

Winter 1982

Unconstitutionality of Congressional Proposals to Limit the Jurisdiction of Federal Courts, The

Carl A. Auerbach

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Carl A. Auerbach, *Unconstitutionality of Congressional Proposals to Limit the Jurisdiction of Federal Courts, The*, 47 Mo. L. REV. (1982)

Available at: <https://scholarship.law.missouri.edu/mlr/vol47/iss1/22>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

THE UNCONSTITUTIONALITY OF CONGRESSIONAL PROPOSALS TO LIMIT THE JURISDICTION OF FEDERAL COURTS

CARL A. AUERBACH*

Almost two hundred years have passed since the United States Constitution was ratified. During that time, the United States Supreme Court has not defined the scope of Congress' power to divest the federal courts, including the Supreme Court, of jurisdiction in entire classes of constitutionally based claims. The Court has had no occasion to decide this issue because Congress has never exercised such power.

*Ex parte McCordle*¹ is no exception. In that case, the Supreme Court upheld the repeal by the Radical Republican Congress in 1868 of an 1867 act that authorized lower federal courts to grant habeas corpus to anyone unconstitutionally restrained and the Supreme Court to hear appeals when the lower federal courts refused to grant habeas corpus. A federal circuit court had denied the habeas corpus petition of McCordle, a Mississippi newspaper editor held in military custody on charges of publishing incendiary and libelous articles. McCordle appealed to the Supreme Court under the 1867 act. Even though McCordle's appeal had been argued to the Court and was being considered when the 1868 act was adopted, the Court held that Congress had withdrawn the Court's authority to decide the case. The Court, however, pointed out that Congress had not withdrawn its entire appellate power in habeas corpus cases. It explained that the 1868 act did not withdraw the jurisdiction that the Court exercised prior to the 1867 act and still retained. Thus, less than one year later, in *Ex parte Yerger*,² the Supreme Court granted certiorari to exercise its appellate jurisdiction over a case in which the petitioner in military detention in Mississippi had unsuccessfully sought habeas corpus in a lower federal court under the Judiciary Act of 1789. Taken together, *McCordle* and *Yerger* indicate only that Congress may close one route to the Court for appellate review of a constitutional claim, so long as other routes remain open.

* Professor of Law, University of Minnesota Law School. A.B., 1935, Long Island University; LL.B., 1938, Harvard University Law School. This Article is adapted from a speech given by Professor Auerbach before the 1981 Judicial Conference of the Eighth Circuit on July 8, 1981.

1. 74 U.S. (7 Wall.) 506 (1869).

2. 75 U.S. (8 Wall.) 85 (1869).

Congress has never withdrawn the Court's appellate jurisdiction in cases involving particular classes of constitutional claims. Recently, however, legislators have introduced bills in both the House of Representatives and the Senate that would limit the appellate jurisdiction of the Supreme Court and the lower federal courts in cases dealing with specified substantive constitutional issues. I believe that this legislation, if enacted, would be unconstitutional and should be declared so by the Court. After briefly outlining the background of the proposed legislation, I will discuss two types of bills that are pending: those that limit the jurisdiction of both the Supreme Court and the lower federal courts and those that limit the jurisdiction of only the lower federal courts.

That Congress has never enacted such legislation does not mean that it has always been satisfied with the Court's decisions. Throughout our history, powerful forces have attacked the Court for decisions with which they disagreed.³ The methods of attack have varied. For example, in 1804, the Jeffersonians sought to impeach Justice Samuel Chase for harboring dangerous opinions. Six of the Jeffersonian Senators broke from their party and joined the Federalists in acquitting Chase on all counts. Thus, the Senate established that as a matter of the practical political construction of the Constitution, a federal judge may not be impeached because of his "political opinions, his conceptions of public policy, or his interpretation of the laws."⁴ President Roosevelt's 1937 "Court-packing" plan was directed against a Court majority accused of usurping the function of the legislature to decide economic and social policy for the country. The people of the nation, including many who disagreed with the Court decisions that provoked the Court-packing plan, concluded that the plan would destroy the principle of judicial independence. Although the Court-packing plan was constitutional because Congress may fix the number of Justices on the Court, by defeating the plan, Congress established another practical political construction of the Constitution: the number of Supreme Court Justices may not be increased solely to change the course of constitutional decisions.

About a quarter of the court-curbing bills introduced in Congress prior

3. As of 1965, one student of the Court identified seven periods of intense court-curbing efforts in Congress: 1802-1804, 1823-1831, 1858-1869, 1893-1897, 1922-1924, 1935-1937, and 1955-1959. See Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965). Since then, three such periods, including the present one, may be added. In the 1960s, the Supreme Court's decisions on apportionment and obscenity provoked such a period, as did its decisions in the 1970s on school prayers, certain police techniques of criminal investigation, and school busing. In six of the seven court-curbing periods up to 1965, liberal groups led the attack on the Court. Conservative groups, generally coalitions of the conservative wings of the Republican and Democratic parties, espoused court-curbing for the first time in the 1950s in response to the internal security rulings of the Court. Nagel, *supra*, at 932.

4. V. HURST, *THE GROWTH OF AMERICAN LAW* 136 (1950).

to 1965 attempted to restrict the Court's appellate jurisdiction.⁵ All except the 1868 act involved in *Ex parte McCordle* failed. I hope that Congress will reject the pending court-curbing bills and establish that divesting the Court of appellate jurisdiction in order to overturn particular decisions is as harmful to the constitutional scheme as packing the Court for the same purpose.

But what if Congress should pass these bills? Would the Court uphold them? As Justice Jackson said of the precedents concerning the scope of executive power in the *Steel Seizure Case*:⁶

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.⁷

I will not trouble you with the apt quotations nor will I predict what the Court will do if the pending court-curbing bills are enacted. Instead, I shall state why the Court should declare them unconstitutional.⁸

Most of the pending bills apply only to cases that involve specified constitutional claims which the Court has upheld and converted into rights. Court decisions on school-sponsored prayer, abortion, and busing, and claims to equal treatment of males and females in the armed services are the objects of these bills. Some of the bills withdraw jurisdiction over cases involving these issues from the Supreme Court as well as from the lower federal courts; others only withdraw from the lower federal courts jurisdiction to issue injunctions or declaratory judgments in such cases.

An example of the first type of bill is Senate Bill 481, which was introduced on February 16, 1981, by Senator Jesse Helms for himself and for Senator John East. This bill first divests the Supreme Court of jurisdiction to review any case "arising out of any State statute, ordinance, rule, regulation, or . . . any act interpreting, applying, or enforcing a state statute, ordinance, rule or regulation which relates to voluntary prayers in public schools and public buildings."⁹ The bill also divests the federal district courts of jurisdiction over any case or question of which the Supreme Court has been divested of jurisdiction.

5. Nagel, *supra* note 3, at 941.

6. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

7. *Id.* at 634-35 (Jackson, J., concurring).

8. In presenting the reasons why the Supreme Court should declare these bills unconstitutional, I do so "reserving . . . [the] right to criticize decisions of any court in any case and without approving or disapproving any decisions of the Supreme Court of the United States." 44 A.B.A.J. 387 (1958) (ABA resolution opposing passage of court-curbing Jenner Bill).

9. S. 481, 97th Cong., 1st Sess. (1981).

Other bills propose similar jurisdictional withdrawals in cases that relate to abortion¹⁰ or to "assigning or requiring any public school student to attend a particular school because of his race, creed, color, or sex,"¹¹ and in cases that arise under any federal statute, ordinance, rule, or regulation establishing different standards on the basis of sex for the composition of the armed services or assignment to duty therein,¹² or different treatment for males and females concerning induction, or mandatory registration for possible induction, of individuals for training and service in the armed forces.¹³

My reasons for believing the Court should declare these bills to be unconstitutional, should they be enacted, have to do with their consequences, which are of constitutional significance. The judiciary will cease to function independently if it must labor under the constant apprehension of the withdrawal of Supreme Court review by a temporary majority of Congress that disagrees with any particular decision. This apprehension can only temper the course of Court decisions.

Bills like Senate Bill 481 threaten the independence of state courts as well as federal courts. On its face, the bill leaves state courts to review cases relating to voluntary prayers in public schools and public buildings, cases over which the federal courts would be deprived of jurisdiction. Members of state legislatures and state judges are bound by oath to support the Constitution of the United States. Presumably they would neither pass nor enforce a law that violated rights relating to school-sponsored prayers, which the Court has held are guaranteed by the establishment clause of the first amendment. Yet the sponsors of the bill obviously do not expect these state officials to be bound by their oaths because that would require adherence to the very Supreme Court doctrines that prompted the bill and render the withdrawal of federal court jurisdiction fruitless.

The intent of the bills' sponsors to alter court decisions on these issues is made evident by a characteristic statement of Senator Helms. In introducing this proposal in 1979, he made it clear that its "limited and specific objective" was "to restore to the American people the fundamental right of voluntary prayer in the public schools."¹⁴ Therefore, Senate Bill 481 and similar bills, if enacted, will place intolerable burdens on state judges who will be torn between their duty to support the Constitution and the pressures that passage of these bills will exert to alter the constitutional law. Without the life tenure and undiminished pay assured federal judges, subject at election time to attack by the single-issue groups to whom the matters covered by the bills are of supreme importance, deprived of any possible future sup-

10. H.R. 867, 97th Cong., 1st Sess. (1981).

11. H.R. 869, 97th Cong., 1st Sess. (1981).

12. H.R. 279, 97th Cong., 1st Sess. (1981).

13. H.R. 2365, 97th Cong., 1st Sess. (1981).

14. 125 CONG. REC. S 4130 (daily ed. Apr. 5, 1979) (remarks of Senator Helms).

port by the lower federal courts and the Supreme Court, and denied the benefit of further doctrinal development by these courts, state judges cannot be expected to be bound indefinitely by the Court decisions under attack. I do not predict that the courts of every state will fulfill the expectations of the bills' sponsors. Some state courts will resist the impact of the bills; many will not. In either case, the pressures put on the state courts because of the enactment of these bills would jeopardize the independence of the state judiciary.

From a national perspective, the enactment of these bills would be disastrous. Public cynicism will be heightened and confidence in our institutions of government will be eroded further by the knowledge that state legislatures and state courts are not obeying the Constitution and that members of Congress and the President are violating their oaths to support the Constitution by allowing constitutional decisions of the Supreme Court to be overturned by means other than an amendment pursuant to article five of the Constitution. Further, the supremacy of the Constitution and its uniform interpretation and application will be destroyed with regard to the subject matters in question. Constitutional rights in these matters will vary with the state in which they are litigated.

Since the founding of the Republic, it has been recognized that constitutional rights and the supremacy of federal law can be guaranteed only by appeals to the Supreme Court from the judgments of the highest state courts. This is why Justice Holmes wrote that the Union would be imperilled if the Court could not declare laws of the states unconstitutional and void.¹⁵

The proponents of these bills base their argument that it is constitutional for Congress and the President to curtail the appellate jurisdiction of the Supreme Court on two grounds. The first is the language of article III, section 2, of the Constitution, which states that in all cases other than those in which it has specified original jurisdiction, the Court "shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The second ground is the assumed "plan of the Constitution for the courts" that, Professor Herbert Wechsler has maintained, was "that the Congress would decide from time to time how far the federal judicial institution shall be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as 'the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'"¹⁶

Before evaluating these grounds, it should be said that there is general agreement that "any federal court in which a purported jurisdictional restriction is asserted at least has jurisdiction to decide whether or not the purported

15. O. HOLMES, *COLLECTED LEGAL PAPERS* 295-96 (1920).

16. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965).

restriction is itself constitutional."¹⁷ If the exceptions and regulations clause is read literally, article III, section 2, empowers Congress to enact the proposed court-curbing bills. Recent studies of the proceedings of the Constitutional Convention and the state ratifying conventions conclude that the Founders intended the exceptions and regulations clause to authorize Congress to restrict only the Court's review of questions of fact.¹⁸ The Constitutional Convention rejected an amendment providing that the judicial power of the United States, in cases other than those falling within the original jurisdiction of the Court, "shall be exercised in such manner as the legislature shall direct."¹⁹

Neither Congress nor the Court has adopted this limited view of the exceptions and regulations clause.²⁰ Nevertheless, no evidence indicates that the Framers of the Constitution, as Professor Wechsler argues, intended to give Congress the choice of relying on the state courts to maintain the Constitution, laws, and treaties of the United States as the supreme law of the land. There is evidence that the Framers intended to give Congress the choice of vesting original jurisdiction in lower federal courts that Congress might ordain and establish or in state courts, and that if Congress chose the state courts, the parties ultimately could appeal to the Supreme Court.

"Literalism," Judge Friendly wrote, is "peculiarly inappropriate in con-

17. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387 (1953).

18. See R. BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3 (1973); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962). Brant suggests that the Judiciary Act of 1789 spelled out the appellate jurisdiction of the Supreme Court to "put the united weight of the legislative and executive departments behind a judiciary of enormously expanded authority"—support which was "of incalculable value [to the Supreme Court] in its first stormy half-century." Brant, *supra*, at 12.

19. 2 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION 425, 431 (1911).

20. It has also been suggested that any case excepted from the Supreme Court's appellate jurisdiction must be included in its original jurisdiction. See Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 32. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), rejected this view. Professor Crosskey read U.S. CONST. art. III, § 2, as stating that if a case is excepted from the Court's appellate jurisdiction, jurisdiction over it must be vested in a lower federal court, and constitutional questions involved in the case must be permitted in some way to reach the Supreme Court on appeal. 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 610-18 (1953).

It may also be maintained that because U.S. CONST. art. III, § 2, grants appellate jurisdiction to the Supreme Court only in "all the other cases before mentioned," the exceptions clause is intended to authorize Congress to make exceptions to this by adding to the appellate jurisdiction cases that article III has assigned to the original jurisdiction. See *Bors v. Preston*, 111 U.S. 252 (1884).

stitutional adjudication.”²¹ Behind “the words of the constitutional provisions,” Chief Justice Hughes insisted, “are postulates which limit and control.”²² One of the most important of the postulates of the constitutional plan is that the Court will be “the instrument for implementing the supremacy clause.”²³ Alexander Hamilton wrote in the *Federalist* papers:

If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen [now fifty] independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.²⁴

This central role of the Court in the constitutional plan was emphasized by Justice Story in *Martin v. Hunter's Lessee*,²⁵ Justice Marshall in *Cohens v. Virginia*,²⁶ and Justice Taney in *Ableman v. Booth*.²⁷ The Court's role, wrote Justice Taney, was essential to the very existence of the government of the United States because without it that government “would soon become one thing in one State and another thing in another.”²⁸ Since the Judiciary Act of 1789, Congress has recognized this role by providing for Supreme Court review of state court decisions involving substantial questions of federal law. By seeking to limit this role, the proposed bills are as unprecedented as they are revolutionary.

Even if the exceptions and regulations clause is not limited by the supremacy clause of article VI, Congress may exercise the power granted by the exceptions and regulations clause only in conformity with the other provisions of the Constitution that limit the exercise of all the powers delegated to Congress by the Constitution: the Bill of Rights; article I, section 9; and article III itself.²⁹ No one would say, for example, that Congress

21. H. FRIENDLY, IN PRAISE OF ERIE—AND OF THE NEW FEDERAL COMMON LAW 21 (1964).

22. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). Justice Rehnquist recently expressed the same thought, writing that the “tacit postulates” of the constitutional plan “are as much engrained in the fabric of the document as its express provisions.” *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

23. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960).

24. THE FEDERALIST No. 80, at 516 (Mod. Lib. ed. 1941). Hamilton reiterated this thought in THE FEDERALIST No. 81, at 539 (Ford ed. 1898) and THE FEDERALIST No. 82, at 533 (Ford ed. 1898). Madison agreed with Hamilton. See THE FEDERALIST No. 22, at 140 (Ford ed. 1898) and THE FEDERALIST No. 39, at 251 (Ford ed. 1898).

25. 14 U.S. (1 Wheat.) 304 (1806).

26. 19 U.S. (6 Wheat.) 264 (1821).

27. 62 U.S. (21 How.) 506 (1858).

28. *Id.* at 517-18.

29. See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

constitutionally could divest the Court of jurisdiction to review cases brought by persons of a specified race, religion, or political belief. The pending court-curbing bills are just as bad; they single out groups of individuals asserting specified constitutional rights or claims and deny them access to the federal courts.

These proposed withdrawals of jurisdiction violate the due process clause of the fifth amendment as well as the equal protection component of that amendment. They violate due process by impinging on fundamental rights without any compelling government interest to justify it. They violate equal protection in two ways: first, they deny access to the federal courts to persons who seek protection of the specified constitutional rights when such access is enjoyed by persons who seek protection of other constitutional rights; second, the specified constitutional rights might be protected in some states but not in others, thereby subjecting persons who are similarly situated to different treatment.

The compelling government interest that justifies the jurisdictional withdrawals, Senator Helms argues, is the correction of "judicial usurpations of power" and the restoration of the autonomy of the states and the democratic system of self-government.³⁰ Indeed, some maintain that the exercise of Congressional power to curtail the Court's appellate jurisdiction may, politically and psychologically, buttress the legitimacy of judicial review.

These are echoes of arguments heard throughout our history. The controversy provoked by *Marbury v. Madison*³¹ keeps recurring. Judicial review is incompatible with majority rule. Yet, judicial review has become a valuable institution in our constitutional democracy. It protects the strategic freedoms and the individual rights guaranteed by the Constitution that majoritarian political processes may not always respect.

The evidence does not indicate that the Founders intended the exceptions and regulations clause to be used to correct judicial usurpation. *Marbury v. Madison* and *Martin v. Hunter's Lessee* justified judicial review as necessary to curb congressional and state excesses complained of in properly presented cases or controversies. It is incongruous and destructive of basic constitutional principles to maintain that if the Court corrects what it perceives as a governmental excess, Congress may, by enacting a law, block the Court if it believes the Court acted improperly.³² If this view were to prevail, it would make Congress supreme vis-a-vis the Court in a way not thought possible since *Marbury v. Madison*.

Granted that the path to constitutional amendment is practically im-

30. 127 CONG. REC. S 1281 (daily ed. Feb. 16, 1981) (remarks of Senator Helms).

31. 5 U.S. (1 Cranch) 137 (1803).

32. R. BERGER, *supra* note 18, at 286. *But see* Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801.

passable, what should be done when the Court is wrong?³³ The Court has, of course, been wrong, at least on the occasions when it has admitted so by reversing itself. Although we must accept the decisions of the Court "as settling the rights and wrongs of the particular matter immediately in controversy,"³⁴ they are not above criticism. Every important decision initiates debate over "the adequacy of the reasons it advances for the value choice that it decrees."³⁵ Individuals and groups participate in this debate as litigants when they bring new cases in the hope of modifying or overturning particular decisions. Legislatures participate not only by passing resolutions praising or condemning particular decisions, but also by enacting legislation retesting issues that they believe the Court decided improperly. Court-curbing bills of the kind now pending may perform the useful function, as long as they do not pass, of indicating disagreement with the Court in a manner that cannot be ignored.

The judges of the lower federal courts participate in the debate as they decide new cases and give their reasons for narrowing or expanding Supreme Court rulings or, in some cases, even anticipating the overruling of a Supreme Court decision. Scholars participate by critically analyzing Court decisions and by providing information necessary to evaluate them. The media participate by bringing the issues to the attention of the general public. Finally, the President participates by reconstituting the Court through "the appointment and promotion of its critics."³⁶

History supports the conclusion that "the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment. It has worked with the premise that constitutional law, like politics itself, is a science of the possible."³⁷ Indeed, our concern should be that the Court not be intimidated from taking the longer view and standing firm in defense of the freedoms guaranteed by our fundamental law.

The second type of pending bills I will discuss are those that limit the jurisdiction of the lower federal courts, but not the appellate jurisdiction of the Supreme Court. House Bill 900 is typical. It deprives the lower federal courts of jurisdiction

to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any state law or municipal ordinance that (1) protects the rights of human persons between conception and birth or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at

33. See generally Moynihan, *What Do You Do When the Supreme Court Is Wrong?*, THE PUBLIC INTEREST, No. 57, at 3.

34. Hart, *supra* note 17, at 1396.

35. Wechsler, *supra* note 16, at 1012.

36. *Id.* at 1002.

37. R. MCCLOSKEY, THE AMERICAN SUPREME COURT 23 (1960).

public expense of funds, facilities, personnel, or other assistance for the performance of abortions.³⁸

The proponents of bills like House Bill 900 argue that because article III allows Congress to create or not to create lower federal courts, Congress may abolish courts it has once created or prescribe and limit in any way it chooses the jurisdiction of those courts it continues in existence.³⁹ In the absence of federal courts inferior to the Supreme Court, the state courts would decide constitutional claims subject to ultimate Supreme Court review. This latter assumption probably is not realistic today. Because of the Court's burdensome caseload, it must refuse to hear many cases that involve important federal questions. Increasingly, judges of federal district courts and courts of appeals act as the primary protectors of federal rights and enforcers of Supreme Court decisions.

It has been argued that under these circumstances, the Founder's constitutional plan requires functioning lower federal courts, and Congress no

38. H.R. 900, 97th Cong., 1st Sess. (1981). Some may argue that such a bill cannot accomplish its purpose because anyone seeking to attack a state law or municipal ordinance of the kind described may bring an action against the state and invoke the original jurisdiction of the Supreme Court, which Congress may not abridge. *See* *Florida v. Georgia*, 58 U.S. (17 How.) 478, 492 (1854); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 148 (1803). The effort to invoke the Supreme Court's original jurisdiction, however, would be barred by U.S. CONST. amend. XI, under *Edelman v. Jordan*, 415 U.S. 651 (1974), unless Congress exercised its power under U.S. CONST. amend. XIV, § 5, explicitly to abrogate the immunity of the states from suit in these cases. *See* *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

39. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), Justice Story argued that "Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance." *Id.* at 331 (dictum) (emphasis added). He relied on the language of article III, observing that the "judicial power of the United States *shall be vested* (not may be vested) in one supreme court, and in such inferior courts as Congress may, from time to time, ordain and establish." *Id.* at 328 (dictum) (emphasis added). The Supreme Court has never accepted Justice Story's view. *See* *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1927); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511 (1898); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

More recently, Professor Julius Goebel, studying the events of the Constitutional Convention anew, reached Justice Story's conclusion, but relied on the words "ordain and establish" to demonstrate that the Constitutional Convention intended that lower federal courts be created. 1 J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 246-47 (1971). Yet, it also is maintained that "the Convention debates clearly indicate that the framers compromised by awarding Congress discretionary power as to . . . [the] creation . . . [of the lower federal courts]." Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 61 (1975).

longer should have the constitutional power to abolish those courts.⁴⁰ Whether changing conditions warrant ignoring the clear language and intent of article III, they warrant questioning the deduction that because Congress may abolish the federal courts, it may limit their jurisdiction as it pleases. Congress will not abolish the federal courts. Moreover, Congress' power to curtail their jurisdiction is subject to the same constitutional limitations that restrain its power to make exceptions from the Supreme Court's appellate jurisdiction. Thus, House Bill 900 and bills like it should be held unconstitutional.

House Bill 900 has additional constitutional vices. It singles out a specified class of cases, those involving abortions, and while ostensibly leaving the federal courts with subject matter jurisdiction over these cases, it withdraws from the federal courts the power to grant remedies that the Constitution may require. To ask a federal court to decide a case or controversy, yet deprive it of jurisdiction to effectuate its decision, is an unconstitutional limitation of the judicial power. The constitutional right to have an abortion, by its very nature, demands interim protection. The bills that would divest all article III courts of jurisdiction to require a student to attend a particular school because of race, color, creed, or sex⁴¹ share the same constitutional infirmity. Effective school desegregation, in some local situations, may require that certain students attend particular schools.

House Bill 761, which would withdraw the jurisdiction of all article III courts "to make any decision, or issue any order, which would have the effect of requiring any individual to attend any particular school,"⁴² apparently for any reason, also invades the judicial power unconstitutionally. It also violates the principle of *United States v. Klein*⁴³ because it instructs federal courts that they may not make certain decisions in cases over which they have subject matter jurisdiction regardless of the facts they find and what the Constitution may demand.

Special constitutional problems are also presented by House Bill 2791, which would strip all article III courts of jurisdiction over cases challenging the validity of federal statutes treating males and females differently in military registration, induction, training, or service.⁴⁴ Not all such cases have been resolved by the recent Supreme Court decision that the Military Service Act, which authorizes the President to require the registration of males and not females, does not violate the fifth amendment.⁴⁵ Such cases may

40. See Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 513 (1974).

41. H.R. 869, 97th Cong., 1st Sess. (1981); H.R. 1079, 97th Cong., 1st Sess. (1981); H.R. 1180, 97th Cong., 1st Sess. (1981).

42. H.R. 761, 97th Cong., 1st Sess. (1981).

43. 80 U.S. (13 Wall.) 128 (1871).

44. H.R. 2791, 97th Cong., 1st Sess. (1981).

45. *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981).

attack the actions of federal officers, but the state courts in which such cases would have to be brought under the proposed bills would have no jurisdiction to grant relief against federal officials as long as *Ableman v. Booth*,⁴⁶ *Tarble's Case*,⁴⁷ and *McClung v. Silliman*⁴⁸ remain the law⁴⁹ and Congress does not authorize the state courts to act against federal officials in such matters. If this bill is passed, neither state nor federal courts would have jurisdiction to hear the constitutional claims asserted. Thus, the congressional withdrawal of federal court jurisdiction should be held to violate the due process clause of the fifth amendment.

I submit that if the pending court-curbing bills become law, weighty reasons should compel the Court to declare such laws unconstitutional. These bills, which, if enacted, would prove unwise as well as unconstitutional, should draw the united opposition of conservatives and liberals, Republicans and Democrats, and those who agree or disagree with the decisions that provoked the bills. Proponents of these bills should not seek to set precedents for future use of jurisdictional withdrawals to circumvent the constitutional requirement of just compensation, the constitutional protections against the impairment of contract obligations, or the deprivation of property without due process of law. Jurisdictional withdrawal may not be used to create classes of congressionally disfavored constitutional rights. Supreme Court decisions may not be overturned by a simple majority vote in Congress and an acquiescing President.

46. 62 U.S. (21 How.) 506 (1858).

47. 80 U.S. (13 Wall.) 397 (1871).

48. 19 U.S. (6 Wheat.) 598 (1821).

49. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411-12 (1871), and *Abelman v. Booth*, 62 U.S. (21 How.) 506, 515-16 (1858), held that state courts have no power to issue writs of habeas corpus to federal officials. *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 604 (1821), held that state courts have no power to mandamus federal officials. Redish and Woods argue persuasively that state courts should also be held to have no power to enjoin or issue declaratory judgments against federal officials because the danger of state interference with federal functions is the same whether the state courts use mandamus, habeas corpus, injunctive relief, or a declaratory judgment. See Redish & Woods, *supra* note 39, at 76-109.