Naked Came I: Jurisdiction-Stripping and the Constitutionality of House Bill 3313

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I. INTRODUCTION

> Our country was founded on the principle that there are fundamental human rights that should be beyond the reach of any government—not just a king, not just an elected executive, but *any* government, including even a majority of the representative Congress or state legislature.[1]

On July 22, 2004, the U.S. House of Representatives passed House Bill 3313, which strips original jurisdiction from federal courts and the Supreme Court of its appellate jurisdiction over same-sex marriage cases.[2] This bill comes at a time in our nation's history when our country is as politically divided as it has been in the past 150 years, when particularly divisive issues define voting patterns, and when many citizens believe that the Supreme Court has become much too political for its own good.[3] Additionally, House Bill 3313 comes before the Senate in the wake of eleven new state constitutional amendments passed in 2004 that define marriage as solely between a man and a woman,[4] with Texas joining that group in November 2005. In total, eighteen states have constitutional amendments prohibiting same-sex marriage and forty states have

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1. Remarks of Archibald Cox, *reprinted in* NEWSWEEK, Sept. 28, 1981.

2. Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004) ("No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, Section 1738C or this section.").
This bill would amend 28 U.S.C. §1632 (2005). *Id.*

3. *See generally* THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA 1–5 (2004).

4. Thomas Roberts & Sean Gibbons, *Same Sex Marriage Bans Winning on State Ballots*, CNN, Nov. 3, 2004, *at* http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage.

laws prohibiting same-sex marriage.[5] The House passed House Bill 3313 with the intent to take certain "political" issues out of the hands of the courts[6] and, in light of the political atmosphere of the country today, the bill may be the first true subject matter jurisdiction-stripping bill to become law.

On its face, Article III of the Constitution seems to give Congress the power to limit federal courts' original jurisdiction and the Supreme Court's appellate jurisdiction. Article III, Section 1 of the Constitution vests the judicial power of the United States in the Supreme Court, "and in such inferior Courts as the Congress may from time to time ordain and establish."[7] Commentators agree that Congress' power to create inferior federal courts includes the lesser power of granting and limiting jurisdiction to those courts.[8] Additionally, Article III, Section 2 grants appellate jurisdiction to the Supreme Court, "with such Exceptions, and under such Regulations as the Congress shall make."[9] The Exceptions and Regulations Clause seems to explicitly provide Congress with the power to limit the Supreme Court's appellate jurisdiction. In the Judiciary Act of 1789,[10] Congress interpreted the Exceptions and Regulations Clause just this way, creating a congressional mandate for Supreme Court appellate jurisdiction, and the Supreme Court has tacitly accepted this statutory grant of jurisdiction ever since.[11]

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5. ALASKA CONST. art. I § 25; ARK. CONST. amend. III; GA. CONST. art. I, § 4; HAW CONST. art. 1, § 23; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA CONST. art. XII, § 15; MICH. CONST. art. § 25; MISS. CONST. §263-A; MO. CONST., art. I, § 33; NEB. CONST. art. I, § 29; NEV. CONST. art I, § 21; OH. CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; 3 PA. CONST. STAT. §1704; TEX. CONST. art. I,§ 32; UTAH CONST. art. I, § 29; *see also* Human Rights Campaign, *at* http://www.hrc.org/Template.cfm?Section=Federal_Constitutional_Marriage_Amendment&CONTENTID=20716&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66 (last visited Nov. 17, 2005).

6. John Hostettler, Protecting Marriage by Constraining the Courts, *at* http://www.house.gov/hostettler/Issues/Hostettler-issues-2003-10-17-constraining-courts.htm (last visited Nov. 17, 2005).

7. U.S. CONST. art. III, § 1.

8. *See* PAUL M. BATOR ET AL, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 12 (2d Ed. 1973); Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 145 (1982).

9. U.S. CONST. art. III, § 2, cl. 2.

10. Act of Sept. 24, 1789, ch. 20, § 1 Stat. 73 (current version at 28 U.S.C. §§ 1251–1259 (2005)).

11. Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 24–25 (1981); *see also* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810).

> When the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared that the ap-

In his law review article, Professor Henry Hart responded to the questions of whether Congress had unlimited control of federal jurisdiction and whether this control was consistent with other provisions in the Constitution.[12] Though Professor Hart's article has been widely debated,[13] his overarching thesis is generally accepted:[14] Congress' power to restrict Supreme Court jurisdiction is bound by the requirement that the Court's "essential functions" may not be trammeled, but Congress' power to restrict lower federal court jurisdiction is broad.[15]

This Comment will build on Professor Hart's thesis, arguing that the essential functions of the federal judiciary are broader than what he and later commentators have purported. The federal judiciary's jurisdiction is protected by a three-tiered "essential functions" restriction.[16] First, Congress may not abridge federal courts' essential functions within the tripartite system.[17] Secondly, Congress may not abridge federal courts' essential functions as the "judicial power of the United States."[18] Finally, Congress may not violate any individual constitutional liberty in exercising its jurisdictional powers.[19] Ultimately, by expanding Professor Hart's essential functions thesis, this Comment will demonstrate that this three-step test is necessary to analyze the constitutionality of any jurisdiction-stripping act within our tripartite system of government.

Part II of this Comment will summarize the various theories of Congress' jurisdictional powers. Part III will examine the historical and philosophical roots of the Constitution and Congressional power. This section will illustrate that the framers' intent and the wording of the Constitution prevent Congress from altering the constitutional plan or preventing federal courts from performing its essential functions. Part IV will apply the preceding analysis to House Bill 3313 and ultimately conclude that Congress does not have the power to strip any federal court of the jurisdiction to hear same-sex marriage cases.

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pellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

Id.; *see also* United States v. More, 7 U.S. (3 Cranch) 159, 172–73 (1805).

12. *See* Hart, *supra* note 8, at 1363.

13. *See, e.g.*, Sager, *supra* note 11; Redish, *supra* note 8; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 61–66 (1975).

14. *See generally* Lloyd C. Anderson, *Congressional Control Over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise*, 39 BRANDEIS L.J. 417, 417–18 (2000).

15. Hart, *supra* note 8, at 1365.

16. *Id.*

17. *Id.*

18. Hart, *supra* note 8, at 1365; U.S. CONST. art. III, § 1.

19. Hart, *supra* note 8, at 1365.

II. THE THEORETICAL UNDERPINNINGS OF CONGRESSIONAL JURISDICTION-STRIPPING POWER

The crux of the debate surrounding congressional jurisdiction-stripping power is the question of whether state courts are proper fora for the adjudication of federal issues. The first scholars to address this issue based much of their analysis on the assumption that state courts and federal courts have coequal abilities to interpret federal issues.[20] This assumption led these scholars to conclude that Congress' power to strip federal courts of subject matter jurisdiction is broad.[21] Recently, however, many scholars have rejected this traditional position because they believe that state courts cannot sufficiently adjudicate many federal issues.[22] Although this Comment takes a wholly different approach to this debate, it is nonetheless important to understand the issue's ideological and theoretical underpinnings.

A. Justice Story

The first person to question Congress' ability to limit subject matter jurisdiction was Supreme Court Justice Story. In *Martin v. Hunter's Lessee*,[23] Justice Story argued that the language of "shall be vested" in Article III, Section 1 meant that the entire federal judicial power must be vested in some federal court.[24] Justice Story argued that the word "shall" was an imperative, mandating that a federal forum always be available for federal questions.[25] Justice Story further contended that because Article III vests judicial power wherever the Supreme Court lacks original jurisdiction, it logically follows that "[C]ongress 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 [S]upreme [C]ourt cannot take original cognizance."[26]

B. Professor Hart

Justice Story's assertions lay fallow until the 1950s when Professor Henry Hart sowed the seeds of the modern debate. In 1953, Professor Hart published a law review article in the form of an imaginary conversation between two interlocutors in which he argued that Congress had plenary control over the jurisdiction of lower federal courts and control

20. *See, e.g.*, Hart, *supra* note 8, at 1363–64; Redish, *supra* note 8, at 145.
21. Hart, *supra* note 8, 1363–64; Redish, *supra* note 8, at 145.
22. Anderson, *supra* note 14, at 426.
23. 14 U.S. (1 Wheat.) 304 (1816).
24. *Id.* at 331.
25. *Id.*
26. *Id.*; *see also* Redish & Woods, *supra* note 13, at 56–57.

over Supreme Court jurisdiction so long as the Supreme Court's essential functions were not abridged.[27] Professor Hart's article, because it was the first and most influential, is the jumping off point for this subject.

Professor Hart based his essential function argument on his reading of *Ex Parte McCardle*.[28] In *McCardle*, the Supreme Court upheld legislation that deprived it of appellate jurisdiction in habeas corpus cases by interpreting the Exceptions and Regulations Clause[29] as granting Congress the power to confer to the Supreme Court whatever appellate jurisdiction Congress sees fit.[30] He based his essential function theory on the argument that a broad reading of the Exceptions and Regulations Clause would "authorize exceptions which engulf the rule."[31] That is, Professor Hart believed that the Exceptions and Regulations Clause gives Congress explicit power to limit Supreme Court appellate jurisdiction, but that to interpret the clause too broadly would permit Congress to eliminate the Supreme Court's power of appellate review, one of the essential functions of the Supreme Court. Thus, Professor Hart argued that Congress' power under the Exceptions and Regulations Clause was broad, but could not be construed so broadly as to completely strip the Supreme Court of appellate review.[32]

Professor Hart reasoned that the Supreme Court's essential functions were not abridged in *McCardle* because the circuit courts remained open to hear habeas corpus cases and the Supreme Court could still entertain direct habeas corpus petitions.[33] Thus, the *McCardle* court did not destroy the essential role of the Supreme Court in the constitutional plan.[34]

However, Professor Hart did not specifically enumerate which functions were essential and he generally took a narrow view of such things.[35] He did not believe that the Constitution granted any right to

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27. Hart, *supra* note 8, at 1365.

28. *Id.* at 1364–65; 74 U.S. (7 Wall.) 506 (1868).

29. U.S. CONST. art. III, § 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id.

30. *McCardle*, 74 U.S. at 513.

31. Hart, *supra* note 8, at 1364. That is to say, if Congress were allowed to make Exceptions and Regulations at will, the role of the Supreme Court could be whittled down to nothing at all.

32. *Id.*

33. *Id.* at 1365.

34. *Id.*

35. *Id.* at 1363–65.

bring cases in federal courts[36] and he further believed that the proper forum for all claims, constitutional or otherwise, was state court.[37]

With regard to restrictions on lower federal courts, Professor Hart argued that congressional power was plenary.[38] He argued that denial of federal court jurisdiction did not substantially affect a litigant's rights because state courts are the proper forum to bring federal and constitutional law questions.[39] Once federal jurisdiction is stripped, a state court may not disclaim jurisdiction because the court would then be under a constitutional obligation to ensure that a forum exists for such a case.[40] Thus, Congress may strip federal courts of all jurisdiction so long as one forum remains, state or otherwise, which can grant a remedy to the parties in the litigation.[41] As Professor Hart argued, "It's hard, for me at least, to read into Article III any guarantee to a civil litigant of a hearing in a federal constitutional court (outside the original jurisdiction of the Supreme Court) if Congress chooses to provide some alternative procedure."[42]

However, Professor Hart's analysis is problematic for several reasons. First, if the lower federal courts were stripped of jurisdiction, because the Supreme Court would still be available to hear the case, the state court may deny jurisdiction as well.[43] This would lead to the Supreme Court taking original jurisdiction over a case for which the Constitution did not confer original jurisdiction. This analysis, then, essentially pits two provisions of the Constitution against one another. Because interpreting the Establish and Ordain Clause in such a way would lead to its trumping an explicit provision in Article III, this analysis, at the very least, requires more consideration. Second, as Professors Martin Redish and Curtis Woods point out, Professor Hart's analysis fails when the remedy sought requires the state court to issue an injunction to a federal

36. *Id.* at 1363.

37. *Id.* at 1401.

38. *Id.* at 1364.

39. *Id.*

40. *Id.* Professor Hart's reading of the Constitution, in this regard, predicts one crux of the modern debate over Sovereign Immunity. As this Comment later shows, Congressional restrictions of federal subject matter jurisdiction essentially force state courts to adjudicate federal laws, which, when the cause of action is against the state, runs afoul of traditional notions of federalism. *See infra* Part III.A.2; *see also* Alden v. Maine, 527 U.S. 706 (1999).

41. Hart, *supra* note 8, at 1366.

42. *Id.* at 1372–73.

43. *Id.* at 1364. If no federal forum exists, then the state court may not deny jurisdiction. However, if only lower court jurisdiction is stripped, a state court could, under Professor Hart's reasoning, deny jurisdiction without violating the litigants' constitutional rights because one forum—the Supreme Court—still exists to hear the case. *See id.*

officer because state courts do not possess injunctive power over federal officials.[44]

C. Redish and Woods

In response to a flurry of jurisdiction-stripping bills proposed in the House and Senate, commentators in the late 1970s and early 1980s again took up the debate. Twenty-two years after Professor Hart's dialectic, Martin Redish and Curtis Woods began the process by identifying a flaw in Professor Hart's argument.[45] In *Tarble's Case*, a Wisconsin state court, under its power of habeas corpus, ordered the United States Army to release an allegedly underage enlistee.[46] The Supreme Court held that state courts lacked the power to issue remedies that mandated actions by federal officers.[47] The Court reasoned that the federal government must be free from such intrusions on its sovereignty in order to prevent "forcible collision between the two governments."[48] Thus, Redish and Woods argued that a state court could not be a sufficient forum for cases in which the remedy sought involved an injunction of a federal officer because it lacked mandamus power over federal officers.[49]

Though essentially agreeing with Professor Hart's analysis, Redish and Woods' analysis focused on an important limitation on Congress' power over federal courts. Implicit in this argument is the assertion that the judicial power of the United States exists, partially, to provide remedies for its litigants.[50] Under this analysis, Congress may not restrict jurisdiction if it denies to a litigant the possibility of achieving the remedy sought. This argument is essentially a reformulation of the Fifth Amendment right of procedural due process. Therefore, Congress may limit federal court jurisdiction so long as the litigant still has "the opportunity to be heard . . . which must be granted at a meaningful time and in a meaningful manner."[51] However, when a state court lacks the power to

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44. Redish & Woods, *supra* note 13, at 63.

45. *Id.*

46. 80 U.S. (13 Wall.) 397, 398–400 (1871).

47. *Id.* at 406.

48. *Id.* at 407.

49. Redish & Woods, *supra* note 13, at 108. *See also* McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821) (holding that state courts lack the power to issue writs of mandamus to federal officers). *But cf.* Pa. Turnpike Comm'n 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 (state courts lack power to enjoin federal officers) *with* Lewis Pub. Co. v. Wyman, 152 F. 200, 205 (C.C.E.D. Mo. 1907) (state courts can enjoin federal officers); *c.f.* Wheeldin v. Wheeler, 373 U.S. 647, 664 n.13 (1963) (Brennan, J., dissenting).

50. *See infra* Part III.B.2. This is so because if the remedy were unimportant, the Supreme Court in this case would have allowed the Wisconsin court to hear the case regardless of whether it had the necessary mandamus power over the federal officer.

51. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

fix the litigant's problem, the court clearly cannot provide a meaningful hearing. This theme will be explored further in Part IV.

This procedural Due Process problem, however, is not limited merely by a lack of mandamus or injunctive powers over federal officers. State courts lack the power to command officers of other states as well. Redish and Woods' analysis of *Tarble's Case* leads to an obvious but important conclusion: the power to provide a remedy is an essential function of the judicial branch. Therefore, what Redish and Woods argued as a flaw in Professor Hart's analysis was a rephrasing of the procedural due process imperative.[52]

D. Professor Sager

Taking up Justice Story's thesis, Professor Lawrence Sager argued that, taken as a whole, the "shall be vested" language, the congressional power to create lower federal courts, the tenure and salary provision, and the Exceptions and Regulations clause mandate that at least one Article III court must remain open for litigants making constitutional claims.[53] Thus, argues Sager, Congress may not limit federal court jurisdiction for constitutional cases.[54]

Some commentators have argued that Professor Sager stretched the framers' intentions somewhat to suit his purposes.[55] However, his analysis provides the foundation for a strong argument. One prong of Professor Sager's argument rests on the assertion that no congressional act may violate the Constitution.[56] This statement provides a great deal of ammunition against jurisdiction stripping-statutes. Because the judiciary is the branch of government vested with the power to interpret the Constitution and laws of the country, judicial review must be an essential function of Article III courts.[57] As this Comment will show, the idea that judicial review is an essential function of the federal judiciary is also consistent with the history of the Constitutional Convention.

Another important point Professor Sager made is that the tenure and salary provisions of Article III indicate that the framers intended federal judges to be as independent as possible from outside influences.[58] Sager argued that this provision prevents Congress from conferring jurisdiction over certain cases to tribunals without Article III independence because

52. *See infra* Part III.B.2.
53. Sager, *supra* note 11, at 66.
54. *Id.*
55. *See* Redish, *supra* note 8, at 146–49.
56. Sager, *supra* note 11, at 68.
57. *Id.* at 66.
58. *Id.* at 61–63.

to do so would render meaningless the tenure and salary provision.[59] This assertion makes sense, because the rationale behind the tenure and salary provision is to ensure that federal judges are unbiased. Logically, fear of losing one's job can contribute to bias. This assertion has important implications if a federal cause of action is relegated to an elected state court judge.

One can criticize Professor Sager for pitting the tenure and salary provision against the clear language of the "ordain and establish" provision and for awarding victory to tenure and salary based only on speculation as to the alternative interpretation's effect on the power of the tenure and salary provision itself.[60] However, Professor Sager's conclusion that "Congress can regulate the adjudication of Article III business to the state courts, but it must provide persons who advance claims of federal constitutional right an opportunity to secure review—in some Article III court—of the state court's disposition,"[61] seems unassailable.

E. Mini-Conclusion

Ultimately, all of this judicial philosophical wrangling has failed to establish a clearly delineated description of Congress' power to shape federal court jurisdiction. However, there is at least one postulate on which every scholar agrees: that Congress' power over Supreme Court jurisdiction is significantly less than its power over lower federal court jurisdiction.

To date, the debate over Congress' jurisdictional shaping authority has focused solely on the relationship between the legislative and judicial branch. However, by looking only at the two branches' relationship with each other, this analysis fails in that it neglects to consider each branch's respective role in the greater constitutional scheme. This Comment takes a different approach by considering the Constitution as a whole and the normative values that underlie the tripartite system of government.

III. THE ESSENTIAL FUNCTIONS

Combining the above theories on Congress' constitutional power to limit jurisdiction, this Part expands the essential functions theory and argues that the framers intended both the Supreme Court and lower federal courts to have more essential functions than Professor Hart or other theorists have contemplated. Commentators have consistently structured the debate into two categories: (1) Congress' power over Supreme Court

59. *Id.* at 62–63.

60. Redish, *supra* note 8, at 149–54.

61. Sager, *supra* note 11, at 66.

jurisdiction, and (2) Congress' power over lower federal court jurisdiction.[62] However, this paradigm falls short because, by compartmentalizing congressional power over the federal judicial hierarchy, it neglects to consider the overarching role the framers intended for the "judicial power of the United States."[63] This Part will demonstrate that the framers intended, and the Constitution established, that all federal courts perform certain essential functions. These functions include: (1) functions necessary within the tripartite constitutional scheme, what this comment terms "interbranch function"; (2) functions necessary for a properly functioning judiciary within the federal system, or "intrabranch functions"; and (3) functions necessary for upholding individual constitutional rights.

Accordingly, this analysis will be structured into two parts: (1) interbranch, and (2) intrabranch functions of the federal judiciary. First, it will be argued that the framers' overarching constitutional theme of checks and balances mandates that federal courts act as a check on the other two branches. As such, any jurisdictional restriction that abridges federal judicial power to check legislative acts runs afoul of this most essential constitutional imperative. Second, it will be shown that the framers intended that the federal courts be superior to the state courts. Consequently, any jurisdictional restriction that prevents federal courts from ensuring that federal law trumps state law or that permits state courts to interpret federal law without federal court review violates the federal courts' essential role within the federal system.

A. Interbranch Essential Functions of the Judiciary

The French political philosopher Baron de Montesquieu is credited with the idea of a tripartite system of government that consists of an executive, a legislative, and a judicial branch, with each branch acting as a check on the other two.[64] The rationale behind Montesquieu's theory of checks and balances, echoed by James Madison in Federalist 47, is simple: the rights of the people will be preserved so long as the three branches of government are coequal and each has certain powers over

62. *See* Hart, *supra* note 8, at 1362; Redish, *supra* note 8, at 145; Sager, *supra* note 11, at 21. This division is not surprising because the Constitution did not require Congress to create any lower federal courts at all. *See* U.S. CONST. art. III, § 1.

63. U.S. CONST. art. III, § 1.

64. *See* CHARLES LOUIS DE SECONDAT, BARON DE LA BREDE ET DE MONTESQUIEU, THE SPIRIT OF THE LAWS 201 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748) ("In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law."). *See also* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The oracle who is always consulted and cited on this subject is the celebrated Montesquieu").

the other branches.[65] At its most basic level, this system is designed to prevent tyranny: tyranny by the minority and tyranny by the majority.[66] By distributing governmental power among the three branches, the Constitution attempts to insulate the citizenry against any one branch using its power in a harmful manner or depriving citizens of their constitutional rights.[67] Speaking of the courts' role in the constitutional scheme, James Madison wrote, "[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of [constitutional] rights; they will be an impenetrable bulwark against every assumption of power in the legislature or executive."[68] Similarly, in Federalist No. 78, Alexander Hamilton described the role of an independent judiciary as follows: "In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body."[69] Put more bluntly, the Constitution is the sword with which the Supreme Court can delegitimize or refuse to enforce legislative or executive acts. In order to ensure the proper functioning of this tripartite system, the judiciary's sword may not be dulled or stripped by a congressional act.[70]

At the Constitutional Convention, there was no question that the new federal government would bring Montesquieu's political vision to fruition.[71] Nor was there any question that the framers would establish a federal Supreme Court.[72] However, there was a great deal of debate over the powers and makeup of the federal judicial branch.[73] Proposals ranged from granting the Supreme Court the power to review all legislation before it was enacted,[74] to merely allowing the Supreme Court to declare statutes unconstitutional when necessary.[75] Ultimately, the theories be-

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65. *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

66. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 333 (4th ed. 2001).

67. *Id.* at 334; *see also* Coll. Sav. Bank v. Fla Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 690 (1999). The protection of liberty requires that "governmental power, even—indeed, especially—governmental power wielded by the people, had to be dispersed and countered." *Id.* at 690.

68. James Madison to the House of Representatives (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 1789–1790 197, 207 (Charles F. Hobson et al. eds., 1979).

69. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

70. *See generally* THE FEDERALIST NO. 48 (James Madison) (Clinton Rossiter ed., 1961).

71. *See* BATOR ET AL, *supra* note 8, at 3; Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960).

72. BATOR ET AL, *supra* note 7, at 3.

73. *Id.* at 7–9.

74. *Id.*

75. *Id.* at 8.

hind the creation of the federal system and behind the powers granted to the federal judiciary are highly instructive.

Article III, on its face, gives Congress fairly broad power to limit Supreme Court jurisdiction.[76] However, if Madison's constitutional imperative to prevent tyranny is to be given proper credit, Article III power cannot be used to alter the balance of power among the coequal branches of government. Thus, the most salient essential requirement of the judiciary is that it must act as a check on the other governmental branches. This essential judicial function limits congressional control over jurisdiction in two ways. First, Congress cannot structure its jurisdictional limitations in such a way that deprives federal courts of the power to review legislative actions. Second, Congress cannot use a jurisdiction stripping provision to achieve, through ordinary legislation, what it must otherwise achieve through constitutional amendment. Put another way, Congress cannot strip the Court of its power of judicial review and Congress cannot usurp the Court's role as the interpreter of the laws of the United States.

1. Judicial Review: The Power to Declare Statutes Unconstitutional

The framers took for granted that the Supreme Court would have the power of judicial review.[77] Chief Justice Marshall famously iterated this maxim in *Marbury v. Madison*,[78] and there has never since been any doubt about the Court's ability to do so.[79] A few framers were concerned that judicial review would usurp the legislative power Congress had explicitly protected by denying the Court the extra-judicial power to review proposed legislation and to enable or prevent it from being enacted.[80] However, in the end, the Supreme Court was endowed with the power of judicial review, the only power federal courts wield over the other

76. U.S. CONST. art III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the *Congress may from time to time ordain and establish.*") (emphasis added); U.S. CONST. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*") (emphasis added).

77. BATOR ET AL, *supra* note 7, at 9.

78. 5 U.S. 137, 177 (1803).

79. *See* THE FEDERALIST NO. 81, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("That there ought to be one court of supreme and final jurisdiction is a proposition which has not been, and is not likely to be contested.").

80. BATOR ET AL, *supra* note 8, at 7. Governor Randolph had proposed that the Supreme Court also act as a council of revision, determining the constitutionality of all legislation *before* it was passed. The proposal was supported as a check on the legislative branch. However, this proposal was roundly rejected because the Framers saw the Court's ability to rule on the constitutionality of legislation *after it was passed* as sufficient to prevent Legislative aggrandizement. *Id.* at 8.

branches of government.[81] Therefore, no act of Congress can abridge this power without altering the overall constitutional balance of power.

Although the Supreme Court's power of judicial review is unassailable, that position is not so clear in regard to the lower federal courts. Under Article III, Congress has the power to create lower federal courts.[82] Thus, it is conceivable that Congress could have created lower federal courts without the power of judicial review; Congress could have chosen not to create lower federal courts at all. Indeed, the first Judiciary Act did not grant lower federal courts the power to hear all Article III cases, and the lower federal courts did not have general original federal subject matter jurisdiction until 1875.[83] Nonetheless, the use of the language "judicial power" throughout Article III, without question confers the power of judicial review to lower federal courts, once created.[84] In Federalist 81, Alexander Hamilton wrote,

> The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or *authorize*, in each State or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.[85]

Congressional power to limit jurisdiction conflicts with federal courts' power of judicial review in a number of ways. If Congress has the power to limit jurisdiction, and the courts do not have the power to review the constitutionality of a denial of jurisdiction, then the courts' powers of judicial review are toothless; even jurisdiction stripping statutes that are facially unconstitutional would be exempted from review. This result would certainly run contrary to the framers' intent in granting federal courts judicial review.[86] Thus, courts, at the very least, still retain the power to determine their own jurisdiction, in light of the constitutionality of Congress' grants or removals of jurisdiction.[87] That being the case, the fact that courts still retain the power to determine the constitutionality of a removal of jurisdiction means that Congress' power to con-

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81. THE FEDERALIST NO. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

82. U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish*") (italics added).

83. Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470.

84. Indeed, the fact that lower federal courts act with precisely the same power as the Supreme Court, minus the power to review their own decisions, is strong evidence for this supposition.

85. THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

86. *See* BATOR ET AL., *supra* note 7, at 9.

87. *See* Marbury v. Madison, 5 U.S. 137, 178 (1803); *see also* Sager, *supra* note 11, at 26.

trol jurisdiction is limited.[88] Inherent in this argument is that Congress cannot restrict jurisdiction in such a way that would violate the constitutional rights of the excluded litigants.[89]

What this analysis demonstrates, however, is that Congress' power to limit jurisdiction is subject to at least one more very important limitation. All federal courts have the constitutional power to make the threshold determination of whether they have jurisdiction and whether a congressional grant or removal of jurisdiction is constitutional.[90] Therefore, the power of judicial review limits Congress' power to create a jurisdictional limitation that violates a constitutional right. If the Supreme Court lacked the power to declare unconstitutional a limitation on its jurisdiction, the balance of power would be impermissibly shifted to the legislative branch.

2. Separation of Powers: Maintaining the Federal Balance

The sword with which the judiciary arms itself to counter congressional acts is the Constitution. Congress does have the power to alter the Constitution, but it can only do so by amending it.[91] The amendment process is arduous, but with the power to amend at its disposal, Congress has the ability to reforge the judiciary's sword. Therefore, if the Constitution is to remain a viable judicial weapon, Congress cannot be allowed to circumvent the prescribed amendment procedures of Article V and achieve through ordinary legislation (i.e. through a jurisdiction-stripping act) what would otherwise require a constitutional amendment.

In Federalist 49, James Madison, commenting on a future Article V, wrote, "The danger of disturbing the public tranquility by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions to the decisions of the whole society."[92] To Madison and others, the Constitution's vitality lay in its long-term mutability and its short-term resistance to change.[93] Any

88. Sager, *supra* note 11, at 26.

89. *See, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

90. *See Marbury*, 5 U.S. at 178.

91. U.S. CONST. art V.

92. THE FEDERALIST NO. 49, at 315 (James Madison) (Clinton Rossiter ed., 1961).

93. Indeed, that some questions are best resolved far from the caprice of the majority is enshrined in much case law as well. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 104–05 (Phillips Bradley, ed., Vintage Books 1945).

> In France the constitution is, or at least is supposed to be, immutable; and the received theory is that no power has the right of changing any part of it. In England the constitution may change continually, or rather it does not in reality exist; the Parliament is at once a legislative and a constituent assembly. The political theories of America are more simple and more rational. An American constitution is not supposed to be immutable, as

act of Congress or act of judicial acquiescence that permits Congress to achieve a de facto constitutional amendment violates the framers' intention to isolate the Constitution from the caprice of the general populace.

Article V explicitly lays out the means by which Congress may amend the Constitution.[94] By making the Constitution difficult to amend, the framers intended to ensure that the Constitution would only be altered when there was overwhelming popular support for the proposed change.[95] However, this clear intent would be contravened if the Exceptions and Provisions Clause were interpreted to allow Congress, through a simple majority, to circumvent the amendment process and achieve a de facto constitutional amendment. In one sense, this argument presupposes that, once a subject matter is relegated to state courts, the state courts will be amenable to the will of Congress. Nevertheless, this presupposition need not necessarily occur for a jurisdiction-stripping act to achieve a de facto amendment.

For example, the intent of both House Bill 3313 and a constitutional amendment defining marriage as between a man and a woman is to maintain the matrimonial status quo.[96] House Bill 3313 achieves that end by insulating the Defense of Marriage Act (DOMA) from legal challenge.[97] A constitutional amendment achieves that end by enshrining current marital mores under the rubric of the Constitution. Clearly, if the will of the people is such that three-fourths of the states are willing to ratify the amendment, then the goal will have legitimately been met. However, using ordinary legislation to circumvent the arduous political

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in France; nor is it susceptible of modification by the ordinary powers of society, as in England. It constitutes a detached whole, which, as it represents the will of the whole people, is no less binding on the legislator than on the private citizen, but which may be altered by the will of the people in predetermined cases, according to established rules. In America the Constitution may therefore vary; but as long as it exists, it is the origin of all authority, and the sole vehicle of the predominating force.

Id.

94. U.S. CONST. art. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

Id.

95. *See* THE FEDERALIST NO. 49, at 315 (James Madison) (Clinton Rossiter ed., 1961).

96. *See* Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004); *see also* President George W. Bush, Remarks in The Roosevelt Room, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), *at* http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html [hereinafter Remarks].

97. *See* Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004).

road required for ratification violates the separation of powers doctrine in two ways. First, the political process required to ratify an amendment to the Constitution is a check on the amendment process itself. Second, using ordinary legislation to achieve an end otherwise necessitating constitutional amendment violates the text of Article V.

Furthermore, ordinary legislation is not sufficient to overturn Supreme Court decisions.[98] Historically, there are two important examples of congressional machinations that resulted in an amendment or alteration to the types of cases over which federal courts have original jurisdiction: the Judiciary Act of 1789[99] and the Eleventh Amendment.

The Judiciary Act of 1789 did not strip federal courts of any essential function, but rather altered the avenues by which a case may reach federal court.[100] Likewise, in the face of *Chisholm v. Georgia*,[101] Congress could not have simply enacted a law mandating sovereign immunity. Because the creation of sovereign immunity would have overturned a prior Supreme Court decision and altered the overall federal balance of power, it had to be enshrined in a constitutional amendment and not in federal legislation.[102]

Thus, any congressional attempt to overrule unpopular court decisions by restricting Supreme Court jurisdiction over a class of cases must be viewed as an attempt to overturn federal case law and achieve a de facto amendment to the Constitution. Such an act must be unconstitutional because, by essentially allowing Congress to "say what the law is,"[103] it contravenes Article V by shifting judicial power to the legislature. This is so because a restriction on jurisdiction is, at its core, Congress acting as the Supreme Court would: determining a threshold for what is justiciable.

B. Intrabranch Essential Functions of the Judiciary

In addition to requiring the federal judiciary to perform certain functions in relation to the other branches of government, the Constitu-

98. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (holding that states could be sued in federal court by citizens of other states).

99. Judiciary Act of 1789, ch. 20, § 1 Stat. 73 (1789) (current version at 28 U.S.C. §§ 1251–1259 (2005)).

100. *Id.* The Judiciary Act of 1789, one of the first acts of the new Congress, established lower federal courts and federal appellate procedure. *Id.*

101. 2 U.S. (2 Dall.) 419 (1973).

102. Indeed, recent Supreme Court decisions on the subject of sovereign immunity have supported this claim. In *Boerne*, the Court expressly denied Congress' power to define substantive Fourteenth Amendment rights, because the power to interpret the constitution is explicitly judicial, and to allow Congress that power would alter the federal balance of powers. *See City of Boerne*, 521 U.S. at 519.

103. *See* Marbury v. Madison, 5 U.S 137, 177 (1803).

tion also requires the federal judiciary to perform functions in relation to state courts.[104] Historically, the balance of power between federal and state courts has fluctuated, and the relationship between the two entities is at the core of a great deal of constitutional debate.[105]

At the Constitutional Convention, many framers believed that state courts would generally act the way lower federal courts do today.[106] Indeed, until the Judiciary Act of 1789 created the lower federal courts, federal court authority over state court decisions was minimal.[107] By the late 19th Century, nationalism was at its height and federal courts routinely overturned state court decisions.[108] Federal power over state courts was high.[109] Consequently, in the 1930s the Supreme Court began creating prudential doctrines that were intended to be more sensitive to the various interests of both state and federal governments.[110] The rationale behind the doctrines that fall under the umbrella of "Our Federalism"[111] is highly instructive for deducing what essential roles the federal judiciary must play in relation to state courts.[112] Ultimately, the two essential functions that federal courts must perform in relation to state courts are: (1) to ensure the supremacy of federal law, and (2) to provide remedies unavailable in state courts.

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104. "I have never been able to see," James Madison wrote in 1832 commenting on the federal courts, how "the Constitution itself could have been the supreme law of the land; or that the uniformity of Federal authority throughout the parts to it could be preserved; or that without the uniformity, anarchy and disunion could be prevented." MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: FROM THE FOUNDING TO 1890 150 (2002).

105. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 64 (1927).

106. *See* Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 212 (1985); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 239 (1988).

107. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

108. *Id.*

109. *See* FRANKFURTER & LANDIS, *supra* note 105.

> Sensitiveness to "states" rights', fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War. Nationalism was triumphant; in national administration was sought its vindication. The new exertions of federal power were no longer trusted to the enforcement of state agencies.

Id.

110. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447 (1923) (standing doctrine); Textile Workers v. Lincoln Mills of Ala., 353 U.S. 448 (1957) (federal question doctrine).

111. Younger v. Harris, 401 U.S. 37 (1971).

112. One rationale behind the federal question doctrine is to ensure that federal courts decide important federal issues. *See Textile Workers*, 353 U.S. at 457. One rationale behind the standing doctrine is to preclude federal jurisdiction over litigants to whom federal courts cannot provide a remedy. *See* Allen v. Wright, 468 U.S. 737, 750–51 (1984).

1. The Supremacy Clause and Appellate Jurisdiction— The Uniformity Imperative

Congressional jurisdiction-stripping power is framed by Article VI[113] and is rooted in the key debate at the Constitutional Convention regarding the relationship between the state and federal governments. Article VI was written to solve many of the problems that arose under the Articles of Federation and there has been little debate about the federal courts' important role to ensure the supremacy of federal law.[114] Rather, the debate lies on the appropriate means that federal courts should use to achieve that end.

Interestingly, the limits that prevent the federal judiciary from asserting its supremacy over state courts are judicially created.[115] Doctrines such as standing, ripeness, and mootness show that federal courts are endowed with the authority to create hurdles that determine which cases they may hear. However, none of these hurdles precludes the enforcement of federal law; they simply determine the way in which cases may reach federal courts.[116] Congress' power to limit access to court is similar to the Supreme Court's power in that neither Congress nor the federal courts may create a hurdle that entirely precludes the enforcement of a federal law.[117] Doing so would violate Article VI by keeping federal courts from ensuring that federal law is the "supreme law of the land."[118]

Because state laws must comply with the federal Constitution, the language of the Supremacy Clause and federal judicial review over state laws indicates that the framers intended that state laws do not conflict with the supreme law of the country.[119] This makes sense, because without a forum in which to ensure that states comply with federal law, the Supremacy Clause would be an empty statement.

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113. U.S CONST. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made pursuant thereof. . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.") *Id.*

114. Indeed, in Federalist No. 80, Alexander Hamilton responded to one problem that ensued from the lack of a federal judiciary by noting that "[t]hirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction can proceed." THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

115. For example, the standing doctrine, abstention, equitable restraint, and, many would argue, sovereign immunity.

116. In effect, only cases which present an actual "case or controversy," are not presented too soon, nor too late.

117. U.S. CONST. art. VI, § 1, cl. 2; *see also* Younger v. Harris, 401 U.S. 37 (1971).

118. U.S. CONST. art. VI, § 1, cl. 2.

119. Ratner, *supra* note 71, at 160.

This proposition is also supported by the legislative history of the Constitution. The framers were aware of the importance of a uniform interpretation of federal laws among the states and thus explicitly granted appellate jurisdiction over state court decisions in order to prevent the harm that would ensue from allowing state courts to be independent interpreters of federal law.[120] As Rutledge wrote, the grant of appellate jurisdiction over state court judgments ensures "national rights & uniformity of Judgmts."[121]

The Supreme Court has repeatedly reinforced this maxim.[122] In *Martin v. Hunter's Lessee*, Justice Story reasoned that the Supreme Court must have the authority to review state court decisions involving federal questions because if the laws and the Constitution were interpreted differently in different states, "The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention which formed the Constitution . . . . [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils."[123] Consequently, in order to ensure that this uniformity exists, at least one federal court must be available to interpret federal law.[124]

Aside from being constitutionally mandated, the requirement that one federal forum be open also makes practical sense. If Congress shuts off federal jurisdiction for a particular issue, the Supremacy Clause still binds state courts to comply with past federal decisions on the issue handed down before the removal of federal jurisdiction.[125] State courts would then be hamstrung. In some cases, they would be required to hear a case but lack the power to provide the remedy sought. In other cases, mores, political beliefs, and social conditions may have changed, but

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120. *Id.* at 166.

121. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 124 (Max Farrand, ed., rev. ed., 1937).

122. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48; Merrel Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J. Dissenting).

> One might argue that [the Supreme] Court's appellate jurisdiction over state-court judgments in cases arising under federal law can be depended upon to correct erroneous state-court decisions and to insure that federal law is interpreted and applied uniformly. However, as any experienced observer of this Court can attest, "Supreme Court review of state courts, limited by docket pressures, narrow review of the facts, the debilitating possibilities of delay, and the necessity of deferring to adequate state grounds of decision, cannot do the whole job." Currie 160. Indeed, having served on this Court for 30 years, it is clear to me that, realistically, it cannot even come close to "doing the whole job" and that § 1331 is essential if federal rights are to be adequately protected.

Id.

123. 14 U.S. at 348.

124. *See* Sager, *supra* note 11, at 60.

125. *Id.* at 41.

without federal courts breaking new ground in these areas, state courts would either be forced to ignore federal precedent, in derogation of the Supremacy Clause, or to be bound by antiquated or outmoded case law. Thus, any congressional act that prevents federal courts from ensuring the supremacy of federal law would violate Article VI and would impermissibly alter the balance of power between federal and state courts.

2. The Power to Heal: Remedies as Constitutional Imperative

The requirement that legal rights are accompanied by the potential for relief when those rights are violated is a long-standing legal maxim.[126] In *Marbury v. Madison*, Chief Justice Marshall penned:

> The very essence of liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . [I]t is a general and indisputable rule, that where there is a legal right, there is a legal remedy by suit, or action at law, whenever that right is invaded . . . [E]very right, when withheld, must have a remedy, and every injury its proper redress . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right.[127]

As it relates to congressional power over federal court jurisdiction, this imperative has two logical consequences. First, Congress cannot remove jurisdiction if the result would be to render impossible the enforcement of a federal right.[128] Second, Congress cannot remove jurisdiction when, by relegating an issue to state court, the litigants would be deprived of their due process rights.[129]

Recent sovereign immunity case law indicates that the Supreme Court adheres to these maxims.[130] In *Seminole Tribe*, for example, the Court based much of its decision denying litigants' the ability to enforce congressionally created private rights of action against the state on the

126. Indeed, Akhil Amar echoed this sentiment when he wrote, "Few propositions of law are as basic today—and were as basic and universally embraced two hundred years ago—as the ancient legal maxim, *ubi jus, ibi remedium*: Where there is a right, should be a remedy." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1485–86 (1987).

127. 5 U.S. 137, 162–63 (1803).

128. Hart, *supra* note 8, at 1366.

129. Sager, *supra* note 11, at 66; Hart, *supra* note 8, at 1387 ("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.") *Id.*

130. *See, e.g.*, Seminole Tribe of Fla v. Florida, 517 U.S. 44 (1996).

rationale that the federal government could still enforce the right.[131] Integral to that rationale, however, is the principle that rights require remedies.[132] As Professor Redish first noted, Congress does not have the power to limit federal jurisdiction when state courts cannot provide the remedy sought, assuming the plaintiff has a due process right to that remedy.[133] American citizens have due process rights for any deprivation of their "Life, Liberty, or Property,"[134] as well as any deprivation of a "fundamental right."[135] Thus, an act violates litigants' due process rights if state courts bear the sole responsibility for adjudicating cases involving fundamental rights, but lack the ability to remedy those violated fundamental rights.

IV. THE ESSENTIAL FUNCTION WALTZ: APPLICATION OF THEORY TO FACT

If a federal court were faced with an act stripping it of jurisdiction over a certain subject matter, the court must take a three-step approach to determine if the act is constitutional. First, the court must determine if the act, on its face, impermissibly alters the balance of power in the tripartite constitutional plan. Second, if the act passes this test, the court must determine if the act abridges an essential function of the court itself. Finally, the court must look at the intent and function of the act to determine if it violates any individual constitutional liberty. The following section will apply this three-part test to House Bill 3313 and ultimately conclude that the bill fails at every step of the test.

A. Interbranch Analysis

House Bill 3313 alters the constitutional balance of power by attempting to achieve through ordinary legislation what otherwise would require constitutional amendment. At the threshold level, a reviewing court must either accept the act as valid and immediately disclaim all jurisdiction or review the constitutionality of the jurisdiction-stripping act itself.[136] Because judicial review is a constitutional imperative,[137] the

131. *Id.* at 73.

132. Amar, *supra* note 126, at 1485.

133. Redish & Woods, *supra* note 13, at 51.

134. U.S. CONST. amend. V.

135. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000).

136. Hart, *supra* note 8, at 1387.

> 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.

Id.

court must choose the latter option. If the court were to choose the former, it would find itself on the horns of a separation of powers dilemma.[138] By choosing to accept the jurisdictional limitation, the court will have effectively sounded its own death knell by inexorably shifting the balance of power to Congress to such a degree that federal courts, including the Supreme Court, may be rendered irrelevant through congressional fiat.[139] Therefore, the very act of acquiescing to a removal of subject matter jurisdiction would itself be unconstitutional.[140]

More importantly, the intended and likely effect of House Bill 3313 is that of a de facto constitutional amendment because the bill denies federal courts the power to enforce federal law.[141] As of November 2, 2005, seventeen states have amended their Constitution to define marriage as between a man and a woman.[142] In light of the Supreme Court's decision in *Lawrence v. Texas*, however, it is possible that upcoming federal constitutional law will invalidate those state constitutional amendments.[143]

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137. *See supra* Part III.

138. *See id.*

139. *See generally* Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983); United States v. Nixon, 418 U.S. 683 (1974).

140. An interesting situation arises, however, if federal courts abide by the Act. It would be folly to assume that federal courts operate entirely outside the political atmosphere in this country, and, considering the overwhelming majority by which state constitutional amendments prohibiting same-sex marriage have passed, it is not inconceivable, or even unlikely, that a federal court judge would choose to abide by a jurisdiction stripping act rather than to confront a potential equal protection dilemma, in light of *Lawrence v. Texas*. 539 U.S. 558 (2003). Furthermore, it is not unlikely that, considering the tenuous 5-4 margins in gay rights cases such as *Lawrence* and *Romer v. Evans*, 517 U.S. 6 (1996), that the Supreme Court itself might legitimate such a Congressional act for the same politico-social reason that a lower federal court judge might. *See Romer*, 517 U.S at 644 (Scalia, J., dissenting), stating

> But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.

Id.

141. Redish & Woods, *supra* note 13, at 51–52.

142. *See supra* note 5 and accompanying text. The states are Alaska, Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Ohio, Oregon, Utah, and Wisconsin. *Id.*

143. *But see Lawrence*, 539 U.S. 558 (Scalia, J., dissenting):

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution."

Id. at 604–05.

In fact, many political conservatives are fearful that the Court's decision in *Lawrence* will lead to an invalidation of the provision in the DOMA[144] that overrides the Full Faith and Credit[145] provision of the Constitution.[146] Indeed, John Hostettler, the Congressman who proposed House Bill 3313, said its purpose is "to keep federal courts from imposing homosexual marriages on Indiana and the rest of the country."[147]

Even if House Bill 3313 is enacted before any same-sex marriage cases reach the federal courts, its de facto constitutional effect would be the same because it would insulate DOMA from judicial review. Although marriage has traditionally been an area legislated exclusively by the states,[148] current fears that DOMA will be overturned or that states prohibiting same-sex marriage will be forced to recognize another state's legal same-sex marriages have led the President and lawmakers to push for a federal constitutional amendment defining marriage as between a man and a woman.[149] However, passage of House Bill 3313 would render the constitutional amendment process moot; Congress could effectively insulate DOMA from review and the feared consequence of the Supreme Court's decision in *Lawrence* could be avoided.

The framers believed that the Constitution's longevity was predicated on its short-term immutability.[150] Constitutional change requires a

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144. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as 1 U.S.C. § 7 (2005); 28 U.S.C. 1738(c) (2005)).

145. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.") *Id.*

146. When the Massachusetts State Supreme Court, in Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (2003), ruled that same-sex marriage was a constitutional right, it opened the door to constitutional challenges to DOMA. *See generally* Note, *Litigating the Defense of Marriage Act (DOMA): The Next Battleground for Same-Sex Marriage,* 117 HARVARD L. REV. 2684 (2004).

> Until recently, DOMA was effectively unchallengeable by the individuals subjected to its stigma . . . . Now the time is ripe for a constitutional challenge to DOMA . . . . DOMA violates principles of equal protection and due process. A strong case can also be made that DOMA abuses the Full Faith and Credit Clause and contravenes fundamental principles of federalism. A successful equal protection or due process challenge, however, is likely to have the farthest-reaching implications for the future of same-sex marriage in two respects. First, if DOMA is found to violate equal protection or due process, the state DOMAs are likely to fall on the same grounds. And second, it is difficult to imagine how the Court could find excluding same-sex couples from the definition of marriage unconstitutional without creating a constitutional requirement that same-sex couples be allowed to marry.

Id. at 2687–88.

147. *See* Hostettler, *supra* note 6. Considering the fact that *Goodridge* and the Multnomah County, Oregon decision to issue marriage licenses in Li. v. State, No. 0403-03057, 2004 WL 1258167 (Or. Cir. 2004), may very well go before the Supreme Court, Representative Hostettler's fears are not unfounded.

148. *See* Zablocki v. Redhail, 434 U.S. 374, 399 (1978).

149. Remarks, *supra* note 96.

150. *See supra* Part III.

supermajority to ensure that disfavored minorities like homosexuals are protected from the tyranny and caprice of the majority. The process of amending the Constitution is inherently political and potentially politically dangerous. Because the process is widely scrutinized, it naturally requires legislators to be much more guarded in their support or dissent.[151] This intense focus on the amendment process is a very powerful—perhaps the most powerful—check on the legislative branch.[152] The requirement that three-fourths of the states ratify constitutional amendments is the quintessence of this legislative check.[153] Because depriving federal courts of jurisdiction to hear same-sex marriage cases achieves the same goal as the proposed constitutional amendment, but circumvents the check of the three-fourths majority requirement, House Bill 3313 impermissibly alters the balance of power among the branches of government.

B. Intrabranch Analysis

House Bill 3313 abridges the essential functions of both lower federal courts and the Supreme Court by denying those courts the ability to enforce the supremacy of federal law and provide remedies for violations of constitutional rights. This section will briefly address how House Bill 3313 may frustrate litigants' ability to achieve sought remedies and then discuss in more detail how House Bill 3313 violates Article VI.

By relegating same-sex marriage cases to state courts, House Bill 3313 may prevent litigants from availing themselves of federal remedial structures. A victorious state court plaintiff could be prevented from having her judgment enforced under the logic of *Tarble's Case*.[154] Because, as shown above, plaintiffs have a fundamental right to the possibility of achieving the remedy sought, any congressional act that prevents litigants from enforcing their claim must be unconstitutional.

Furthermore, the Founding Fathers wrote Article VI to ensure "national rights & uniformity of Judgmts."[155] Although it can be argued that marriage is an inherently state issue and not subject to Article VI's uni-

151. *See, e.g.*, THE FEDERALIST NO. 43 (James Madison) (Clinton Rossiter ed., 1961) (detailing how making the amendment process difficult ensures stability within the union); THE FEDERALIST NO. 50 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961) (outlining how difficult it is politically to amend a Constitution).

152. *See, e.g.*, THE FEDERALIST NO. 43 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 50 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961).

153. U.S. CONST, art. V.

154. 80 U.S. (13 Wall.) 397 (1871); *see* discussion *supra* Part II.C.

155. I FARRAND, RECORDS OF THE FEDERAL CONVENTION 124 (1911).

formity imperative, Article VI applies equally to state court applications of federal constitutional law.[156]

The rationale behind Article VI is to make sure that state and federal courts apply federal law in a consistent manner.[157] House Bill 3313 frustrates the purpose of Article VI by preventing federal courts from exercising the only powers they wield over state courts: judicial review and, implicitly, stare decisis.[158] In thirty-eight states, Supreme Court judges are elected to their posts.[159] In the wake of the eleven state constitutional amendments banning same-sex marriage, many of which were overwhelmingly passed, it is possible that many state court judges would ignore the requirements of Article VI and the protections of the Bill of Rights and let *realpolitik* rule, rather than the Constitution.[160] Though this possibility already exists to some degree,[161] it is tempered by federal review of state court decisions and stare decisis. If state court judges were isolated from federal court review, it seems significantly more likely that state judges would ignore federal precedent and allow Article VI to fall by the wayside in order to secure reelection. Nevertheless, even if state court judges continued to abide by the federal constitution, by isolating those judges from federal review, House Bill 3313 renders Article VI an empty statement; without the possibility for federal review, the only force requiring state courts to adhere to the federal Constitution is its good will. Because Article VI is the keystone of the state-federal judicial hierarchy, any act that makes Article VI obsolete necessarily alters the intrajudicial balance of power, and is therefore unconstitutional.

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156. U.S. CONST. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

157. THE FEDERALIST NO. 1 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

158. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 137 (1803).

159. Press Release, Brennan Center for Justice, Top Legal Organizations Express Concern About Impact of Supreme Court's White Decision on Fair and Impartial Courts (June 27, 2002) [hereinafter Brennan Center Press Release], *at* http://www.brennancenter.org/presscenter/releases_2002/pressrelease_2002_0525.html.

160. *See Marbury*, 5 U.S. at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men."). *Id.*

161. That Roy Moore, the Alabama Supreme Court justice, erected a Ten Commandments statue outside the Alabama Supreme Court courthouse and posted the Ten Commandments in his courtroom is evidence that this concern is well founded. Associated Press, *Alabama Chief Justice Unveils Ten Commandments in State Supreme Court*, FOX NEWS, Aug. 1, 2001, *at* http://www.foxnews.com/story/0,2933,31137,00.html.

C. Facial Constitutionality Analysis

Finally, House Bill 3313 violates the Fifth and Fourteenth Amendments' procedural due process guarantee.[162] House Bill 3313 deprives litigants of their procedural due process rights because it deprives them of the opportunity for a meaningful hearing from an impartial decision maker.

The Supreme Court has held that the due process clauses of the Fifth and Fourteenth Amendments require that all litigants receive notice of the hearing,[163] opportunity for a meaningful hearing,[164] and an impartial decision maker.[165] House Bill 3313 does not violate the Due Process requirement of notice. However, by relegating same-sex marriage cases to state courts, House Bill 3313 potentially deprives litigants of the right to a meaningful hearing and the right to an impartial decision maker.

Beginning with the worst-case scenario, if House Bill 3313 were passed and if a state followed suit and passed a similar statute prohibiting state courts from hearing same-sex marriage cases, any potential litigant in a same-sex case would be deprived of any process. Under this scenario, at least one of the Acts, either House Bill 3313 or the state equivalent, must be overturned. However, still in question is the situation in which the state forum is available, but is inherently biased?

Until fairly recently in our nation's history, African-American defendants in southern courts were almost presumptively guilty.[166] Congress' creation of a federal cause of action under the Civil Rights Act[167] indicated its intent to remove civil rights cases from the dockets of then-racist southern judges.[168] Despite the Article VI requirement that all judges, both state and federal, be bound by the federal Constitution, during the tumultuous post *Brown v. Board of Education*[169] era, southern judges overtly ignored the Supreme Court's declarations and decisions.[170] Though the disapprobation many feel towards homosexuals to-

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162. U.S. CONST. amends. V, XIV.

163. *See, e.g.*, Mullhane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

164. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

165. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973).

166. *See e.g.*, Powell v. Alabama, 287 U.S. 45 (1932).

167. 42 U.S.C. § 2000 (1964).

168. *See, e.g.*, PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA (1999); ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 (1990); JAMES L. SUNDQUIST, POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS 259–71 (1968) (discussing the historical and legislative processes driving the creation of the Act).

169. 347 U.S. 483 (1954).

170. *See e.g.*, Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430 (1968); Griffin v. Prince Edward County Sch. Bd. of Educ., 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958).

day probably does not match the virulence of the racism that divided America during the last century, "homophobia" is still a powerful force at work in our country. That eleven states passed constitutional amendments prohibiting same-sex marriages, some by vast margins, and that a majority of the House of Representatives passed House Bill 3313, which expressly discriminates against homosexuals, is evidence of the degree of prejudice against homosexuals that exists in America today. The question, then, is whether state judges are likely to be so influenced by their own or by society's animus towards homosexuals that it will render some state courts biased. It is true that many judges do not consider their reelection prospects when deciding cases. However, insulating state court decisions from judicial review incentivizes the politicization of state judiciaries.

Supreme Court judges in thirty-eight states are directly elected.[171] Until recently it was common practice for candidate-judges to remain silent about their political views and most state statutes require this silence.[172] In fact, the old American Bar Association (ABA) Model Code of Judicial Conduct prohibited judges and judicial candidates from engaging in any inherently political activities such as announcing their political or judicial views, even during their own elections.[173] In *Republican Party of Minnesota v. White*,[174] however, the Supreme Court held that laws proscribing candidate-judges from discussing their judicial or political views violated the First Amendment.[175] As a result, in thirty-eight states, the process of becoming and remaining a judge has become inherently more political and those states' judges have become necessarily and increasingly tied to the political will of the majority. In *White*'s wake, the ABA rewrote its Model Code of Judicial Conduct and legal scholars began questioning whether elected judges, now increasingly political, could be nonbiased decision makers.[176] In light of the general animus much of the population feels towards homosexuals and same-sex marriage and the increasingly political nature of state judgeships, it is possible that many state fora can no longer be considered fair for the purposes of due process.

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171. Brennan Center Press Release, *supra* note 159.

172. American Bar Association, Findings, Conclusions and Recommendations Addressing State Judicial Independence Problems, *at* http://www.abanet.org/govaffairs/judiciary/r6c.html (last visited Nov. 15, 2005).

173. *Id.*; MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2000).

174. 536 U.S. 765 (2002) (holding unconstitutional a Minnesota law prohibiting judicial candidates from announcing their views on disputed legal or political issues).

175. *Id.*

176. Brennan Center Press Release, *supra* note 159.

V. CONCLUSION

Under Article III, Congress clearly has power to shape federal court jurisdiction, and for fifty years, commentators have debated how far Congress' power extends. What those commentators had in common is that they did not look beyond the relationship between Congress and the judiciary. This Comment attempts to take a more holistic approach in delimiting Congress' jurisdictional powers. Ultimately, Congress' jurisdictional authority is bound by three requirements. First, Congress cannot alter federal jurisdiction in such a way that will affect the balance of power within the tripartite constitutional system. Second, Congress cannot alter federal jurisdiction in such a way that it will affect the balance of power between federal and state courts. Finally, Congress cannot change federal jurisdiction in such a way that deprives citizens of their constitutional rights. Applying this three-step approach to House Bill 3313, it is clear that the Act impermissibly alters both the interbrach and intrabranch functions of the federal judiciary and would deprive homosexual litigants of their individual constitutional rights.