could accept this result. After all, as noted previously, it seems eminently reasonable to have federal courts adjudicate federal constitutional rights. But we are obviously not writing on a clean slate, and to argue that the courts can openly disregard the all too clear dictates of article III simply because they now find the effect of that provision ill-advised is to set an extremely dangerous precedent in the area of constitutional interpretation. There will undoubtedly be occasions where courts will, in the opinion of many, incorrectly reject as ill-advised in modern society many of our fundamental constitutional principles. If we are to permit judicial repeal of the Constitution in certain cases, it becomes intellectually awkward to deny that power in others.[252]

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preclude state judicial review of *any* federal legislation, regardless of whether or not a federal official is enjoined as a result. After all, if the concern of the Court in *Tarble's Case* was that state courts might violate the "new" post-Civil War federal supremacy by disrupting federal programs, it could be argued that the same danger applies to state judicial review of all federal legislation. However, the most substantial interference clearly is direct control of the actions of federal officers in carrying out federal programs. In any event, the federal courts do not appear to have accepted this extension of the logic of *Tarble's Case*. Thus, rightly or wrongly, in cases where there exists no danger of enjoining or otherwise directly interfering with the actions of a federal official the state courts remain open. Hence under the logic of our position, congressional limitations of lower federal court jurisdiction in such situations would not violate the fifth amendment.

[251] It is important to note that our theory will limit Congress' power in certain instances where Eisenberg's "changing circumstances" theory would not. Recall that Eisenberg recognized what we consider a logically questionable exemption for congressional limitations which are "neutral" in their motivation. Text accompanying notes 129-34 *supra*. Thus he would allow the $10,000 jurisdictional minimum in federal question cases, even if its application prevented a claim for the deprivation of constitutional rights by federal officials from being brought in federal court. Under our theory, such an application of the jurisdictional amount requirement would be unconstitutional. *Accord*, Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); Note, 34 GEO. WASH. L. REV. 171, 174 (1965). *But see* Lynch v. Household Finance Corp., 405 U.S. 538 (1972) (dictum).

[252] Although the point has been made previously, *see* note 128 *supra* and accompanying text, it is of such significance that it is worth reemphasizing: We are not arguing that a court's interpretation of a constitutional provision can never be influenced by changing conditions. On the contrary, if we are to keep the concepts of "cruel and unusual punishment" or "due process" viable in modern society, we must constantly reevaluate their definitions. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). But in doing so, we are rejecting neither the fundamental broad dictates nor the language of the constitutional provision, as does the "changing circumstances" approach with respect to article III. Unlike the constitutional provisions referred to above, the language and intent of article III are narrowly drawn,

Of course, it might be argued that the approach described here disregards the framers' clear intent just as flagrantly as does the "changing circumstances" theory. The historical evidence appears fairly well established that the framers' fundamental assumption in drafting article III was that the state courts would always remain open to hear federal claims. Yet the synthesis here is premised on a significant limitation on that assumption: the radical change in political philosophy toward a strong centralized national government which took place in the interval between the drafting of article III and the post-Civil War era.[253]

But there exists a fundamental distinction between this theory and Eisenberg's. Eisenberg's "changing circumstances" theory rejects the clear dictate of article III that Congress has the discretion to create or abolish the lower federal courts. The limitation urged here is based on a recognition of the radical change in political philosophy that occurred after the drafting of article III. Though the availability of a state forum was an assumption of the framers, nothing in article III—or any other constitutional provision, for that matter—specifically provides that the state courts must remain open to hear all federal claims. Hence no constitutional provision is being disregarded merely because it no longer seems advisable. Only an assumption of the framers external to the Constitution is being rejected because it is inconsistent with acceptable modern political thought. So long as that assumption was not placed in the body of the Constitution, we are no more bound by it today than we are by the dictates of the Virginia and Kentucky Resolutions, authored by two of the most respected framers, Madison and Jefferson.

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thus effectively precluding the kind of "modernizing" analysis for which the others are so well suited.

[253] This radical change in political philosophy is demonstrated by the Virginia and Kentucky Resolutions passed by the legislatures of the respective states in 1798. The Kentucky Resolution was written by Thomas Jefferson and its Virginia counterpart by James Madison. Both were written in response to the passage of the Alien and Sedition Acts by the Federalist dominated Congress. The problems considered in the documents, however, were much wider in scope, relating to the very nature of the federal system of government. A major question addressed in the resolutions concerned who was to judge whether the central government was overstepping its rightful powers. The Resolutions, in varying degrees, advocated that the states should be the final judges. In later years, these resolutions were used as support for the doctrines of states' rights and nullification, particularly by John Calhoun. Many, including Calhoun, erroneously considered the resolutions to be part of the Constitution and to have legal authority. *See generally* A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 272-81 (1935); E. WARFIELD, THE KENTUCKY RESOLUTIONS OF 1798 (1887).

Once we reject the external assumption of the Madisonian Compromise to the limited extent recognized by *Tarble's Case*, the limitation on Congress' power to restrict lower federal court jurisdiction flows not from our rejection of article III because of its modern inadvisability, but rather from the dictates of the fifth amendment's due process clause, which requires an independent judicial forum for the adjudication of constitutional rights. In this manner we have avoided the potentially harmful effects on methods of constitutional interpretation that could result from use of the "changing circumstances" theory.

The limitations on judicial jurisdiction discussed to this point are those directed by Congress solely at the lower federal courts. Complications arise when Congress has precluded *any* court, federal or state, from reviewing the constitutionality of certain actions.[254] When the subject of the limitation concerns activities of federal officers, the analysis would logically not differ from the situations previously discussed: Due process requires an independent judicial forum, and even if Congress had not explicitly limited state court jurisdiction, *Tarble's Case* would have yielded the same result. Thus as in the previous situations, Congress' limit on the jurisdiction of the federal courts would fall, and *Tarble's Case* would leave the limitation on state court jurisdiction intact.

In cases where the congressional limitation does not concern judicial control of the acts of federal agents, however, a dual congressional preclusion of both federal and state court jurisdiction would present very different problems. As noted previously, the dual limitation is unconstitutional for failing to provide an independent judicial forum. Thus one of the two limitations must fall; but which one? The Second Circuit Court of Appeals, faced with such a problem in *Battaglia v. General Motors Corp.*[255] in regard to the constitutionality of the Portal-to-Portal Act of 1947,[256] concluded that because due process required an independent judicial forum the congressional limitation on the federal courts must fall. However, if in ruling upon the constitutionality of the Act a state court would not be in any way enjoin-

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[254] *See, e.g.*, Portal-to-Portal Act of 1947, § 204(d), 29 U.S.C. § 252(d) (1970).
[255] 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).
[256] 29 U.S.C. § 252(d) (1970).

ing or otherwise ordering a federal officer or agent,[257] there would appear to be no reason why the dictates of the Madisonian Compromise could not be given effect. Thus where Congress has precluded both federal and state judicial review, in situations where there is no danger of directly controlling the acts of federal officials, a logical conclusion would be that since Congress has complete power to limit *federal* court jurisdiction under article III, it is, under the Madisonian Compromise, the limitation on the *state* courts which should fall. This is so for the framers clearly gave Congress the power to limit lower federal court jurisdiction. If the subject matter excluded from judicial review does not involve the actions of federal officers, the state courts are not prevented by the logic of *Tarble's Case* from reviewing the federal legislation. Hence, since Congress was given power to limit federal court jurisdiction precisely because the state courts would be available to hear federal claims, the dictates of due process can be reconciled most effectively with the terms of the Madisonian Compromise by the conclusion that the limit on the state rather than on the federal courts must fall.

One further potentially severe limitation on the reach of the new synthesis derives from the fact, noted earlier, that Congress can probably circumvent the difficulties created by *Tarble's Case* by explicitly authorizing state court jurisdiction over the acts of federal officials. Thus if Congress truly desired to preclude lower federal court jurisdiction, it could avoid constitutional problems by authorizing state court review in those cases.

This fact does not mean, however, that judicial recognition and adoption of the new synthesis would have no effect on possible congressional limitations on lower federal court jurisdiction. When Congress consciously attempts to exclude federal court review of a particular area of the law, it often intends to exclude all forms of judicial review, both state and federal. Recognition of a due process right to an independent judicial forum would, of course, prohibit such a result. Absent the new synthesis' emphasis on the role of *Tarble's Case*, it would seem logical that it be the state rather than the federal courts which would retain their jurisdiction. If the dictates of due process can be followed without disregarding the requirements of article III, such a reconciliation should be achieved. Because of *Tarble's Case* and its

[257] This appears to have been the case in *Battaglia*. *See* note 250 *supra*.

progeny, however, the state courts must remain closed in cases in which the acts of federal officials would be subject to direct judicial regulation, at least absent explicit congressional authorization. Thus, in cases in which Congress has attempted to preclude all forms of judicial review of the actions of federal officials, adoption of the new synthesis would result in federal, rather than state, jurisdiction.

Secondly, judicial recognition of the new synthesis would probably deter congressional limitations on the jurisdiction of federal courts. Often when Congress considers adoption of limits on the powers of the lower federal courts it is likely that little thought is given to possible denials of due process. This is especially true, one might suppose, for what Eisenberg calls "neutral" housekeeping regulations, such as the jurisdictional amount prerequisite to general federal question jurisdiction.[258] Under the new synthesis, Congress, in passing such legislation, would be required to provide explicitly for a state forum to hear constitutional claims involving the direct control of federal officials. Congress would thus be made aware of two important considerations: (1) the legislation in question presents serious constitutional problems, and (2) the only way to avoid these problems is to entrust to the competence of the state courts the power to control federal officials directly and perhaps even to frustrate numerous federal programs.[259] Indeed, not even the protection of potential removal to the federal courts would be available since the purpose of Congress' action has been specifically to preclude federal review. Awareness of these considerations would hopefully do much to deter such congressional limitations. Absent the new synthesis, however, we could not be assured that Congress would even be aware of the dangers in such jurisdictional limitations.

Of course, Congress may at times be all too well aware of the

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[258] Eisenberg, *supra* note 3, at 516; *see* text accompanying notes 129-41. It appears that in increasing the jurisdictional amount requirement from $3,000 to $10,000 in 1958, Congress was unaware that constitutional claims against federal officers fell within the general federal question statute. S. REP. No. 1830, 85th Cong., 2d Sess. 6 (1958). Thus, section 1331, as applied to suits to restrain unconstitutional conduct of federal officers, is clearly susceptible to attack under the new synthesis.

[259] Congress could, we suppose, simply pass a statute authorizing state court review of all actions of federal officers. But, primarily because of the policy arguments discussed earlier concerning the inherent dangers of state court control of federal officers, passage of such a statute is almost inconceivable.

effects of jurisdictional limitations on the lower federal courts and the entrusting of jurisdiction to the state courts. Congress might, for example, grant jurisdiction to the state rather than the federal courts to prevent findings of fact which might be more favorable to one or the other litigant when the federal court is the trial forum. Thus, since the new synthesis does not question the motives of Congress in denying original jurisdiction to the federal courts, Congress might well decide, for example, to deny the federal courts original jurisdiction in all school desegregation cases so as to entrust the state courts with a broad power, as finders of fact, to determine the presence of *de jure* segregation subject only to Supreme Court reversal in the event that the findings are completely against the weight of the evidence. (Indeed, were Congress to deny the federal courts original jurisdiction in school desegregation cases, it would not even be necessary to specify that the state courts have such jurisdiction since *Tarble's Case* would not apply to such state actions unless, possibly, federal funds were involved.) The problem is real; but the solution, if any, must lie in a constitutional amendment and not in a "changing circumstances" interpretation of the Constitution.

IV. Conclusion

Congress clearly does not enjoy unfettered control over lower federal court jurisdiction. Rather, in exercising its otherwise plenary article III powers, it is restricted from withdrawing the jurisdiction of lower federal courts to hear suits seeking direct control of federal officers. Article III's apparent grant of complete discretion over lower federal court jurisdiction must be read in light of the fifth amendment's guarantee of due process and the fundamental change in the philosophy of federalism that took place following the Civil War.

The compromise underlying the drafting of article III does not require discarding the Supreme Court's decision in *Tarble's Case*. Rather, the compromise must be considered in light of the developments during the first seventy years of the Republic and the change in the philosophy of state-federal relations. *Tarble's Case* represents one of many manifestations of the philosophy favoring a strong, centralized national government free from unwarranted state interference.

By using *Tarble's Case* as an offensive weapon, lower federal courts can check congressional control of their jurisdiction. In this way they will be able to provide a federal forum for the proper resolution of certain constitutional claims involving federal statutes. Though Congress can, if it truly desires, circumvent the limits imposed by the combination of *Tarble's Case* and the fifth amendment, the elements of the new synthesis nevertheless do place obstacles in Congress' path, forcing Congress to comprehend the true consequences of its acts. In situations where Congress has attempted to limit all judicial review of the acts of federal officers and in those where Congress has failed to provide explicitly for state court review, the new synthesis forces cases into federal rather than state court. This result may prove insufficient to those who would hope to circumvent completely Congress' power to limit the jurisdiction of the federal courts. But it is, quite frankly, the most that can be obtained within the rational bounds of article III; and though greater restrictions on congressional power might be preferred as a policy matter, the achievements of the new synthesis should not be underestimated.