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BALANCING ACT
*LEGISLATIVE POWER AND
JUDICIAL INDEPENDENCE*

THE REPORT OF THE CITIZENS FOR INDEPENDENT COURTS
TASK FORCE ON THE ROLE OF THE LEGISLATURE IN
SETTING THE POWER AND JURISDICTION OF THE COURTS

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TASK FORCE RECOMMENDATIONS

1. Congress and state legislatures should heed constitutional limits when considering proposals to restrict the powers and jurisdiction of the courts.
2. Legislatures should refrain from restricting court jurisdiction in an effort to control substantive judicial decisions in a manner that violates separation of powers, due process, or other constitutional principles.
3. Legislatures should not attempt to control substantive judicial decisions by enacting legislation that restricts court jurisdiction over particular types of cases.
4. Legislatures should refrain from enacting laws that command a particular interpretation of federal or state constitutions.
5. Legislatures should not restrict remedies that courts may impose when the restrictions on remedies have the effect of leaving constitutional or other rights with inadequate redress.
6. Legislatures should ensure that courts have adequate resources and judges to perform their essential functions. Legislatures should recognize that resource limits in retaliation to specific substantive decisions are undesirable and may be unconstitutional.

7. Legislatures should refrain from restricting access to the courts and should take necessary affirmative steps to ensure adequate access to the courts for all Americans.

REPORT OF THE TASK FORCE ON THE ROLE OF THE LEGISLATURE IN SETTING THE POWER AND JURISDICTION OF THE COURTS

INTRODUCTION

The judiciary, at the federal and state levels, is both independent of and interdependent on the other branches of government. At the federal level, for example, the assurances of life tenure and salary protection found in Article III of the Constitution are meant to provide federal judges a high degree of independence in deciding the cases that come before them. At the same time, Article III leaves for Congress to decide whether lower federal courts shall exist and accords it substantial control over the courts' jurisdiction. For instance, Congress has set an amount-in-controversy in diversity suits since the first judiciary act in 1789. Indeed, all three branches of government are assured by the federal and state constitutions a degree of independence in some realms and interdependence in other areas so as to create checks and balances.

Independence of the judiciary is vitally important. Alexander Hamilton, quoting Montesquieu, forcefully declared: "For I agree, that 'there is no liberty, if the power of judging be not separated from legislative and executive powers [T]he complete independence of

the courts of justice is peculiarly essential in a limited constitution.’”¹ The Constitution’s framers were acutely concerned about judicial independence because of their experience with judges in the colonies who served at the pleasure of the King and were widely distrusted.² It is not hyperbole to say that freedom and liberty depend on the existence of an independent judiciary.

The goal of this Task Force has been to identify basic principles as to when legislatures act unconstitutionally in setting the powers and jurisdiction of the courts. Not all legislative actions directed at the judiciary should be regarded as unconstitutional.³ As described below, however, the Task Force is unanimous in its conclusion that some legislative acts restricting the powers and jurisdiction of the courts are unconstitutional. Additionally, the Task Force believes that some legislative actions, even if constitutional, are undesirable.

CONCLUSIONS AND RECOMMENDATIONS

1. The ability of Congress to restrict the powers and jurisdiction of the federal courts is limited by Article III of the Constitution, as well as by the separation of powers, due process of law, and other constitutional provisions. Similarly, the ability of state legislatures to restrict the powers and jurisdiction of state courts is limited by provisions in state constitutions as well as by the guarantee of due process of law in the United States Constitution.

Separation of powers protects judicial independence. At the federal level and in every state, the judiciary is a coequal branch of government. Justice Lewis F. Powell explained that the doctrine of separation of powers can be violated in two ways: “One branch may interfere impermissibly with the other’s performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.”⁴ In other words, legislative actions unconstitutionally violate separation of powers if they keep the judiciary from performing its duties or if the legislature takes over responsibilities assigned to the judiciary.

Second, due process of law is a basis for constitutional protection of judicial independence. For example, legislative actions that deny a mean-

ingful hearing before a neutral decision-maker violate procedural due process. The Supreme Court long has declared that the very essence of due process of law is a fair hearing before an impartial decision-maker.⁵ Over a century ago, the Supreme Court declared that due process “is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any ‘due process of law,’ by its mere will.”⁶ For instance, the Court has explained “that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.”⁷

This is not to imply that these are the only constitutional limits on legislative control over the judiciary. Article I, section 9 of the Constitution directly limits Congress’s authority over the federal courts in its declaration that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Article III limits congressional authority to define the crime of treason by specifying that “[t]reason against the United States shall constitute only in levying War against them, or in adhering to their Enemies giving them aid and comfort.”

Likewise, provisions of the Bill of Rights limit the legislature’s control over the judiciary. The First Amendment’s right “to petition the Government for a redress of grievances” can be violated by legislative actions denying availability of the judiciary. The Sixth and Seventh Amendments’ guarantees of jury trials in criminal and civil cases also limits an area of legislative control over judicial procedures. For instance, an attempt by Congress to restrict the fact-finding power of juries, in common law or statutory cases, would run afoul of these constitutional protections.

State constitutions also mandate separation of powers and independently protect rights such as due process, a right to petition government for redress of grievances, and a right to a jury trial. In addition, thirty-eight states have constitutional provisions that require a right to a remedy for injuries and violations of rights. These provisions, too, limit the scope of legislative control over the judiciary.

Recommendation: Congress and state legislatures should heed constitutional limits when considering proposals to restrict the powers and jurisdiction of the courts.

2. Separation of powers, due process, and other constitutional provisions limit the ability of legislatures to restrict court jurisdiction in an effort to control substantive judicial decisions.

The Task Force also is unanimous in its view that there are some constitutional limits on the ability of a legislature to restrict court jurisdiction in an effort to control substantive judicial decisions. In response to controversial Supreme Court decisions, there have been proposals to curtail federal court jurisdiction to hear particular types of issues. For example, during the 1950s, the Supreme Court invalidated some loyalty oaths for government workers and attorneys.⁸ In response, the Jennings-Butler Bill was introduced in the Senate to prevent review of State Board of Bar Examiners' decisions concerning who could practice law in a state.⁹ During the 1960s, in response to the Supreme Court decisions ordering reapportionment of state legislatures,¹⁰ proposals were made to preclude federal courts from hearing constitutional challenges to apportionment.

Altogether, between 1953 and 1968, over sixty bills were introduced into Congress to restrict federal court jurisdiction over particular topics.¹¹ During the 1980s, there were proposals in Congress to prevent federal courts from hearing cases involving challenges to state laws permitting school prayers or state laws restricting access to abortions.¹² Bills of this sort have continued to be introduced into Congress throughout the 1990s.

Similar proposals have been advanced at the state level. For example, after the New Hampshire Supreme Court ruled in 1997 that the state's system of funding public education was unconstitutional, the governor and state legislature drafted constitutional amendments restricting the supreme court's oversight of school funding.¹³ A similar proposal to restrict the jurisdiction of Ohio courts was introduced after the Ohio Supreme Court declared the Ohio system for funding public schools unconstitutional.¹⁴ In Washington, in 1997, a bill was introduced to amend the state constitution to allow the legislature to overrule decisions of the state supreme court on issues of constitutional interpretation.¹⁵

Task Force members have differing views about the scope and source of the constitutional limit on the legislature's power in this area. For instance, many, but not all, of the Task Force members believe that restrictions on jurisdiction become unconstitutional, as argued by Professor Henry Hart a half century ago, when "they destroy the essential role of the Supreme Court in the constitutional

system.”¹⁶ Others rely on a reading of the Vesting Clause of Article III, which places judicial power—the power to decide cases—in the hands of the courts alone. Although Task Force members may disagree about the nature of the constitutional limit on a legislature’s ability to restrict judicial jurisdiction, all believe that a constitutional limit exists.

Congressional limits on the ability of federal courts to review constitutional issues can undermine the federal judiciary’s crucial role in the constitutional system. For example, the Constitution’s structure would be compromised if Congress could enact a law and immunize that law from constitutional judicial review.

Task Force members believe that some legislative actions regulating jurisdiction would be clearly unconstitutional. For example, it is unconstitutional for a legislature to require that a court render a judgment for one party or another in a particular case. Also, it is unconstitutional for a legislature to dictate an unconstitutional result or decision. No court may render a decision that it believes violates the Constitution and a legislative command to do so is obviously unconstitutional.

Moreover, a legislature cannot vest jurisdiction in courts to deal with some issues in a matter and prohibit it from considering the constitutionality of the law that it is enforcing. For instance, it would be unconstitutional for a legislature to assign the courts with enforcing a criminal statute, but preclude them from deciding the constitutionality of this law.

Perhaps most important, legislation precluding court jurisdiction that prevents the judiciary from invalidating unconstitutional laws is impermissible. Neither Congress nor state legislatures may use their powers to keep courts from performing their essential function of upholding the Constitution.

These constitutional limits, of course, are not exhaustive of all the situations where jurisdictional restrictions are unconstitutional. The Task Force is unanimous in its conclusion that separation of powers and due process, as well as other constitutional principles, limit the ability of legislatures to restrict court jurisdiction in an effort to control substantive judicial decisions.

Recommendation: Legislatures should refrain from restricting court jurisdiction in an effort to control substantive judicial decisions in a manner that violates separation of powers, due process, or other constitutional principles.

3. Legislative acts stripping courts of jurisdiction to hear particular types of cases in an effort to control substantive judicial decisions are undesirable and inappropriate in a democratic system with coequal branches of government.

Apart from the constitutionality of laws restricting federal court jurisdiction, the Task Force is unanimous in its view that such legislative actions are undesirable. Legislative restriction of jurisdiction in response to particular substantive decisions unduly politicizes the judicial process. At the federal level, limits on Supreme Court review undermine desirable uniformity in the interpretation of federal law. At every level of government, attempts by legislatures to control substantive outcomes by curtailing judicial jurisdiction are inappropriate, even if some believe that they may be constitutional. Indeed, it is striking that members of Citizens for Independent Courts reflecting a broad ideological range—from, for example, Leonard Leo of the Federalist Society to Steven R. Shapiro of the American Civil Liberties Union—agree that restrictions on jurisdiction to achieve substantive changes in the law are unwise and undesirable policy. The Task Force is thus unanimous in urging self-restraint by legislatures in not restricting court jurisdiction in response to particular rulings.

Recommendation: Legislatures should not attempt to control substantive judicial decisions by enacting legislation that restricts court jurisdiction over particular types of cases.

4. Legislatures may not command a particular judicial interpretation of the Constitution; such legislation is undesirable and unconstitutional.

Judicial independence also is compromised by legislation that directs the courts to interpret the Constitution in a particular manner. Central to the judicial power, at both the federal and state levels, is the ability of judges to decide the meaning of the United States Constitution and state constitutions. Long ago, in *Marbury v. Madison*, the Court declared: “It is emphatically the province and duty of the judicial department to say what the law is.”¹⁷ Legislation commanding a particular interpretation of the Constitution is undesirable and unconstitutional.

In *United States v. Klein*, more than a century ago, the Supreme Court held that Congress cannot constitutionally direct particular substantive results.¹⁸ The Court explained that legislation that directs

the Court to decide cases in a particular manner “passe[s] the limit which separates the legislative power from the judicial power.”¹⁹

For example, the House of Representatives recently passed H.R. 1501, a bill that directs the judiciary to interpret the First Amendment in a particular manner. The bill seeks to permit the posting of the Ten Commandments on government property.²⁰ The bill accomplishes this by declaring that the Tenth Amendment should be interpreted as leaving this choice to state governments: “The power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions thereof is hereby declared to be among the powers reserved to the States respectively.”²¹ Moreover, the bill directs the courts to interpret the Constitution to uphold the law. Section (c) of the bill declares: “The courts constituted, ordained, and established by the Congress shall exercise the judicial power in a manner consistent with the foregoing declarations.”

The Task Force is unanimous in concluding that such legislative commands to the judiciary to interpret the Constitution in a particular manner are unwise and unconstitutional.²²

Recommendation: Legislatures should refrain from enacting laws that command a particular interpretation of federal or state constitutions.

5. Restrictions on remedies are distinct from jurisdictional limitations; restrictions on remedies are generally undesirable and unconstitutional when they have the effect of leaving constitutional or other rights with inadequate redress.

In *Marbury v. Madison*, Chief Justice John Marshall declared that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”²³ Although there are instances where the law does not fulfill this command, such as because of sovereign immunity, remedies are essential if rights are to have meaning and effect.

While Task Force members may disagree over the extent of a legislature’s power to restrict remedies, the Task Force is unanimous that there are constitutional limits on the ability of legislatures to preclude remedies. At the federal level, where the Constitution is interpreted to vest individual rights, it is unconstitutional for Congress to preclude the courts from effectively remedying deprivations of those rights.

For instance, the Fourth Amendment’s prohibition of unreasonable searches and seizures clearly was intended to create a remedy against

unlawful police behavior. The Fifth Amendment's takings clause requires that just compensation be available when the government uses its power to take private property. Likewise, equal protection was denied by state laws mandating segregation and courts constitutionally had to have the authority to provide an effective remedy.

More generally, courts must have the authority to enjoin ongoing violations of constitutional rights. For example, legislatures cannot preclude courts from enjoining laws that violate the First Amendment's guarantee of freedom of speech.

Congressional action that precludes effective remedies in such situations is unconstitutional. Moreover, apart from constitutionality, such attempts by Congress to prevent federal courts from providing necessary remedies for constitutional violations are undesirable. The Task Force urges self-restraint by Congress in this regard.

Restrictions on remedies at the state level can violate state constitutions. Indeed, thirty-eight states have constitutional provisions that require a right to a remedy for injuries and violations of rights. Preclusion of effective remedies, for common law wrongs as well as for constitutional violations, violates these provisions.

Recommendation: Legislatures should not restrict remedies that courts may impose when the restrictions on remedies have the effect of leaving constitutional or other rights with inadequate redress.

6. Although legislatures have great latitude in determining the resources available to the judiciary, legislative actions that undermine the institutional functioning of the courts are undesirable and unconstitutional.

The judiciary depends on the legislature for necessities essential for its operation. The most obvious example is funding. If a legislature were to refuse funding of the judiciary, or to fund it inadequately, the judiciary would be compromised in its ability to function. Additionally, judicial independence would be further compromised if this were done in response to particular rulings. For example, the governor of New Hampshire recently proposed cutting the funding of the New Hampshire courts in response to the state supreme court's decision finding that the state's system for funding public schools violates the state's constitution.²⁴

The Task Force recognizes the constitutional role for the legislature in determining the level of funding for the judiciary. Legislatures

undoubtedly have great discretion in this regard. Moreover, there is an obvious need for judicial restraint in ordering legislatures to provide more resources for courts. However, the Task Force is unanimous in its conclusion that it is undesirable for the legislature to restrict funds for the judiciary in retaliation to specific court decisions. Moreover, at some point, where restrictions on funding are so great as to disable the judiciary from performing its basic tasks, the legislative action violates separation of powers.

Apart from the Constitution's requirements, the Task Force believes that legislatures should, as a matter of desirable public policy, ensure adequate funding for the judiciary so that it will be able to fulfill its duties. This includes a responsibility to ensure sufficient judges and sufficient resources so that the courts can deal with their caseloads in an effective and efficient manner. Moreover, at the federal level, restraint in adding additional work for the federal courts is desirable and any significant increases must be accompanied by necessary added resources and judges.

Recommendation: Legislatures should ensure that courts have adequate resources and judges to perform their essential functions. Legislatures should recognize that resource limits in retaliation to specific substantive decisions are undesirable and may be unconstitutional.

7. Legislation that restricts access to the courts and precludes individuals from using a judicial forum to vindicate rights is undesirable and unconstitutional.

Rights are meaningless without a forum in which they can be vindicated. Therefore, access to the courts at both the federal and state levels is essential in order for rights to have effect. Although Task Force members may disagree about the desirability of particular legislative actions, the Task Force is unanimous that access to the judiciary is crucial if the courts are to perform their constitutional role. Legislatures have the duty to ensure meaningful access to the courts and legislative actions that preclude this are undesirable and unconstitutional.

The Task Force believes, for example, that legislatures should ensure adequate funding for legal services so that all in society have access to the judiciary. Similarly, the Task Force has grave concerns about laws that have the effect of cutting off access to the courts.

For example, the Prison Litigation Reform Act of 1995 limits the authority of federal courts to order systemic relief in prison condition cases, provides for the termination of injunctions issued by federal courts as remedies, and restricts the ability of federal courts to issue relief in prisoner cases.²⁵ Legislation of this sort undermines needed access to the courts.

Recommendation: Legislatures should refrain from restricting access to the courts and should take necessary affirmative steps to ensure adequate access to the courts for all Americans.

CONCLUSION

Judicial independence, vital in a democratic society, is compromised by legislative actions restricting the powers and jurisdiction of the judiciary. The Task Force is unanimous in its conclusion that federal and state legislatures act unwisely and unconstitutionally when they attempt to control substantive judicial decisions by restricting jurisdiction, controlling remedies, or by mandating that courts interpret the Constitution in a particular manner. The Task Force urges legislatures to exercise restraint in this area and to ensure that courts can perform their essential role in our constitutional democracy. This requires that courts have sufficient resources and that all litigants have adequate access to the courts.

NOTES

1. Alexander Hamilton, *The Federalist* No. 78, Clinton Rossiter, ed. (New York: New American Library, 1961), p. 466, quoting Montesquieu, *Spirit of Laws*, vol. I, p. 186.

2. See Charles Gardner Geyh, "The Origins and History of Federal Judicial Independence," in *An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence*, American Bar Association, Washington, D.C., 1997, Appendix A.

3. See, e.g., *Report of the National Commission on Judicial Discipline and Removal* (1993), p. 16 (“Although . . . the constitutional provisions pertaining to judicial tenure and the power of the courts may be understood in terms of their underlying purpose of judicial independence, this is not to say that everything that could interfere with the work of an Article III judge or court is unconstitutional”).

4. *INS v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring).

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

6. *Murray’s Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272, 276 (1856); see also *Hutardo v. California*, 110 U.S. 516, 531 (1884).

7. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). The specific issue of the legislature’s ability to restrict the availability of remedies is discussed in Recommendation 4 (see pp. 218–19).

8. See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

9. S. 3386, 85th Cong., 2d Sess. (1958); see also Sheldon D. Elliott, *Court-Curbing Proposals in Congress*, 33 *Notre Dame Law.* 597 (1958).

10. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

11. Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, and David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System*, 3d ed. (New York: Foundation Press, 1988), p. 377.

12. See, e.g., S. 158, 97th Cong., 1st Sess. (1981); H.R. 3225, 97th Cong., 1st Sess. (1981) (bills restricting federal court jurisdiction in abortion cases); S. 481, 97th Cong., 1st Sess. (1981); H.R. 4756, 97th Cong., 1st Sess. (1981) (bills restricting federal court jurisdiction over cases that involve voluntary school prayers).

13. See, e.g., Ralph Jimenez, “Judges, Lawyers Decry the Virulence of Attacks on High Court,” *Boston Globe*, October 4, 1998, *New Hampshire Weekly*, p. 1.

14. Catherine Candisky, “2 Senators Propose to Amend State Constitution School-Funding Debate,” *Columbus Dispatch*, March 4, 1999, p. 1A; Randy Ludlow, “School Call: Skip Courts Lawmakers Want Funding Control,” *Cincinnati Post*, March 4, 1999, p. 7A.

15. “Defeat this Poor Attempt to Curb the Judiciary,” *Seattle Times*, March 7, 1997, p. B4; Peter Callaghan, “Legislature 1997: Bill Would Let Legislature Override the Courts; Some Lawmakers Want the Final Say in Interpreting the State Constitution,” *News Tribune*, March 3, 1997, p. A1.

16. Henry Hart, *The Power of Congress to Limit Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362, 1402 (1953).

17. 5 U.S. (1 Cranch) 137, 177 (1803).

18. 80 U.S. (13 Wall.) 128 (1872).

19. 80 U.S. at 146–47.

20. The Supreme Court has invalidated such posting in public schools as violating the establishment clause of the First Amendment. *See Stone v. Graham*, 449 U.S. 39 (1980).

21. H.R. 1501, "Rights to Religious Liberty," section (b).

22. Of course, legislatures possess the ability to create additional rights by statute, beyond those recognized by courts as being constitutionally protected. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966). In *City of Boerne v. Flores*, 519 U.S. 1088 (1997), the Court reaffirmed that Congress cannot use its powers under section five of the Fourteenth Amendment to reinterpret the Constitution, but it may use this authority to enhance protection for constitutional rights.

23. 5 U.S. (1 Cranch) 137, 163 (1803).

24. Shirley Elder, "As Shaheen Plans are Foiled, Some Judges Fall Out of Favor," *The Boston Globe*, May 2, 1999, *New Hampshire Weekly*, p. 7.

25. Pub. L. No. 104-131, 110 Stat. 1321 (1996).

APPENDIX:

HISTORICAL BACKGROUND OF THE ROLE OF THE LEGISLATURE IN SETTING THE POWER AND JURISDICTION OF THE COURTS

Erwin Chemerinsky*

A crucial topic in considering judicial independence is the relationship between the legislatures and the courts. As the Task Force Report observes, courts at the federal and state levels are both independent and interdependent of the other branches of government. The Task Force set out to identify basic principles as to when legislatures act unconstitutionally in setting the powers and jurisdiction of the courts. This paper is meant to provide historical background for the Task Force's conclusions.

THE FOUNDING

The debate over the relationship between the courts and the other branches of government can be traced to the earliest days of American history. The Constitution's framers were acutely concerned about

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judicial independence because of their experience with judges in the colonies who served at the pleasure of the King and were widely distrusted.¹ There was great dissatisfaction with a court system beholden to the King and unresponsive to the needs of the colonists. The enumeration of grievances in the Declaration of Independence stated that the King “made judges dependent upon his will alone for the tenure of their offices and payment of their salaries.”

The Constitutional Convention recognized the need for a federal judiciary and, in fact, unanimously approved Edmund Randolph’s resolution “that a National Judiciary be established.”² To ensure the independence of the federal judiciary, the framers voted to accord all federal judges life tenure, “during good Behaviour,” and salaries that cannot be decreased during their time in office.

In fact, a crucial, lasting difference between federal and state court judges is the electoral accountability of the latter. In thirty-eight states, state court judges are subject to some form of electoral review.³

Article III vests the judicial power of the United States “in one supreme Court and in such inferior courts as Congress may from time to time ordain and establish.” A major dispute at the Constitutional Convention was whether lower federal courts should exist. The Committee of the Whole, echoing resolutions offered by Randolph, proposed that there should be both a Supreme Court and inferior courts.⁴ This proposal drew strong opposition from those who thought it was unnecessary and undesirable to create lower federal courts. Opponents of lower federal courts argued that they were unnecessary because state courts, subject to review by the Supreme Court, were sufficient to protect the interests of the national government. Furthermore, lower federal courts were perceived as an unnecessary expense and a likely intrusion on the sovereignty of the state governments. Farrand explains: “[Inferior courts] were regarded as an encroachment upon the rights of the individual states. It was claimed that the state courts were perfectly competent for the work required, and that it would be quite sufficient to grant an appeal from them to the national supreme court.”⁵

But others expressed distrust in the ability and willingness of state courts to uphold federal law. James Madison stated, “Confidence cannot be put in the State Tribunals as guardians of the National authority and interests.”⁶ Madison argued that state judges were likely to be biased against federal law and could not be trusted, especially in

instances where there were conflicting state and federal interests.⁷ Appeal to the Supreme Court was claimed to be inadequate to protect federal interests because the number of such appeals would exceed the Court's limited capacity to hear and decide cases.

The proposal to create lower federal courts was initially defeated, five votes to four, with two states divided.⁸ Madison and James Wilson then proposed a compromise. They suggested that the Constitution mandate the existence of the Supreme Court, but leave it up to Congress whether to create inferior federal courts. They said that "there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them."⁹ Their proposal was adopted by a vote of eight states to two, with one state divided.¹⁰ Congress, in its first judiciary act, established lower federal courts and they have existed ever since.

This history is important to contemporary discussions of judicial independence in two ways. First, Congress's control over some aspects of federal courts is part of the very structure of the Constitution. Congress is given discretion as to whether to create lower federal courts. This inevitably raises issues as to the extent of Congress's authority to control their jurisdiction and when exercise of this power is a threat to judicial independence. Second, some of the framers—most notably James Madison—expressed concern about judicial independence at the state level from the earliest moments of American constitutional history.

Although Article III is based on a strong belief in the need for an independent judiciary, the framers also institutionalized an interdependent relationship between the federal courts and the other branches of government. Congress, for example, determines the salary of federal judges, so long as they are not decreased during the terms of office. Additionally, Article III provides that, except for a few instances in which the Supreme Court is granted original jurisdiction, the Supreme Court is granted appellate jurisdiction, both as to law and fact, subject to "such Exceptions and under such regulations as Congress shall make." This is express authority for some congressional control over Supreme Court jurisdiction, though the scope of this authority has never been resolved.

The same issues regarding judicial independence and interdependence arise at the state level. Many of those who wrote state constitutions were just as concerned about judicial independence as those who framed the United States Constitution. On the other hand,

many of the states experimented in their initial constitutions with the establishment of all-powerful legislatures as a contrast to an all-powerful executive,¹¹ only to learn the truth of Thomas Jefferson's warning that "173 despots would surely be as oppressive as one."¹² By the middle of the nineteenth century, states were rewriting their constitutions to constrain legislative power and begin a march toward greater judicial independence.¹³

At the state level, just as much as for the federal government, legislative actions can threaten judicial independence. State legislatures, too, have some control over state court jurisdiction and judges' salaries; often they have greater control than exists at the federal level. Most states do not have provisions prohibiting decreases in judicial salaries during their tenure in office. Thus, the same basic issues arise at both the federal and state levels as to the appropriate legislative role in setting powers and jurisdiction of the courts.

HISTORICAL EXPERIENCE WITH LEGISLATIVE CONTROL OVER THE JUDICIARY

The Task Force premised its report on the conclusion that "the ability of Congress to restrict the powers and jurisdiction of the federal courts is limited by Article III of the Constitution, as well as by the separation of powers, due process of law, and other constitutional provisions. Similarly, the ability of state legislatures to restrict the powers and jurisdiction of state courts is limited by provisions in state constitutions as well as by the guarantee of due process of law in the United States Constitution." The Task Force was particularly concerned about legislative actions that attempted to control the judiciary by restricting court jurisdiction to control substantive decision-making, by limiting remedies that courts can impose, and by directing judicial interpretation of the Constitution.

There is surprisingly little guidance from history and prior decisions concerning the scope of Congress's powers in these areas. Because Congress rarely has attempted such jurisdiction stripping—and never in a manner that has been interpreted as precluding *all* Supreme Court review or *all* federal court review—the question of constitutionality is uncertain. The scholarly literature is rich with articles arguing both sides of whether, and when, Congress may

restrict federal court jurisdiction.¹⁴

Distinct constitutional issues are raised concerning Congress's authority over the Supreme Court as compared to over the lower federal courts. Those who believe that Congress can limit Supreme Court jurisdiction to hear particular matters point to the language of Article III, section 2: "[T]he Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Supporters of jurisdiction-stripping proposals argue that the Framers of the Constitution intended such congressional control as a check on the judiciary's power.¹⁵

Opponents of jurisdiction-stripping proposals—including the Task Force—take a very different view of the language of Article III. Some argue that the term "Exceptions" in Article III was intended to modify the word "Fact."¹⁶ The contention is that the Framers were concerned about the Supreme Court's ability to overturn fact-finding by lower courts, especially when done by juries. Hence, Congress was given the authority to control the manner in which the Supreme Court reviews questions of fact. Under this view, Congress could create an exception to the Supreme Court's jurisdiction for review of matters of fact, but Congress could not eliminate the Court's appellate jurisdiction for issues of law.

Alternatively, it is argued that even though Congress is given authority to limit Supreme Court jurisdiction under the text of Article III, this power—like all congressional powers—cannot be used in a manner that violates the Constitution. Opponents of jurisdiction restriction contend that congressional preclusion of Supreme Court review of particular topics would violate other parts of the Constitution.¹⁷

The initial Supreme Court decision concerning congressional control over Supreme Court jurisdiction is *Ex parte McCordle*.¹⁸ McCordle was a newspaper editor in Vicksburg, Mississippi, who was arrested by federal officials for writing a series of newspaper articles that were highly critical of Reconstruction and especially of the military rule of the South following the Civil War. McCordle filed a petition for a writ of habeas corpus pursuant to a statute adopted in 1867 that permitted federal courts to grant habeas corpus relief to anyone held in custody in violation of the Constitution or laws of the United States by either a state government or the federal government. Under the 1867 law, the Supreme Court was empowered to hear appeals from lower federal courts in habeas corpus cases. Before 1867, under the Judiciary Act of 1789, which was supplemented but not replaced by the 1867 law, federal courts could hear

habeas petitions of only those who were held in federal custody.

McCardle contended that the Military Reconstruction Act was unconstitutional in that it provided for military trials for civilians. He also claimed that his prosecution violated specific Bill of Rights provisions, including the First, Fifth, and Sixth Amendments. The United States government argued that the federal courts lacked jurisdiction to grant habeas corpus to McCardle under the 1867 Act. The federal government read the 1867 statute, despite its language to the contrary, as providing federal court relief only for state prisoners. The Supreme Court rejected this contention and set the case for argument on the merits of McCardle's claim that the Military Reconstruction Act and his prosecution were unconstitutional.¹⁹

On March 9, 1868, the Supreme Court held oral arguments on McCardle's constitutional claims. Three days later, on March 12, 1868, Congress adopted a rider to an inconsequential tax bill that repealed that part of the 1867 statute that authorized Supreme Court appellate review of writs of habeas corpus. Members of Congress stated that their purpose was to remove the McCardle case from the Supreme Court's docket and thus prevent the Court from potentially invalidating Reconstruction. Representative Wilson declared that the "amendment [repealing Supreme Court authority under the 1867 Act is] aimed at striking at a branch of the jurisdiction of the Supreme Court . . . thereby sweeping the [McCardle] case from the docket by taking away the jurisdiction of the Court."²⁰

On March 25, 1868, President Andrew Johnson vetoed the attempted repeal of Supreme Court jurisdiction. The Congress immediately overrode President Johnson's veto on March 27, 1868.

The Supreme Court then considered whether it had jurisdiction to hear McCardle's constitutional claims in light of the recently adopted statute denying it authority to hear appeals under the 1867 Act that was the basis for jurisdiction in McCardle's petition. The Court held that it could not decide McCardle's case because of Congress' authority to create exceptions and regulations to the Court's appellate jurisdiction.

Chief Justice Salmon P. Chase, writing for the Court, began by noting that the "first question necessarily is that of jurisdiction," and that the case had to be dismissed for want of jurisdiction if the 1868 Act repealed the Court's authority under the 1867 statute.²¹ Chief Justice Chase then observed that although the Court's authority stems from the Constitution, it "is conferred 'with such excep-

tions and under such regulations as Congress shall make.’”²² The Court concluded that the 1868 Act was an unmistakable exception to the Court’s appellate jurisdiction, thus mandating the dismissal of *McCardle*’s appeal. The Court stated: “The provision of the Act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.”²³ Accordingly, the Court dismissed the case for lack of jurisdiction.

It should be noted that *McCardle* is easily distinguished from contemporary attempts to prevent Supreme Court review of topics such as abortion and school prayer. In *McCardle*, even after the repeal of the 1867 Act, the Supreme Court still had authority to hear *McCardle*’s claims under the 1789 Judiciary Act, which allowed federal courts to grant writs of habeas corpus to federal prisoners. In other words, in *McCardle*, the Supreme Court was considering the constitutionality of a statute that did not completely preclude Supreme Court review, but rather eliminated only one of two bases for its authority. The *McCardle* Court expressly indicated that it still had jurisdiction in habeas corpus cases notwithstanding the repeal of the 1867 Act. The Court, at the conclusion of its opinion, declared:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.²⁴

In fact, a year after its decision in *McCardle*, the Supreme Court in *Ex parte Yarger* held that it had authority to review habeas corpus decisions of lower federal courts under the Judiciary Act of 1789.²⁵

The Supreme Court’s next consideration of the constitutionality of jurisdiction restrictions was in *United States v. Klein*.²⁶ *Klein*, like *McCardle*, arose during Reconstruction. In 1863, Congress adopted a statute providing that individuals whose property was seized during the Civil War could recover the property, or compensation for it, upon proof that they had not offered aid or comfort to the enemy during the war. The Supreme Court subsequently held that a presidential pardon fulfilled the statutory requirement of demonstrating that an

individual was not a supporter of the rebellion.²⁷

In response to this decision and frequent pardons issued by the president, Congress quickly adopted a statute providing that a pardon was inadmissible as evidence in a claim for return of seized property. Moreover, the statute provided that a pardon, without an express disclaimer of guilt, was proof that the person aided the rebellion and would deny the federal courts jurisdiction over the claims. The statute declared that upon “proof of such pardon . . . the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.”²⁸

The Supreme Court held that the statute was unconstitutional. While acknowledging Congress’ power to create exceptions and regulations to the Court’s appellate jurisdiction, the Supreme Court said that Congress cannot direct the results in particular cases. The Court stated:

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . . What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? . . . We think not. . . . We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.²⁹

Thus, opponents of proposals to restrict Supreme Court jurisdiction argue that *Klein* establishes that Congress may not restrict Supreme Court jurisdiction in an attempt to dictate substantive outcomes. By analogy, it would be unconstitutional for Congress to restrict Supreme Court jurisdiction in an attempt to undermine the Court’s protections in cases involving controversial social issues such as abortion and school prayer.

Apart from these decisions that are more than a century old, the Supreme Court has had very little occasion to consider congressional efforts to restrict its jurisdiction. Recently, in *Felker v. Turpin*, the Supreme Court considered a federal law that precluded Supreme Court review of some habeas corpus petitions.³⁰ Title I of the 1996

Antiterrorism and Effective Death Penalty Act prohibits state prisoners from bringing successive habeas corpus petitions unless approval is received from the United States Court of Appeals.³¹ The law precluded United States Supreme Court review, by appeal or certiorari, of any decision by a court of appeals granting or denying authorization for a state prisoner to file a successive habeas corpus petition.³²

In *Felker v. Turpin*, the Supreme Court unanimously upheld the constitutionality of this jurisdictional restriction.³³ Chief Justice William Rehnquist, writing for the Court, emphasized that the law did not preclude *all* Supreme Court review of petitions from individuals denied the ability to file successive ones; the law did not repeal the Court's authority to entertain original habeas petitions.³⁴ The Court explained: "But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, section 2."³⁵

The authority of Congress over lower federal court jurisdiction is no more settled by prior case law. Again, the debate in the scholarly literature has been heated and lengthy.³⁶

The Supreme Court in many cases has held that Congress's discretion as to whether to create lower federal courts gives it authority to determine lower federal court jurisdiction.³⁷ Yet it also has been recognized throughout American history that there are limits on Congress in the exercise of this power. Justice Joseph Story, in *Martin v. Hunter's Lessee*,³⁸ stated that the full judicial power must be vested in some federal court. Justice Story argued that "[t]he language of the article throughout is manifestly designed to be mandatory upon the legislature. . . . The judicial power of the United States *shall be vested* (not may be vested). . . . If then, it is the duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*."³⁹ Justice Story stated, "[i]t would seem, therefore, to follow, that congress [is] bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States and of which the supreme court cannot take original cognizance."⁴⁰

Indeed, the Supreme Court long has interpreted federal statutes to avoid complete preclusion of federal court jurisdiction. For example, in *Johnson v. Robison*, the Court refused to interpret a statute limiting review of Veterans Administration decisions in a manner that would have foreclosed all judicial review.⁴¹ Robison, a consci-

entious objector who had performed alternative service, challenged a federal statute that provided educational benefits to veterans but excluded conscientious objectors. A federal law appeared to preclude federal court review of Robison's claim. The statute provided: "[T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans . . . shall be final and conclusive and no official or any court of the United States shall have power or jurisdiction to review any such decision."⁴²

The Court observed that there would be "serious question" about the constitutionality of this provision if it precluded all review. The Court, however, narrowly interpreted the statute and said that it did not apply in this case because this was not an objection to a decision made by the Veterans Administration, but instead a challenge to a statute adopted by Congress. The Court said that the purposes for the limit on judicial review—deference to the agency in awarding benefits—would not be undermined by allowing jurisdiction to hear challenges to the statute.

Similarly, in *Oestereich v. Selective Service System Local Board No. 14*, the Court narrowly interpreted a provision limiting review of Selective Service decisions.⁴³ During the 1960s, the Selective Service Commission retaliated against students involved in anti-Vietnam War protests by revoking their student deferments and classifying them as ready for induction. After the federal courts held that this was impermissible and enjoined the Selective Service Commission, Congress responded by adopting a statute limiting judicial review. The act provided that "no judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded affirmatively or negatively to an order to report for induction."⁴⁴ The statute appeared to limit challenges to its validity to two contexts: defenses to a criminal prosecution and habeas corpus.

Oestereich was a full-time student at a theological school preparing for the ministry and was therefore entitled to a draft exemption under federal statutes. But after he participated in an antiwar protest, he was reclassified as I-A, ready for induction. Despite the federal statute appearing to preclude jurisdiction, the Court held that Oestereich could bring a suit challenging the legality of his reclassification. The Court held that the law limiting judicial review was not meant to apply to a clearly lawless action by a draft board. Justice

Harlan, in a concurring opinion, stated that it “is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims.”⁴⁵

In many other cases as well, the Court has interpreted statutes to leave open federal jurisdiction—even in the face of language and legislative intent that seems to foreclose a federal judicial forum.⁴⁶ The Court’s decisions support the view—strongly endorsed by the Task Force—that principles of separation of powers and due process limit Congress’s authority over lower federal court jurisdiction.

State constitutions also mandate separation of powers, leading state courts to strike down legislative attempts to exercise judicial power. In 1846, the Tennessee Supreme Court struck down such a legislative action in a case in which an 1838 statute regulating the sale of liquor was repealed and the legislature attempted to absolve all prior offenders of the earlier statute. In a case involving a pending prosecution, the court found the statute an unconstitutional interference with the judicial function.⁴⁷ A similar result was reached by the Pennsylvania Supreme Court in 1850 after the state legislature attempted to grant a new trial to the losing party in a trespass case.⁴⁸

State constitutions also independently protect rights such as due process, a right to petition government for redress of grievances, and a right to a jury trial. In addition, thirty-eight states have constitutional provisions that require a right to a remedy for injuries and violations of rights. These provisions, too, limit the scope of legislative control over the judiciary.

PRINCIPLES LIMITING LEGISLATIVE CONTROL OVER THE JUDICIARY

The Task Force unanimously concluded that basic constitutional principles, as well as over two hundred years of American history, support its conclusions as to the limits that exist on legislative control over judicial power and jurisdiction. The Task Force believes that restrictions on jurisdiction become unconstitutional, as argued by Professor Henry Hart a half century ago, when “they destroy the essential role of the Supreme Court in the constitutional system.”⁴⁹ For example, the

Constitution's structure would be compromised if Congress could enact a law and immunize it from constitutional judicial review. The Task Force also believes that due process and other constitutional provisions limit Congress' control over federal court jurisdiction.

The Task Force thus unanimously concluded that legislative acts stripping courts of jurisdiction to hear particular types of cases in an effort to control substantive judicial decisions are undesirable and inappropriate in a democratic system with coequal branches of government. Likewise, legislatures may not command a particular judicial interpretation of the Constitution. The Task Force also was unanimous in its conclusion that restrictions on remedies are generally undesirable and unconstitutional when they have the effect of leaving constitutional or other rights with inadequate redress.

The Task Force also recognized other ways in which legislatures can undermine judicial independence. For example, although legislatures have great latitude in determining the resources available to the judiciary, legislative actions that undermine the institutional functioning of the courts are undesirable and unconstitutional. The Task Force is unanimous in its conclusion that it is undesirable for the legislature to restrict funds for the judiciary in retaliation for specific court decisions. Moreover, at some point, where restrictions on funding are so great as to disable the judiciary from performing its basic tasks, the legislative action violates separation of powers.

Additionally, judicial independence requires the availability of courts to redress grievances. The Task Force thus unanimously concluded that legislation that restricts access to the courts and precludes individuals from using a judicial forum to vindicate rights is undesirable and unconstitutional. Rights are meaningless without a forum in which they can be vindicated. Legislatures have the duty to ensure meaningful access to the courts, and legislative actions that preclude this are undesirable and unconstitutional. The Task Force believes, for example, that legislatures should ensure adequate funding for legal services so that all in society have access to the judiciary.

For decades the debate over congressional restrictions on federal court jurisdiction has been academic, as Congress did not adopt any of the court-stripping proposals. Since 1994, however, Congress has enacted several important restrictions on jurisdiction. Each of these raises important questions concerning judicial independence and whether Congress has impermissibly violated the Constitution. Although the constitutionality of many of these

provisions is unresolved, so far the Supreme Court has upheld all that it has considered.

For example, there have been significant restrictions on the authority of the federal courts to hear certain immigration matters. Both the Antiterrorism and Effective Death Penalty Act⁵⁰ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁵¹ significantly restrict federal court jurisdiction over certain immigration matters.⁵² The Antiterrorism and Effective Death Penalty Act greatly restricts the ability of federal courts to review deportation orders. The Act provides: “Any final order of deportation against an alien who is deportable by means of having committed a criminal offense [within the listed category] shall not be subject to review by any court.”⁵³ Additionally, the Act expressly deletes the prior provision in federal law that permitted habeas corpus review of claims by aliens who were held in custody pursuant to deportation orders.⁵⁴ The law thus appears to foreclose all judicial review of deportation orders.⁵⁵

Congress further restricted judicial review in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. This law repealed a long-standing provision that authorized judicial review in the circuit courts of appeals and guaranteed habeas corpus upon detention. Additionally, the act limits review of removal orders directed at aliens by declaring that “all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this title . . . shall be available only in judicial review of a final order.”⁵⁶ The act also limits court review of discretionary decisions by the attorney general, stating that no court has jurisdiction to review such rulings by the attorney general as cancellation of removal,⁵⁷ voluntary departure,⁵⁸ or adjustment of status.⁵⁹

In 1999, in *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court upheld the provisions limiting review of deportation orders.⁶⁰ The case involved a First Amendment challenge to a deportation order by a group of individuals who claimed that they were being deported solely for constitutionally protected speech activities. The group repeatedly had prevailed in the lower federal courts prior to the enactment of the new law, but the government then invoked it and claimed that it stripped the federal judiciary of discrimination to hear the matter. The Supreme Court reversed the U.S. Court of Appeals for the Ninth Circuit and held that the law limits judicial review to final deportation orders and that this is permissible.

The availability of federal habeas corpus relief is another area

in which Congress has recently restricted judicial review. The Antiterrorism and Effective Death Penalty Act of 1996 limits federal habeas corpus relief, especially by precluding successive habeas corpus petitions without the express permission of the Court of Appeals.⁶¹ In *Felker v. Turpin*, the Court upheld this provision's restriction on Supreme Court review of Court of Appeals decisions by concluding that there remained some opportunity for Supreme Court review: writs for habeas corpus filed directly in the Court.⁶²

Yet another federal law that imposes substantial limits on federal jurisdiction is the Prison Litigation Reform Act of 1995.⁶³ Among other things, the law provides for the termination of prospective relief issued by federal courts in prisoner cases and limits the remedies that federal courts can impose in prison condition cases. The Court of Appeals for the Ninth Circuit recently held the law unconstitutional.⁶⁴ Other courts, however, have upheld the law.⁶⁵ This statute could well provide the opportunity for the Supreme Court to answer a question that long has been unresolved: When may Congress limit the authority of federal courts to impose remedies in constitutional cases?

CONCLUSION

The most important lesson to be drawn from this history is the almost constant recognition by Congress, for over two hundred years, as to the importance of judicial independence. Successful attempts by Congress to restrict Supreme Court jurisdiction or to preclude all federal jurisdiction have been almost nonexistent. Likewise, at the state level, successful legislative efforts to control courts and undermine judicial independence have been rare.

The Task Force unanimously urges continued legislative self-restraint in this regard. Judicial independence is vital in a democratic society and legislatures must refrain from actions that compromise the ability of the courts to serve their essential functions. If and when legislatures act improperly, it is the duty of the courts to invalidate such actions to ensure continued judicial independence.

NOTES

1. See Charles Gardner Geyh, "The Origins and History of Federal Judicial Independence," in *An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence*, American Bar Association, Washington, D.C., 1997, Appendix A.

2. Max Farrand, *The Records of the Federal Convention* (New Haven: Yale University Press, 1913), pp. 20–23.

3. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1589–1590 (1990); Larry Charles Berkson, Scott Beller, and Michele Grimaldi, *Judicial Selection in the United States: A Compendium of Provisions* (Chicago: American Judicature Society, 1981) (listing each state's method of judicial selection).

4. Farrand, *The Records of the Federal Convention*, pp. 104–5.

5. *Ibid.*, pp. 79–80.

6. *Ibid.*, p. 27.

7. *Ibid.*

8. *Ibid.*, p. 125.

9. *Ibid.*

10. *Ibid.*

11. See, e.g., Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 Rutgers L.J. 911, 916–917 (1993).

12. Thomas Jefferson, *Notes on the State of Virginia*, William Peden, ed., (Chapel Hill: University of North Carolina Press, 1955 [1781]), p. 157.

13. See, e.g., Ill. Const. (1848), Ohio Const. (1851), and Ind. Const. (1851).

14. Recent scholarship on the issue includes: Akhil Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569 (1990); Martin H. Redish, *Text, Structure, and Common Sense in Interpretation of Article III*, 138 U. Pa. L. Rev. 1633 (1990); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U.L. Rev. 1 (1991); Akhil Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 Nw. U.L. Rev. 442 (1991); Mark Tushnet, *The Law, Politics, and Theory of Federal Courts: A Comment*, 85 Nw U.L. Rev. 454 (1991); Michael Wells, *Congress' Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 Nw. U.L. Rev. 465 (1991).

15. See, e.g., Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005–1006 (1965).

16. See Raoul Berger, *Congress v. The Supreme Court* (Cambridge, Mass.: Harvard University Press, 1969), pp. 285–96.

17. See, e.g., Leonard Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981); Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129 (1981).

18. 74 U.S. (7 Wall.) 506 (1869). For an excellent discussion of this case, see William Van Alstyne, *A Critical Guide to Ex parte McCordle*, 15 Ariz. L. Rev. 229 (1973).

19. *Ex parte McCordle*, 73 U.S. (6 Wall.) 318 (1868).

20. Quoted in Van Alstyne, *supra* note 18, at 239.

21. 74 U.S. at 512.

22. *Id.* at 513.

23. 74 U.S. at 514.

24. *Id.* at 515.

25. 75 U.S. (8 Wall.) 85 (1869).

26. 80 U.S. (13 Wall.) 128 (1872). For an excellent discussion of this case, see Gordon G. Young, *Congressional Regulations of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 Wis. L. Rev. 1189.

27. *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869).

28. 92 Stat. 2076.

29. 80 U.S. at 146–47.

30. 518 U.S. 651 (1996).

31. Pub. L. 104-132, 110 Stat. 1217, §106(b).

32. §106(b)(3)(E).

33. 518 U.S. 651 (1996).

34. *Id.* at 658.

35. *Id.* at 661–62.

36. See, e.g., Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985); Robert Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741 (1984); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498 (1974); Martin H. Redish and Curtis Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and New Synthesis*, 124 U. Pa. L. Rev. 45 (1975).

37. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938); *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Yakus v. United*

States, 321 U.S. 414 (1944).

38. 14 U.S. (1 Wheat.) 304, 328–331 (1816). See Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39 (1995) (arguing that history supports Justice Story’s theory; that the framers thought that state courts would not adjudicate federal issues and that Congress was required to create lower federal courts to hear these claims).

39. *Id.* at 328–330 (emphasis in original).

40. *Id.* at 331 (emphasis in original).

41. 415 U.S. 361 (1974).

42. 38 U.S.C. §211(a) (1982).

43. 393 U.S. 233 (1968).

44. Military Selective Service Act of 1967, 50 U.S.C. §10(b)(3) (1982).

45. 393 U.S. at 243–244 n.6.

46. *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Reno v. Catholic Social Services*, 509 U.S. 43 (1993).

47. *State v. Fleming*, 26 Tenn. 152 (1846).

48. *DeChastellux v. Fairchild*, 15 Pa. 18 (1850).

49. Henry Hart, *The Power of Congress to Limit Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1402 (1953).

50. Pub. L. No. 104-132, 110 Stat. 1214.

51. Pub. L. No. 104-208, 110 Stat. 3009, amended Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996).

52. For a discussion of these provisions and their constitutionality, see Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn. L. Rev. 1411 (1997); Note, *The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions*, 110 Harv. L. Rev. 1850 (1997).

53. Antiterrorism and Effective Death Penalty Act §440(a).

54. Antiterrorism and Effective Death Penalty Act §401(e). The Act also provides that an alien convicted of an aggravated felony is to be “conclusively presumed” to be deportable. A petition for review or for habeas corpus on behalf of such an alien may challenge only whether the alien is in fact an alien. §242A(c).

55. Lower courts generally have upheld the constitutionality of the restrictions found in the Antiterrorism and Effective Death Penalty Act. See, e.g., *Mansour v. INS*, 123 F.3d 423 (6th Cir. 1997); *Chow v. INS*, 113 F.3d 659 (7th Cir. 1997); *Yang v. INS*, 109 F.3d 1185 (7th Cir. 1997).

56. §242.

57. §240(a).

58. §240(b).
59. §245.
60. 119 S.Ct. 936 (1999).
61. Pub.L. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (amended 1996, 1997).
62. 518 U.S. 651 (1996).
63. Pub. L. No. 104-131, 110 Stat. 1213 (1996).
64. *Taylor v. United States*, 1998 WL 214578 (9th Cir. 1998).
65. See, e.g., *Hadix v. Johnson*, 133 F.3d 940, 942-43 (6th Cir. 1998); *Dougan v. Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997); *Benjamin v. Jacobson*, 124 F.3d 162, 170-73 (2d Cir. 1997).