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## CONGRESSIONAL POWER OVER THE JURISDICTION OF THE FEDERAL COURTS \*

PAUL M. BATOR †

### I. CONGRESS' POWER OVER THE JURISDICTION OF THE INFERIOR FEDERAL COURTS

The Constitution contains many provisions that are not at all clear. It does, however, contain a few that are clear. One of the clearest is the power of Congress to regulate the jurisdiction of federal "[t]ribunals inferior to the Supreme Court."

Article III of the Constitution provides that the "judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>1</sup> As we know from the records of the Constitutional Convention, this text was the product of a compromise between those who thought that the Constitution itself should establish a full set of federal courts, and those who thought that the Constitution should authorize no federal courts inferior to the Supreme Court whatever. The purpose of the compromise was to leave it to *legislative* judgment, to be made from time to time, whether and to what extent lower federal courts are needed to assure the effectiveness and supremacy of federal law.<sup>2</sup>

The Constitutional text itself makes clear that Congress is free to decide that there should be no lower federal courts at all. This would leave all questions of federal law (including the enforcement of federal rights) wholly to the state courts in the first instance, subject to review in the United States Supreme Court. However, the purpose of the compromise imbedded in Article III goes further than giving the Congress the all-or-nothing power to decide whether lower federal courts should exist. It leaves it to Congress

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\* This paper is based substantially on a statement by the author before the Subcommittee on the Constitution of the Senate Committee on the Judiciary in May, 1981. See *Hearings on Constitutional Restraints on the Judiciary Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 39-56 (1981).

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1. U.S. CONST. art. III, § 1.

2. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 11-13 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

to decide, having created lower federal courts, what their jurisdiction should be—that is, to decide *which* of the cases to which the federal judicial power extends should be litigated in the lower federal courts.

The position that Congress has this additional power to “pick and choose,” to create lower federal courts and give them less than the entire federal judicial power, is not based primarily on the mechanical argument that the greater power (not to create such courts at all) must include the lesser (to create them but limit their jurisdiction). It is based on the fact that this reading is the only one consistent with the understanding which animated the compromise adopted by the Framers. The essence of that compromise was an agreement that the question whether access to the lower federal courts was necessary to assure the effectiveness of federal law should not be answered as a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment, to be made from time to time in the light of particular circumstances. It would make nonsense of that notion to hold that the only power to be exercised is the all-or-nothing power to decide whether *none* or *all* of the cases to which the federal judicial power extends need the haven of a lower federal court. The central premise of the compromise was the insight that the question whether a given “federal” case should initiate in a state court (subject to Supreme Court review), or in a lower federal court, is not an appropriate question for a decision at the constitutional level. Rather, Congress is the body best suited to make this institutional judgment on the basis of changing circumstances.

The position that the Constitution obligates Congress to create lower federal courts, or (having created them) to vest them with some or all of the jurisdiction authorized by article III, has been repudiated by an unbroken line of authoritative judicial and legislative precedent. From the very first, Congress has acted on the premise that it is for it to decide which if any of the cases and controversies to which the federal judicial power extends should be litigated in the first instance in lower federal courts. The First Judiciary Act, passed by a Congress whose membership included many of the Framers, created lower federal courts but gave them only a small portion of the federal judicial power.<sup>3</sup> Cases arising under federal law could not generally be brought in

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3. The First Judiciary Act of 1789, 1 Stat. 84 (1789). This Act left to the state courts cases arising under federal law. See HART & WECHSLER, *supra* note 2, at 32-36.

the lower federal courts until 1875;<sup>4</sup> and even thereafter, a jurisdictional amount limit put many such cases in the exclusive original jurisdiction of the state courts.<sup>5</sup> Further—and most significantly—to this day litigants who assert federal rights by way of defense do not generally have any access to the inferior federal courts.

Nor has this exercise of Congressional power been a one-way ratchet. Congress has consistently felt free to restrict lower court jurisdiction even after it has been given. Thus, it has on numerous occasions raised the jurisdictional amount.<sup>6</sup> It has both expanded and restricted the diversity and removal jurisdictions.<sup>7</sup> It has excluded from the jurisdiction of the lower federal courts special categories of cases—most significantly in measures such as the Norris-LaGuardia Act,<sup>8</sup> the Johnson Act of 1934,<sup>9</sup> and the Tax Injunction Act of 1937.<sup>10</sup>

Further, and notwithstanding contrary dicta by Justice Story in *Martin v. Hunter's Lessee*,<sup>11</sup> the Supreme Court has upheld Congress' exercise of this power in an unbroken line of authoritative precedent.<sup>12</sup> Indeed, the dramatic fact is that not a single Supreme Court case can be cited casting the slightest doubt on the validity of the hundreds of statutes premised on the notion that it is for Congress to decide which, if any, of the cases to which the federal judicial power extends should be litigated in the first instance in the lower federal courts.

The most recent authoritative statement of the meaning of the Constitution in this respect is the opinion of the Supreme Court in *Palmore v. United States*.<sup>13</sup> Here is the relevant passage:

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4. General federal question jurisdiction was first granted to the inferior federal courts by the Judiciary Act of 1875, 18 Stat. 470 (1875) (current version at 28 U.S.C. § 1331).

5. The jurisdictional amount limit for federal question cases was set initially at \$500. Judiciary Act of 1875, 18 Stat. 470 (1875). It was escalated in stages to \$10,000. It was not eliminated until 1980. See Act of December 11, 1980, Pub. L. 96-486, § 2(a), 94 Stat. 2369 (1980) (to be codified at 28 U.S.C. § 1331).

6. See, e.g., Act of July 25, 1958, 72 Stat. 415 (1958) (raising the jurisdictional amount to \$10,000).

7. See generally HART & WECHSLER, *supra* note 2, at 1050-51, 1192-93.

8. 29 U.S.C. §§ 101-115 (1976).

9. 28 U.S.C. § 1342 (1976).

10. 28 U.S.C. § 1341 (1976).

11. 14 U.S. (1 Wheat.) 304 (1816); see generally HART & WECHSLER, *supra* note 2, at 313-15.

12. See cases cited in HART & WECHSLER, *supra* note 2, at 309-24. In particular, see the important opinion in *Lockerty v. Phillips*, 319 U.S. 182 (1943).

13. 411 U.S. 389 (1973).

Article III describes the judicial power as extending to all cases, among others, arising under the laws of the United States; but, aside from this Court, the power is vested "in such inferior Courts as the Congress may from time to time ordain and establish." The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts to hear and decide cases within the judicial power of the United States, including those criminal cases arising under the laws of the United States. Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III. "[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."

. . . .

Congress plainly understood this, for until 1875 Congress refrained from providing the lower federal courts with general federal-question jurisdiction. Until that time, the state courts provided the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts.<sup>14</sup>

In light of this clear—and consistent—line of authority in the Supreme Court, occasional lower-court dicta which espouse the opposite view do not have authoritative weight.

It should be noted that it is not my argument that Congress has plenary power to determine what if any rights shall be enforceable in court. The Constitution does guarantee that, under certain circumstances, there shall be access to courts; due process

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14. *Id.* at 400-01 (citations omitted).

does in some cases mean judicial process.<sup>15</sup> Consequently, Congress is *not* free to control the jurisdiction of the state courts so as to foreclose the vindication of the constitutional right to judicial review. But the Constitution is indifferent whether that access is to a federal or a state court. If the Congress decides that a certain category of case arising under federal law should be litigated in a state court, subject to Supreme Court review, *neither the letter nor the spirit of the Constitution has been violated*. What has happened is that Congress has taken up one of the precise options which the Constitutional Framers specifically envisaged. From the viewpoint of the Constitution, nothing has gone awry.

It is commonplace to say that Congress' power to regulate the jurisdiction of the lower federal courts cannot be exercised in a manner that violates some other Constitutional rule. In that sense—and in that sense only—it can be said that Congress' power is not plenary. Thus, if Congress provides that only Catholics may bring suits in the lower federal courts, this would be invalid, not because non-Catholics have a constitutional right of access to lower federal courts, but because the Constitution prohibits any Congressional action discriminating among religious denominations. Similarly, a statute which said that whites only may resort to the district courts would be invalid. The reason, again, is that, in the absence of some compelling and valid justification, Congress is not free to make distinctions based on race.

Furthermore, a Congressional statute regulating the lower courts' jurisdiction in a wholly arbitrary manner ("only plaintiffs who are more than six feet tall may sue in the district courts") would obviously violate the due process clause.

It is, however, a fundamental and egregious mistake to broaden this argument into an assertion that Congress is not free to differentiate among different subject matters, and to specify categories of cases arising under federal law which may or may not be brought in the lower federal courts. Unlike legislation which makes distinctions on the basis of race or religion, there is no independent constitutional rule which says, absolutely or presumptively, that various categories of federal question litigation must be treated jurisdictionally alike. There is no independent constitutional value which says that it is absolutely or presumptively illegitimate, or undesirable, or suspect to decide that one

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15. See generally HART & WECHSLER, *supra* note 2, at 324-60; L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 376-94 (1965).

category of federal right shall be enforced originally and exclusively in the state courts, whereas another may be litigated in the lower federal courts. From the perspective of the Constitution, the obligation to litigate a given category of federal question cases in the state courts is not a "burdening" of that right. Indeed, it was the very purpose of the article III compromise to give Congress the power to make precisely these decisions.

It is therefore my submission that a statute providing that cases challenging the validity of state legislative apportionments, or cases challenging the validity of state statutes regulating abortions, may not be brought in the lower federal courts, would (if correctly drafted technically) be invulnerable to constitutional challenge. (It is important to note that there are difficult technical problems in drafting such statutes. Congress is free to decide that a lower federal court may not hear a given category of case or controversy at all. But it cannot allow a federal court to take jurisdiction and then command it to decide the case in an unconstitutional manner. Intricate problems of draftsmanship, therefore, arise when statutes seek to remove federal court jurisdiction over certain types of *questions*.) Such a statute would, if correctly drafted, be valid because it would exemplify the very power that the Framers sought to give Congress: the power to decide that federal interests are best maintained by requiring certain cases to which the federal judicial power extends to be initiated in the state—rather than the lower federal—courts.

Various arguments contrary to this position have been offered, but none of them seem to me to be impressive.

The argument advanced by Justice Story, that article III requires the Congress to vest the entire quantum of federal judicial power in federal courts, has been rejected by an unbroken line of Congressional and Supreme Court precedents, running from the time of the first Congress to the present. It no longer deserves to be taken seriously.

It is sometimes argued that, notwithstanding the clearly expressed plan of the Framers, changing circumstances show that lower federal courts *are* an absolute necessity and that we should therefore override the original understanding and restrict Congress' power.<sup>16</sup> The argument seems to me to be wholly illegiti-

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16. See Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 501 (1974); cf. Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-54 (1975).

mate and without authority. Indeed, the argument refutes itself: the fact that circumstances are, today, different than they were in 1789 with respect to the need for and role of lower federal courts, supports the wisdom of the Framers' compromise rather than furnishing an excuse for its abandonment.

It is sometimes asserted that Congress does not have the authority to carve out special categories of cases arising under federal law and remit those to the exclusive original jurisdiction of the state courts.<sup>17</sup> It is unclear just why this is asserted to be so. Neither the equal protection clause nor any other clause of the Constitution requires equal jurisdictional treatment for different subject-matters of litigation. If it is asserted that this "discriminates" against a certain category of federal right, the answer must be that such discriminations—that is, the power to pick and choose among different categories and subject matters of federal cases—is precisely the power that article III sought to grant. Ultimately the assertion must rest on the notion that there is a constitutional right as such to litigate certain categories of cases in the lower federal courts—a notion which seems to me to be plainly erroneous.

A somewhat narrower argument is that if it is shown that Congress' motive in requiring a certain category of case to be brought in the exclusive original jurisdiction of the state courts is "hostility" to the substantive constitutional right in question, it can be struck down. I do not understand how such a rule could be administered. What would be an adequate indication of hostility? The New Deal Congress, in 1934 and again in 1937, moved by serious reservations about the constitutional doctrines restricting the states' regulatory and taxing authority under the due process clause, provided that constitutional suits to restrain the enforcement of state tax statutes<sup>18</sup> and public utility rate orders<sup>19</sup> must ordinarily be brought in the state courts. Are these statutes invalid? No court or commentator has so suggested in the past forty years. Why is a statute, divesting the lower federal courts of jurisdiction to hear suits challenging state statutes regulating abortions different?

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17. See, e.g., Sager, *Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

18. See note 10 *supra*.

19. See note 9 *supra*.



Indeed, the notion that it is illegitimate for Congress to express concerns about substantive constitutional matters through the technique of jurisdictional regulation is itself erroneous. As just stated, that is precisely what Congress did in the Johnson Act of 1934 and the Tax Injunction Act of 1937, and it acted in an analogous manner in the Norris-LaGuardia Act.<sup>20</sup> Such jurisdictional statutes rest on a rational and legitimate notion: that our federalism may benefit if the further elaboration of certain types of constitutional issues are subjected to the insights of the state, rather than the lower federal courts before they reach the United States Supreme Court.<sup>21</sup> The state courts, equally with the federal, are charged with the task of enforcing and protecting federal constitutional rights. To give them the task of doing so—subject to Supreme Court review—may manifest concern with or even disagreement with existing constitutional doctrine, but does not subvert it. Such a decision by the Congress may quite legitimately rest on two allied notions: that in interpreting the constitutional provisions which restrict state power, it may be wise in the first instance to have access to the insights of the tribunals which are closest to the problem at hand; and, second, that it may be politically healthy to give the state courts the opportunity in the first instance to enforce federal constitutional restrictions on state power.

I conclude that a correctly drafted statute that does nothing more than provide that a given category of case or controversy arising under the Federal Constitution or laws shall revert to the exclusive original jurisdiction of the state courts is valid, so long as it does not create discriminations which the Constitution independently prohibits and is not wholly irrational and arbitrary.<sup>22</sup>

It must be stressed that the fact that Congress has the *power* to do something is not an argument that it should exercise that power. Nothing in this paper should be taken to be an endorsement of any particular proposal with regard to the jurisdiction of the lower federal courts. Indeed, Congress should be most cautious in creating special jurisdictional rules for special categories of constitutional litigation. Such statutes are dangerous because they seem to be premised on the very argument which animates those who assert

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20. See note 8 *supra*.

21. See generally Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 629-34 (1981).

22. I am assuming the case is not one within the Supreme Court's original jurisdiction.

that Congress lacks this power—the argument that state courts may be expected to give federal constitutional rights less vigorous enforcement than the lower federal courts.

On the other hand, this kind of jurisdictional regulation is quite legitimate if it is the conscientious judgment of Congress that a given category of federal constitutional litigation may benefit from the special insights state courts can provide into matters that touch closely upon the regulatory and political authority of the states. And I stress again my initial point. The Constitution has relatively few things in it which are clear; the power to allocate cases arising under federal law between the lower federal and the state courts must be counted as one of them. There are many legitimate reasons for not favoring legislation that restricts the power of the lower federal courts to adjudicate abortion cases, or apportionment cases, or some other category of cases. However, doubts about Congress' power to enact these statutes is not one of them.

## II. CONGRESS' POWER OVER THE APPELLATE JURISDICTION OF THE SUPREME COURT

Congress' power to control the appellate jurisdiction of the Supreme Court raises questions that are much more difficult. The difficulty is created by the following circumstance. The text of the Constitution provides that the appellate jurisdiction of the Supreme Court shall be subject to "such Exceptions, and under such Regulations as the Congress shall make."<sup>23</sup> This language plainly seems to indicate that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the appellate jurisdiction, it has the authority to do so. If the Constitution means what it says, it means that Congress can make the state courts—or, indeed, the lower federal courts—the ultimate authority for the decision of any category of case to which the federal judicial power extends.

What is so troubling about that position, however, is that such a jurisdictional withdrawal would create a system inconsistent with the structure that the Framers assumed to be appropriate. The "states' rights" argument at the Constitutional Convention was that there was no need for lower federal courts precisely because the appellate jurisdiction of the Supreme Court would provide sufficient assurance of the supremacy and uniformity of federal law in cases decided by the state courts. It was the premise of this argument

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23. U.S. CONST. art. III.

that the Supreme Court *would* have the power to review cases originating in the state courts concerning issues of federal law. It was plainly not contemplated that the system could work effectively with the state courts as courts of *last* resort on issues of federal law. Even on the assumption that the state courts would comply with the supremacy clause and conscientiously enforce the Federal Constitution and laws, the insuperable problem would be that there would be no way to make the commands of federal law uniform as well as supreme.

I stated before that a statute providing that an important category of constitutional litigation is to be within the exclusive original jurisdiction of the state courts would not violate the letter or the spirit of the Constitution. A statute depriving the Supreme Court of appellate jurisdiction over the same category of constitutional litigation *would*, however, violate the spirit of the Constitution, even if it would not violate its letter. It violates the spirit because the structure contemplated by the instrument makes sense—and was thought to make sense—only on the premise that there would be a federal Supreme Court with the power to pronounce uniform and authoritative rules of federal law.

Does it make sense to say that there may be things that do not formally violate the Constitution—that comply with its letter, and therefore are not “invalid”—that nevertheless violate its spirit? The answer is clearly “yes.” Congress has undoubted power to pack the Supreme Court by making it a court of fifteen, twenty, or even fifty Justices. A statute so doing could not be held invalid. But there is no doubt that such a statute would violate the Constitution’s spirit—that it would run against the purpose of the Framers to create an independent judiciary.

We should therefore not be embarrassed to take the position that Congress may have the authority to carve out subject matters and withdraw them from the Supreme Court’s appellate jurisdiction, but *should* not do so, not only because they represent bad policy but because they violate the structure and spirit of the instrument.

Should one go further and adopt the position that Congress does not have the *power* to carve out areas of federal-question or constitutional litigation from the appellate jurisdiction of the Supreme Court?

Various arguments have been advanced which would limit the powers of Congress to create exceptions to the appellate jurisdiction of the Supreme Court in a variety of ways. Some of the arguments are historical—they assert that the power to make exceptions was in-

tended by the Framers to be restricted to questions of fact.<sup>24</sup> Other arguments depend on the assertion that to allow Congress such a power would subvert the fundamental Constitutional plan.<sup>25</sup>

There are major weaknesses and flaws in all of these arguments. The historical evidence is far from conclusive, but the evidence to support the proposition that the exceptions clause was to be reserved exclusively to issues of fact is weak. Arguments deriving from "structural" notions are also weak, primarily because they are so vague, particularly in the face of a text that is not at all vague. True, there is ample evidence that the Framers *generally* contemplated Supreme Court review of state court judgments. But they also contemplated Congressional regulation of this jurisdiction, and nothing in the "structure of the document" argument serves in any powerful way to distinguish between regulations that are valid and those that are invalid.

In this connection, it must be remembered that Congress has in fact made major exceptions in the appellate jurisdiction of the Supreme Court. For a century, federal criminal cases were not generally reviewable in the Supreme Court;<sup>26</sup> if the critical feature of the "structural argument" is the need for uniformity, this gap would plainly be invalid. Indeed, for some 100 years, state court decisions on issues of federal law were themselves reviewable only on a limited basis, depending on how the state court decided the federal question.<sup>27</sup> Congress also, on one occasion, made an exception to the appellate jurisdiction of the Supreme Court on an ad hoc "retaliatory" basis; and this statute was upheld in the celebrated *McCardle* case.<sup>28</sup> It is fashionable today to stress that *McCardle* is special and distinguishable; nevertheless, the language of the Court in *McCardle* plainly proceeded on the assumption that Congress' power is plenary; and this is the only Supreme Court opinion squarely on point.

My own opinion is that the arguments that would place serious limits on the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court are not, in the end, persuasive.

24. See R. BERGER, *CONGRESS V. THE SUPREME COURT* 285-96 (1969); Merry, *Scope of the Supreme Court's Appellate Jurisdiction*, 47 MINN. L. REV. 53 (1962).

25. See HART, *supra* note 26, at 1364-65; Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201-02 (1960).

26. See generally HART & WECHSLER, *supra* note 2, at 1539 n.3.

27. See HART & WECHSLER, *supra* note 2, at 439-41.

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

Indeed, a powerful case can be made that such a plenary power may be essential to making the institution of judicial review tolerable in a democratic society.<sup>29</sup>

Nevertheless, it is clear that the contours of the exceptions clause remain shrouded in considerable doubt. Congress may have the power to make the state courts the courts of last resort in important categories of constitutional litigation; but its power to do so is not at all free from ambiguity. Furthermore, even if one believes—as I do—that Congress has the raw power to do this, the argument that it would violate the spirit of the instrument to do so seems extremely powerful. I note, too, the powerful policy arguments against such a retaliatory use of the power granted to Congress by the exceptions clause: it could not long be tolerated to have the Federal Constitution be subject to different interpretations in different states on any issue of significance. Nor would it be tolerable to have the law “frozen” permanently into the shape given it by the last Supreme Court precedents rendered before the enactment of the statute withdrawing jurisdiction—precedents that would continue to be binding authority in the state courts (and that ironically, are likely to be the very precedents leading to the Congressional dissatisfaction manifested in the new jurisdictional statute).

I conclude, therefore, that resort to the power to make exceptions to the appellate jurisdiction of the United States Supreme Court by making the state courts the courts of last resort in one or more important categories of constitutional litigation is a dubious expedient. The validity of such a measure would be surrounded by serious doubts. Such a measure would in any event be criticized as flying in the face of the spirit of the Constitution; its legitimacy would therefore be extremely vulnerable, as was the proposal of President Roosevelt to “pack” the Supreme Court. And, finally, such a measure would create a host of serious and perhaps intolerable problems in the fair and rational administration of the laws.

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29. See Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965).