U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

16 JUL 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Constitutional Issues Raised by Provisions Removing or Limiting Federal Court Jurisdiction in Abortion, School Prayer, Busing and Draft Registration Bills

The Chairmen of the House and Senate Committees on the Judiciary have requested the Department's views with respect to a number of bills 1/ to remove or limit federal court jurisdiction over cases involving abortion, school prayer, busing, and registration for the draft. 2/ Each of these bills raises complex and difficult constitutional considerations and important policy issues. This memorandum examines only the legal issues raised by the various bills; it does not address their policy implications. Part I treats provisions restricting lower federal court jurisdiction; Part II analyzes measures to limit the Supreme Court's jurisdiction. We conclude that Congress has substantial power under the Constitution, if carefully and properly exercised, to limit lower federal court jurisdiction, but that there are limits to congressional power to remove Supreme Court jurisdiction which would be exceeded by these measures.

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I.

PROVISIONS LIMITING JURISDICTION OF LOWER FEDERAL COURTS

A number of Senate and House bills pending in the First Session of the 97th Congress contain provisions that would eliminate the jurisdiction of the lower federal courts over

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1/ At least twenty-four such bills are pending.

2/ A chart which summarizes the proposed bills by title, sponsor, subject matter and nature of the proposed limitation is attached hereto and incorporated herein as Exhibit A.

specified controversies. S. 158, for example, provides in section 2: 3/

> Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have 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 public expense of funds, facilities, personnel, or other assistance for the performance of abortions.

S. 583 and H.R. 73 contain similar provisions, except that their limitation on inferior court power over abortion matters is stated as a limitation on remedies rather than jurisdiction, and they preclude review of cases challenging federal, as well as state, statutes. 4/

3/ Section 1 of S. 158, popularly known as the "Human Life Bill" provides that human life shall be deemed to exist from conception and that unborn children are "persons" for purposes of the right to life under the Fourteenth Amendment. This memorandum does not address the constitutional issues raised by Section 1.

4/ These bills provide as follows:

> That, notwithstanding any other provision of law, a court of the United States may not issue any restraining order or temporary or permanent injunction in any case --
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> (a) involving or arising out of any Federal or State law or municipal ordinance that prohibits, limits, or regulates abortion (including any such law or ordinance that regulates abortion clinics or persons that provide abortions);
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> (b) involving or arising out of any Federal or State law or municipal ordinance that prohibits, limits, or regulates the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions.
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> SEC. 2. As used in this Act, the term "court of the United States" means any court established by or under article III of the Constitution of the United States other than the Supreme Court.

Several bills also limit inferior federal court jurisdiction in conjunction with a limitation on Supreme Court jurisdiction. We discuss the limitations on inferior court jurisdiction separately because of the possibility that they are severable from the provisions limiting Supreme Court jurisdiction. The bills limiting both lower and Supreme Court jurisdiction include H.R. 867 (no jurisdiction over cases arising out of state statutes or regulations relating to abortion); H.R. 72, 326, 408, 865, 989, and 1335 (no jurisdiction over suits challenging voluntary prayer in public schools or other public places) 5/; S. 528 and H.R. 869, 1079, and 1080 (no power to require attendance at particular schools because of race, creed, sex or color), 6/ and H.R. 2365 and 2791 (no

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5/ These bills would amend title 28 of the United States Code, to provide:

> § 1259. Appellate jurisdiction; limitations
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> (a) Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of any Act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings.
>
> § 1363. Limitations on jurisdiction
>
> Notwithstanding any other provision of law, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1259 of this title.

These bills also provide that they would not apply to cases which were pending on the date of the bill's enactment.

6/ H.R. 1079 and 1080 provide, simply, that "no court of the United States shall have jurisdiction to require the attendance at a particular school of any student because of race, color, creed, or sex." H.R. 869 is similar to the school prayer bills discussed in note 3, supra. S. 528 is somewhat more complicated and is discussed at length at pp. 45-46, infra.

The language of H.R. 1079 and 1080 is similar to that of the North Carolina statute considered in North Carolina State Board of Educ. v. Swann, 402 U.S. 43 (1971), which provided, inter alia, that "[n]o student shall be assigned or compelled to attend any school on account of race, creed, color or national origin . . . ." Id. at 44. That statute, which did not deal in terms with the jurisdiction of the courts, was held unconstitutional by a unanimous Supreme Court.

jurisdiction over challenges to sex bias in Selective Service System). 7/ We conclude that the bills limiting the jurisdiction of the lower federal courts are probably constitutional and would be upheld by the Supreme Court unless the statute or its legislative history clearly indicated a legislative intent to deprive persons of constitutional rights.

A. General Power of Congress

Article III of the Constitution provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." See also U.S. Const., Art. 1, § 8, cl. 9 (giving Congress power to "constitute Tribunals inferior to the supreme Court"). This language reflects a compromise arrived at during the Constitutional Convention. While the Framers were unanimous as to the need for a Supreme Court, they disagreed strongly with respect to inferior federal courts. The Committee of the Whole approved a provision for mandatory inferior federal courts, but on reconsideration the Committee struck this provision by a divided vote. See P. Bator, P. Miskin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and The Federal System 11 (1973). The Committee later approved the substance of the present language empowering Congress to establish inferior judicial tribunals within its discretion. It seems a necessary inference from the express decision that the creation of inferior courts was to rest in the discretion of Congress that, once created, the scope of their jurisdiction was also discretionary. 8/ The view that, generally speaking, Congress has very broad control over lower federal court jurisdiction was accepted by the Supreme Court in Cary v. Curtis, 44 U.S. (3 How.) 236 (1845),

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7/ This legislation may not be pursued by its sponsors in light of the Supreme Court's recent decision in Rostker v. Goldberg, 101 S.Ct. ___ (1981).

8/ Id. But see Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974).

and Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). That view remains firmly established today. 9/

Moreover, the power over jurisdiction has been held to include substantial power to limit remedies available in lower federal courts. In Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938), the Court upheld provisions of the Norris-LaGuardia Act, which restricted federal court jurisdiction to issue restraining orders or preliminary or permanent injunctions in cases growing out of a labor dispute, observing that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." In Lockerty v. Phillips, 319 U.S. 182 (1943), the Court upheld a provision of the Emergency Price Control Act that conferred jurisdiction to restrain enforcement of certain price regulations on a specially constituted Article III court and withdrew that jurisdiction from all other courts. The Court noted, in response to the assertion that the statute deprived litigants of "their day in court to challenge [the Act's] constitutionality," id. at 188, that the Act granted to the special Article III court "and, upon review of its decisions, to this Court," id. at 188-89, the power to pass on the constitutionality of the Act and its applications. In Yakus v. United States, 321 U.S. 414 (1944), the Court upheld provisions of the Emergency Price Control Act which prohibited any court from granting temporary stays or injunctions. The Court stated that, on the facts of that case, "[t]he legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions." Id. at 442. Taken together, Lauf, Lockerty, and Yakus recognize a very broad congressional power, "subject to other constitutional limitations," 321 U.S. at 443, to control federal court remedies. 10/

Some of the bills under consideration restrict jurisdiction over a particular class of cases, 11/ while others restrict juris-

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9/ See, e.g., Palmore v. United States, 411 U.S. 389 (1973); Aldinger v. Howard, 427 U.S. 1, 15 (1976)("well established" that lower federal courts, as opposed to state trial courts of general jurisdiction, "are courts of limited jurisdiction marked out by Congress").

10/ See also Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

11/ See H.R. 72, 114, 326, 408, 865, 869, 989 and 1335.

diction to issue certain remedies. 12/ In either situation, in light of the foregoing discussion, they appear to fall within congressional power to limit lower federal court jurisdiction, provided that they contravene no express or implicit limitations on congressional power found elsewhere in the Constitution. Possible limitations are discussed in the following section.

B. Limitations on Congressional Power

1. Separation of Powers

The principle of separation of powers imposes an implicit limitation on congressional control over lower federal court jurisdiction. Congress cannot use its power to limit jurisdiction as a disguise for usurping the exercise of judicial power; nor can Congress impose a duty on the courts to exercise a legislative function by deciding cases without any power to issue relief affecting legal rights or obligations. In United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), the Supreme Court relied on the first of these limitations by refusing to give effect to a statute which prescribed how the Court should decide an issue of fact in a pending appeal by asserting that the courts would have no jurisdiction to decide the matter otherwise. Although the Klein holding was directed at a restriction of Supreme Court jurisdiction, the Court left little doubt that it would also have condemned the statute's similar restriction on Court of Claims jurisdiction. According to the Court, a congressional enactment forbidding an Art. III court "to give the effect to evidence which, in its own judgment, such evidence should have . . . . passed the limit which separates the legislative from the judicial power." Id. at 147. See also n. 33, infra.

None of the jurisdiction-limiting statutes now pending in Congress appears to usurp the judicial function by instructing lower federal courts how to decide issues of fact in pending cases. Some of them do, to be sure, control jurisdiction in a non-neutral fashion. The abortion measures, for example, selectively divest the lower federal courts of jurisdiction over suits seeking equitable relief against statutes limiting or prohibiting abortions, but leave the courts open to give equitable relief against statutes encouraging abortions. However, existing statutes which are almost certainly constitutional are content-biased in a fashion similar to

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12/ See H.R. 1079, 1180; S. 158. At least two bills fail to invoke the talisman of "jurisdiction." See S. 583, 528.

the measures under discussion. 13/ Content bias in jurisdiction is not equivalent to instructing a court how to decide a given case, since a court is not constrained to decide cases over which it has jurisdiction in a particular way.

Somewhat more difficult questions under Article III are raised by those provisions of the bills that allow the federal courts to decide cases and controversies involving the subjects at issue, but that withdraw the court's "jurisdiction" to issue certain remedies. It might be argued that Article III prohibits Congress, in the guise of limiting jurisdiction, from depriving the lower federal courts of their power to issue any effective remedies. Whatever the limits imposed by Article III, however, we believe that they are not exceeded by the present bills. Cases such as Lauf, Lockerty, and Yakus, although they did not involve statutes which precluded all effective remedies, suggest that congressional control over remedies is very broad. The fact that Article III imposes no express limits on congressional power to create or abolish inferior federal courts or to control their jurisdiction over particular classes of cases indicates that this greater power includes the lesser one of controlling remedies once jurisdiction is granted. The restrictions in the current bills do not appear to exceed the relevant limits, for they do not withdraw all remedial power from the courts. 14/

2. Fifth Amendment

Congress' power to restrict lower federal court jurisdiction is subject to limitations contained in other constitutional provisions, such as the Fifth Amendment's Due Process Clause. See Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948). To determine whether the bills would survive a due process challenge, it will be useful first to identify the level of scrutiny that a court is likely to apply in reviewing them and second to assess whether the bills can be justified as adequately related to a sufficient state interest.

13/ See, e.g., 28 U.S.C. §§ 1254, 1257 (Supreme Court appellate and certiorari jurisdiction); id. § 2241 (habeas corpus); id. § 2284 (3-judge district court).

14/ S. 73, 158, and 583 would bar all forms of equitable relief, but do not purport to affect the jurisdiction of the federal courts to adjudicate claims involving alleged deprivations of constitutional rights arising out of state statutes limiting or prohibiting abortions. A plaintiff might, for example, be able to maintain an action under 42 U.S.C. § 1983 to establish liability for damages. Similarly, under some of the busing bills the plaintiff would not lose the right to bring a damage action against a segregated school system.

a. Level of Scrutiny.

(i) "Strict" and "Rational Basis" Scrutiny

In general, courts uphold statutes under the Due Process Clause if they are rationally related to a legitimate state purpose. In two situations, however, courts depart from this minimal, "rational basis" scrutiny and apply "strict" scrutiny, which requires that legislation be closely tailored to a compelling state interest. First, strict scrutiny is applied when legislation discriminates against a suspect class, such as a particular racial group. Second, courts strictly scrutinize legislation burdening certain fundamental rights, such as the right to free speech. The question addressed here is whether the Supreme Court would subject any of the bills under discussion to strict rather than rational basis scrutiny. The question is of crucial importance because, as a practical matter, statutes which are strictly scrutinized are virtually uniformly struck down, while those subjected to rational basis scrutiny are almost always upheld.

(ii) Relevance of "Purpose" and "Effect"

In determining whether legislation discriminates against a suspect class or burdens a fundamental right, it is necessary to consider the relevance of legislative "purpose" and "effect." In the equal protection context, the Supreme Court has stated that strict scrutiny will be applied only if the legislature actually had the purpose of discriminating against a suspect class. Village of Arlington Heights v. Washington Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). Cf. Mobile v. Bolden, 446 U.S. 55 (1980)(plurality opinion). Disproportionate impact (or effect) on a suspect class is relevant to prove invidious purpose, but by itself is insufficient to trigger strict scrutiny. See Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979). The Court has apparently never squarely determined whether disproportionate impact is nevertheless necessary for strict scrutiny -- that is, whether invidious purpose alone, without accompanying discriminatory effect, triggers strict scrutiny.

In the context of fundamental rights, in contrast to the equal protection cases, the Court has applied strict scrutiny to a variety of legislative provisions which burdened fundamental rights without inquiring into whether there was an impermissible legislative purpose. See Mobile v. Bolden, supra; Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Reynolds v. Sims, 377 U.S. 533 (1964).

The Court has not, however, stated whether a purpose to burden a fundamental right triggers strict scrutiny even if the challenged statute does not in fact burden the right.

It is our opinion that strict scrutiny would be imposed for statutes which have the demonstrable purpose of discriminating against a suspect class or burdening a fundamental right, even if those statutes do not have the effect of discriminating against a suspect class or burdening a fundamental right. 15/ Although, as noted above, the Supreme Court has never squarely addressed this question, it did state in City of Richmond v. United States, 422 U.S. 358, 378-79 (1975), that acts "animated by [an impermissible] purpose have no credentials whatsoever for '[a]cts generally lawful may become unlawful when done to accomplish an unlawful end . . . , whatever [their] actual effect may have been or may be,'" quoting Western Union Telegraph Co. v. Foster, 247 U.S. 105, 114 (1918). See also Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960). This seems to be a reasonable interpretation of the courts' responsibility under the Constitution, at least where an invidious motive is manifest. To take an extreme example, it seems likely that the Supreme Court would invalidate a statute unambiguously motivated by a desire to reestablish a segregated school system, even if the statute's effect is to increase funding of predominantly black schools to make them more "equal." However, just as the existence of a discriminatory effect is relevant to the issue of impermissible purpose, the lack of discriminatory effect is highly relevant to show that a statute is permissibly motivated. In our opinion, a statute without discriminatory effect is unlikely to be scrutinized strictly unless the text or legislative history very clearly evinces an intent to burden a fundamental right or discriminate against a suspect class.

15/ In Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1869), the Supreme Court implied that motive was essentially irrelevant to the question of federal power to limit federal court jurisdiction: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution . . . ." This statement seems based on the general rule against inquiring into legislative motives which existed at the time. Such a general rule apparently has no current validity with respect to constitutional challenges under the Fifth Amendment's Due Process Clause. See Washington v. Davis, 426 U.S. 229 (1976).

(iii) "Effect" of the Proposed Measures

In our view, the abortion, school prayer, and busing bills would not have the effect of imposing impermissible burdens on fundamental rights. The rights to abortion, desegregated schools, and the free exercise of religion have been considered fundamental by the courts, but merely removing access to inferior federal tribunals for the vindication of these rights does not necessarily have the effect of burdening those rights. State courts remain open for actions to challenge state or federal laws restricting or prohibiting abortions or authorizing voluntary prayer in public schools. 16/ The Supreme Court has repeatedly and emphatically stated that state courts are initially fully competent to protect federal constitutional rights. 17/ Furthermore, we assume for

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16/ State courts generally may not refuse enforcement of a federal claim if they would enforce a similar claim under state law. Testa v. Katt, 330 U.S. 386 (1947). A different question would be presented if the state court did not provide a mechanism for enforcing a similar claim under state law. We do not address this question because the possibility that the state would provide no adequate mechanism for enforcing the federal constitutional right seems remote.

Similarly, if the decision in Tarble's Case, 80 U.S. (13 Wall.) 397 (1872), which held that state courts lacked jurisdiction under the Constitution to direct the writ of habeas corpus to federal authorities to secure the release of a person held by them, were read broadly to bar state court control of federal action, the bills might be held unconstitutional to the extent that they prevent any court, including the Supreme Court, from direct supervision of federal officers. We do not, however, read Tarble's Case to stand for that broad proposition. Compare 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 (1975) with Hart & Wechsler, supra, at 91 (1979 Supp.). Nevertheless, Tarble's Case raises interesting constitutional questions, particularly with respect to H.R. 2365 and H.R. 2791, since these bills and Tarble's Case both relate to the power to raise and support armies. If these bills remove the jurisdiction from the federal courts, and if the state courts would have no power to secure the release of a person conscripted in violation of his constitutional rights, no court would be empowered to hear the claim.

17/ E.g. Sumner v. Mata, 101 S.Ct. 764 (1981); Stone v. Powell, 428 U.S. 465 (1976). See also The Federalist 81 ("fitness and competency of [state] courts should be allowed in the utmost latitude") (Hamilton).

purposes of discussion that appeal or certiorari will lie from a state court judgment to the Supreme Court. 18/ If a state court does fail to protect a constitutional right in a given case, the plaintiff will have an opportunity for Supreme Court review. Thus, the withdrawal of lower federal court jurisdiction will deny access to a potentially desirable forum, 19/ but will not impose unacceptable burdens on the fundamental rights to privacy, desegregated schools, or free exercise of religion. Strict scrutiny is not, therefore, appropriate on that basis.

The school prayer and abortion bills do not appear to have a discriminatory impact on a suspect class; the Court has never suggested that those who oppose prayers in school or wish to vindicate rights to abortion are members of a suspect class. 20/ By contrast, it is arguable that a provision limiting lower federal court jurisdiction in desegregation cases would have a discriminatory effect. Although the provision is facially neutral, its effect would be to close the lower federal courts to the class of litigants who seek to enforce constitutional rights to be free of segregated schools. This class, it may be presumed, will be disproportionately comprised of blacks or members of other minority groups. A jurisdictional provision affecting only desegregation suits could thus have a discriminatory impact on blacks. As noted above, however, this impact, without evidence of an invidious purpose, is not by itself sufficient to trigger strict scrutiny.

18/ Of the jurisdiction-limiting statutes, the following leave Supreme Court jurisdiction untouched: S. 158, S. 583, and H.R. 73. The remaining bills, discussed in the following section, purport to limit Supreme Court jurisdiction as well.

19/ Lower federal courts may have greater expertise than state courts in dealing with complex questions of federal law. They may also not be as subject to parochial pressures, and hence may provide greater assurance of fairness to litigants from other states. Finally, lower federal court judges, who enjoy life tenure and salary protections, may be more independent than some state judges who do not enjoy such protections. The virtues of inferior federal tribunals were recognized even before the ratification of the Constitution, see The Federalist 81 (Hamilton). Congress created inferior federal tribunals in the first Judiciary Act, apparently believing that the benefits of such tribunals outweighed any disadvantages they might have in the form of a threat to state autonomy.

20/ We would note, however, that members of particular religious groups who opposed school prayer on establishment clause grounds might be considered members of a suspect class.

(iv) "Purpose" of the Proposed Measures

The question of purpose is the next area of inquiry. As noted above, invidious purpose might well be enough in itself to trigger strict scrutiny, even if the statute does not have the effect of disciminating against a suspect class or burdening a fundamental right. Thus, it is necessary to examine the possible purposes which might be said to motivate the various bills to determine how the courts are likely to view them. This discussion is necessarily speculative, however. The actual purpose of the legislation cannot be accurately assessed without the benefit of a full legislative history, which does not exist until a law has been actually enacted.

With respect to the abortion bills, a number of non-invidious legislative purposes can be postulated. The bills may be motivated, for example, by a desire to channel questions fundamental to family life into local fora, or to promote federal-state comity by ensuring that state courts weigh the constitutionality of a state's statutes. The measures might also be motivated by a desire to encourage childbirth--a purpose which the Supreme Court has consistently recognized as legitimate. 21/ By contrast, an intention to place affirmative obstacles in the path of a woman's rights with respect to obtaining an abortion or to overturn Roe v. Wade, 410 U.S. 113 (1973), might be held illegitimate. If the legislative history clearly showed that Congress intended to channel litigants into state courts in the hope that those courts will deny pregnant women their constitutional rights as recognized in Roe v. Wade, we believe that a court might well apply strict judicial scrutiny.

A similar approach is appropriate with respect to the school prayer bills. If legislative withdrawal of the lower courts' jurisdiction in school prayer cases is clearly intended to overcome the First Amendment prohibition on establishment of a religion, it might well be subject to strict scrutiny. If, on the other hand, Congress' purpose is to channel school prayer cases into courts having superior competence over educational matters, strict scrutiny should not be triggered. In the absence of hearings, debates, committee reports, or other indicia of legislative intent beyond the terms of the bills, a full assessement is not possible. However, S. 481 explicitly states that it is designed to "restore the right

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21/ Harris v. McRae, 100 S. Ct. 2671 (1980); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

of voluntary school prayer." If that is the clear purpose of the bill, it might well be strictly scrutinized as an effort to establish religion in contravention of Engel v. Vitale, 370 U.S. 421 (1962).

In the context of busing remedies, the proposed bills might be unconstitutional if their clear purpose is either (1) to prevent vindication of the rights guaranteed by the Due Process Clause against segregated schooling, see Bolling v. Sharpe, 347 U.S. 497 (1954), or (2) to discriminate against blacks and members of other minority groups by barring them, but not others, from obtaining access to the lower federal courts to vindicate their legal rights. If, on the other hand, the bills' purpose is to save petroleum costs, to relieve the burden on children who would otherwise have to commute long distances, to encourage parental involvement in neighborhood schools, to prevent the violence that sometimes attends busing remedies, to prevent the phenomenon of "white flight," to prevent the destruction of public schools, to focus attention on educational problems in local fora, or other similar purposes, the legislative purpose would be held legitimate, and rational basis scrutiny would be appropriate. 22/

(v) Summary

To summarize, identification of the proper level of judicial scrutiny is critical to an analysis of the constitutionality of these bills under the Fifth Amendment's Due Process Clause. Since state courts remain open and are competent to protect constitutional rights, the statutes under consideration do not appear to have the effect of burdening a fundamental right or discriminating against a suspect class. Strict scrutiny would nevertheless be appropriate if the statutes are invidiously motivated; but such motivation, in the case of statutes which do not have constitutionally burdensome or discriminatory effects, should be inferred only when the legislative history is clear. Each of the statutes under consideration may be motivated by a permissible legislative purpose and such a purpose may be established in the legislative history. However, final and accurate assessment of legislative motivation is not possible prior to enactment. Accordingly, it is impossible to predict with assurance that rational basis rather than strict scrutiny will provide the appropriate standard for judicial review.

22/ We note that because state courts are sworn to uphold the Constitution, and because Supreme Court review is available, the bills would not infringe upon the right against segregated schooling.

b. Application of "strict" and "rational basis" scrutiny

If any of these measures is found to be invidiously motivated and therefore strictly scrutinized, it will probably be invalidated. Strict scrutiny has been "strict" in theory and "fatal" in fact, 23/ almost always operating to invalidate the statute under review. 24/ To the extent that strict scrutiny is applicable because of manifest invidious motives, the bills probably will not survive judicial review.

A compelling federal interest is necessary to justify a statute under strict judicial scrutiny. In the abortion cases, prior court decisions suggest that a limitation of lower federal court jurisdiction would not be found to be closely tailored to such a compelling federal interest. The Supreme Court has stated that the state's interest in encouraging childbirth by impeding a woman's freedom to obtain an abortion does not become compelling until the beginning of the third trimester of pregnancy. Roe v. Wade, 410 U.S. 113 (1973). 25/ Because none of these jurisdictional statutes is limited in effect to the third trimester of pregnancy, they may be phrased too broadly to survive strict scrutiny. 26/

23/ See Gunther, The Supreme Court, 1971 Term--Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

24/ But see Korematsu v. United States, 323 U.S. 214 (1944); Regents of the University of California v. Bakke, 438 U.S. 265 (1978)(Powell, J., concurring); Buckley v. Valeo, 424 U.S. 1, 25 (1976); Roe v. Wade, 410 U.S. 113, 155, 163-64 (1973).

25/ As the courts have found in considering the constitutional issues concerning abortion, these questions are inextricably interwoven with medical issues. This analysis does not address the extent to which new and changing medical technology alters the premises upon which prior abortion decisions are predicated.

26/ Moreover, to the extent that the federal interest in restricting the availability of abortions is considered compelling, a law which simply forces the party seeking to vindicate asserted rights to abortion into an alternative forum may not be considered carefully tailored to achieving that interest. State courts have the same obligation to protect the constitutional rights of the plaintiff as do federal courts.

For similar reasons, if impermissibly motivated, the school prayer and busing restrictions might not withstand judicial scrutiny. The Court would be unlikely to find a compelling state interest in restoring prayer to the classroom when it held precisely the contrary in Engel v. Vitale, supra. Moreover, if the purpose of the busing provisions is to prevent vindication of constitutional rights recognized in Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971), and North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971), no sufficient governmental interest of which we are aware would justify the jurisdictional limitation. As the Court held in those cases, the courts must have the power to eliminate segregated schools; no state interest will be considered valid which is motivated by a purpose to restore dual school systems.

On the other hand, we believe that all of the jurisdictional limitations would be upheld under rational basis scrutiny. That test is a highly deferential one. Congress could reasonably believe that state courts would be especially competent at adjudicating controversies involving family law or educational matters, and it could reasonably seek to limit federal-state friction through reliance on state courts to vindicate constitutional rights in these controversial areas. 27/ Because these measures would almost certainly be struck down under strict scrutiny and upheld under rational basis scrutiny, the central issue in any case challenging the jurisdictional limitations would be the determination of whether the clear congressional purpose is to burden a fundamental right or discriminate against a suspect class. For this reason, the manifestation of proper legislative purpose in connection with the bills will be central to a determination that they are constitutional.

27/ As noted previously, however, if the purpose is to encourage childbirth, it is at least questionable whether a limitation on jurisdiction could be said to be rationally related to the purpose.

II.

RESTRICTIONS ON JURISDICTION OF THE SUPREME COURT

Several bills introduced in the 97th Congress purport to withdraw the Supreme Court's jurisdiction over cases involving school prayer, abortion, school desegregation, and registration for the draft. Whether these bills are a permissible exercise of congressional power is considered in this Section. We conclude that, with the possible exception of some of the desegregation bills, the bills would probably be held unconstitutional 28/ by the Supreme Court.29/

28/ Similar views were expressed during the Eisenhower Administration by Attorney General William Rogers, who stated,

> "If this legislation [prohibiting Supreme Court review of issues involving subversive activity] should be enacted, constitutional questions in the fields dealt with in the bill would be left for decision to the 11 Federal courts of appeals and the highest appellate court for each of the 48 States. The law would differ in various parts of the country and the rights, privileges, and immunities of individuals would vary according to their addresses. . . . Full and unimpaired appellate jurisdiction of the Supreme Court is fundamental under our system of government. . . . I am convinced that in the absence of some final arbiter the maintenance of the balance contemplated in our Constitution as among the three coordinate branches of the Government and as between the States and the Federal Government would soon disappear. . . . I urge that the committee report the bill adversely." See Hearings Before the Senate Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Comm. on the Judiciary, 85th Cong., 2d Sess. 573-574 (March 4, 1958).

Assistant Attorney General Malcolm R. Wilkey believed that such legislation was constitutional, but urged opposition on policy grounds: "Aside from the obvious necessity of having the Supreme Court resolve conflicts on matters of great public importance, an attempt to deprive the Court of jurisdiction, which bears the earmarks of retaliation for particular decisions, can only lessen the confidence of the people in the safety of their basic rights." Memorandum of February 25, 1958 from Assistant Attorney General Wilkey, Office of Legal Counsel, for the Attorney General. At the same time, Assistant Attorney General William F. Tompkins concluded that such legislation was unconstitutional. Memorandum of February 14, 1958, from Assistant Attorney General Tompkins, Internal Security Division, for the Deputy Attorney General.

The Department of Justice under President Nixon also opposed legislation limiting the Supreme Court's jurisdiction. See Letter of September 4, 1969, from Deputy Attorney

(Fns. 28 & 29 on next page)

A. Scope of the Exceptions Clause

Art. III, § 1 of the Constitution provides, in pertinent part:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .

28/ (Cont.)
General Richard G. Kleindienst to Senator James O. Eastland, Chairman, Senate Committee on the Judiciary ("Neither a decision on the merits with whom some may disagree nor the possibility of such a decision constitutes a justifiable ground for limiting the Court's general appellate jurisdiction."). During the same month, Assistant Attorney General, Office of Legal Counsel, William H. Rehnquist, while not clearly passing on the constitutional issue, opposed legislation limiting Supreme Court appellate jurisdiction on policy grounds: "the integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions." Memorandum of September 16, 1969, at 3.

The Department of Justice reached a like conclusion with respect to provisions identical to those in the present school prayer bills during the last Administration. See Letter of June 19, 1980, from Assistant Attorney General Parker to Honorable Peter W. Rodino, Jr., Chairman, House Committee on the Judiciary. See generally Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. (July 29, 30, August 19, 21, and September 9, 1980).

29/ In this opinion, we do not distinguish between our own view of what the Constitution requires and what the Supreme Court is likely to hold. As Justice Rehnquist recently observed in Dames & Moore v. Regan, 101 S.Ct. (1981), quoting an admonition of Justice Holmes in Springer v. Phillipine Islands, 177 U.S. 189, 109 (1928) (dissenting opinion) which was subsequently quoted by Justice Frankfurter in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597 (1952) (concurring opinion), "'The great ordinances of the Constitution do not establish and divide fields of black and white.'" In numerous areas of constitutional law, there is room for respectable differences of opinion. Moreover, regardless of what the Supreme Court may hold, each branch of government is under an independent obligation to decide whether the action it proposes to take conforms to the Constitution. See Rostker v. Goldberg, 101 S.Ct. (1981). Ultimately, however, the Court is the final interpreter of the Constitution. This memorandum reflects not only our own personal views regarding the constitutionality of the legislation in question, reached after extensive research and analysis of the subject, but also our conclusions as to how the Court would decide these issues.

Art. III, § 2 of the Constitution provides, in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make (emphasis added).

The question necessarily raised by the legislation at issue here goes to the direct center of the judicial power of the United States and the nature of its exercise. While the specific bills are limited by subject matter, they would deprive the federal judiciary of the power to rule on the constitutionality of certain state and federal laws which implicate rights under the Fifth and Fourteenth Amendments. The power to adjudicate the constitutionality of state and federal laws is unquestionably at the heart of the federal judicial power. If Congress can preclude the federal judiciary from resolving cases such as these, it is difficult to imagine any limit on congressional power over the Supreme Court's appellate jurisdiction. Particularly in conjunction with Congress' broad power over the jurisdiction of the inferior federal courts, such authority would necessarily allow for complete elimination of all federal judicial power, with the narrow and relatively insignificant exception of the Supreme Court's original jurisdiction over cases affecting ambassadors, public ministers and counsels, and cases in which a State is a party. 30/ In short, the questions resolves itself into

30/ The Court's jurisdiction over cases in which a state is a party is already sharply narrowed by the Eleventh Amendment.

whether the Constitution permits Congress to eliminate, for all intents and purposes, the federal judiciary as an independent force in the scheme of separation of powers and in the federal structure.

Supreme Court decisions are inconclusive on the question whether the Exceptions Clause can be used to deprive the Court of authority to assess the constitutionality of state and federal laws. The question is a difficult one on which respected scholars have adopted divergent positions. It is particularly difficult because there is language in Supreme Court opinions suggesting that congressional power in this area is quite broad, because this language contrasts with equally broad statements concerning the central function of the Supreme Court as the final arbiter of constitutional questions in our triparte system of separated powers, and because of the absence of any suggestion during the adoption of the Constitution that Congress could eliminate the Supreme Court's power to hear constitutional challenges to state and federal laws.

In our view, an examination of the history and function of Article III supports the conclusion that the Clause was not intended to confer such broad authority on Congress. In the extensive debates on the Clause, and on the extent of the Supreme Court's powers, there is no indication that the Clause was intended to be a "check" on judicial excess empowering Congress to withdraw jurisdiction in response to what Congress may believe to be an improper interpretation of the Constitution in a particular case. On the contrary, when the subject was mentioned during the debates on the Constitution, the Exceptions Clause was justified primarily on the ground that it might be necessary in certain circumstances to immunize findings of fact by juries from appellate scrutiny. The Framers described the impeachment and appointments power as the sole limits on the Court's independence. An analysis of the subsequent historical practice under the Clause reinforces this view.

In light of this history, and the function of the Supreme Court in the scheme of separation of powers, we do not believe the Supreme Court would hold that the Framers intended to give Congress the authority to withdraw the Court's jurisdiction in constitutional cases. If Congress' power over the Court's jurisdiction to decide cases under the Constitution is plenary, Congress could remove the Court entirely from this area and make the states or the Congress itself the final arbiter of the meaning of the Constitution. There would be no means of obtaining a final resolution of disputes between Congress and the Executive, between states and the federal government, or among the states themselves. In our view, the jurisdiction of the Court was structured to prevent this result, ensuring that state and federal enactments conform to the Constitution and promoting uniformity in the interpretation of federal constitutional law. These functions are critical elements

in the federal structure and in the division of powers among the law-making, law-executing, and law-interpreting Branches. Elimination of the Supreme Court from the process of adjudicating the constitutionality of state and federal laws and assuring the supremacy of the Constitution would have the effect of reducing the three branches of this government to two. We do not believe that the Exceptions Clause authorizes Congress to accomplish this result by the simple expedient of eliminating the Court's essential role of assessing the constitutionality of state and federal laws.31/

1. The Exceptions Clause in the Supreme Court. Supreme Court decisions on the scope of the Exceptions Clause offer inconclusive guidance on the constitutionality of the bills under consideration. The Court has never been faced with an exception to its appellate jurisdiction that totally deprived the Court of power to decide a case in which a federal or state law is alleged to violate the Constitution. A number of cases contain dictum on the closely related question whether an Act of Congress is necessary in order to confer appellate jurisdiction on the Court. The Court's answers to that question have been inconclusive,32/ although they suggest that that Congress need not confer all of the appellate juridiction on the Court.

31/ Because of our conclusion that, as a general rule, Congress may not use the Exceptions Clause to insulate from Supreme Court review state and federal laws alleged to violate the Constitution, we have not attempted to delineate the precise scope of Congress' powers under the Clause. That is a subject upon which there has been little agreement among constitutional scholars. We note, however, that Congress is authorized to withdraw the Court's appellate jurisdiction under one statute when the Court has jurisdiction under another provision, as Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869), holds. Moreover, Congress is authorized to restrict the Court's review of issues of fact or of cases not involving federal law. We also assume that there are other non-fundamental areas in which the Supreme Court's appellate jurisdiction may be diminished. We do not, however, inquire whether or to what extent Congress may use the Exceptions Clause to prevent Supreme Court review of federal statutory questions, or whether there are exceptions to our general conclusion that the Clause may not be used to preclude Supreme Court review of constitutional claims. See also n.43, infra.

32/ In Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810), the Court stated, "The appellate powers of this court are not given by the judicial act. They are given by the constitution." Nonetheless, the Court stated that those powers are "limited and regulated" by Congress

(Cont. on page 21)

In a variety of cases, generally decided before the Civil War, the Court referred in dictum to the broad power of Congress over its appellate jurisdiction. See n. 32 supra (citing cases). For example, in Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 326 (1796), the Court stated that, "If Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction, and if the rule is provided, we cannot depart from it." Similarly, in Barry v. Mercein, 46 U.S. (5 How.) 103 (1847), the Court stated that, "By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes." Id. at 119. And in Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865), the Court observed that "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner proscribed by law." See also n. 32 supra & n.33 infra.

Especially when taken out of context, these statements appear to provide support for the view that Congress has plenary power over the appellate jurisdiction of the Supreme Court. For several reasons, however, we believe that the guidance they offer is far from controlling. First, the statements are merely dicta. The Court has never held that Congress has the power to preclude the Court from hearing a claim that a state or federal law violates the Constitution. Second, it may be doubted whether these broad statements are intended to cover cases in which such an extraordinary power was exercised. They may instead be designed to recognize a broad power which, like the Commerce Clause, is limited by other provisions of the Constitution and by the structure of the document as a whole. Finally, the Court and individual Justices have on several occasions, especially in recent years, indicated that congressional power over the appellate jurisdiction of the Supreme Court may only be exercised in conformity with other provisions of the Constitution. See n.33 infra. For these reasons, we believe that these dicta, not specifically addressed to the issue at hand, offer only little support to those who believe that Congress may preclude the Court from exercising its authority to decide whether state and federal laws are constitutional.

32/ (Cont.)
through the Judiciary Act of 1789, an exercise of power under the Exceptions Clause. Broad congressional authority over Supreme Court jurisdiction is suggested in United States v. More, 7 U.S. (3 Cranch) 159 (1805); Barry v. Mercein, 46 U.S. (5 How.) 103, 119-20 (1847); Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796); The "Francis Wright," 105 U.S. 381, 386 (1881).

In 1869, the Court decided the case of Ex parte McCardle, 74 U.S. (7 Wall.) 506. At issue was the constitutionality of an 1868 statute repealing a provision enacted the previous year which had authorized appeals to the Supreme Court from denials of habeas corpus relief by a circuit court. The appellant had invoked the Court's jurisdiction solely under authority of the 1867 statute. The case had been argued in the Supreme Court when Congress passed the 1868 repeal of the jurisdictional avenue contained in the 1867 enactment. In a brief opinion which did not discuss the scope or implications of the Exceptions Clause, the Court upheld Congress' withdrawal in 1868 of jurisdiction under the 1867 law, stating that "the power to make exceptions to the appellate jurisdiction of this court is given by express words." Id. at 514. Despite this broad language, the Court suggested that the withdrawal of jurisdiction provided by the 1867 law did not deprive the Court of the jurisdiction over habeas corpus cases that had been conferred by section 14 of the Judiciary Act of 1789. "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." Id. at 515.

The Court's dictum regarding alternative procedures for Supreme Court review of habeas corpus cases was converted into a holding several months later in Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869). The petitioner in that case had invoked the Court's jurisdiction under the Judiciary Act of 1789. In holding that it had jurisdiction, the Court in Yerger made it clear that the 1868 legislation considered in McCardle was limited to appeals taken under the 1867 Act and upheld the petitioner's right to Supreme Court review under the proper jurisdictional statute. The Court noted that the 1868 Act did "not purport to touch the appellate jurisdiction conferred by the Constitution . . . ." Id. at 105. In doing so, the Court observed that any total restriction on the power to hear habeas corpus cases would "seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction. . . ." Id. at 103. Thus, within months of the McCardle decision, the Court made it clear that McCardle did not decide the question of Congress' power to deprive it of all authority to hear constitutional claims in habeas corpus cases. For this reason, while the Yerger Court acknowledged that the Court's jurisdiction as given by the Constitution "is subject to exception and regulation by Congress," id. at 102, we believe neither McCardle nor Yerger constitutes an authoritative statement in support of the constitutionality of bills that purport to deprive the Court of any opportunity to assess a constitutional issue.33/

33/ Our reading of Ex parte McCardle, as well as our general conclusion, is in accord with the views expressed in Ratner, Congressional Power Over the Appellate Jurisdiction

(Cont. on p. 23)

We conclude that no decision of the Supreme Court 34/ resolves the question whether Congress' power under the Exceptions

33/ (Cont.)
of the Supreme Court, 109 U. Pa. L. Rev. 151 (1960); Hart, The Power of Congress to Limit The Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953); Strong, Rx for a Nagging Constitutional Headache, 8 San Diego L. Rev. 246 (1971); Brant, Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause, 53 Oregon L. Rev. 3 (1973); Grinnell, Proposed Amendments to the Constitution, 35 A.B.A.J. 648 (1949); Comment, Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity? 1969 Duke L.J. 291; Forkosch, The Exceptions and Regulations Clause of Article III, 72 West Va. L. Rev. 238 (1970). A limited interpretation of the Clause is also adopted in 1 W. Crosskey, Politics and the Constitution 616-18 (1953); R. Berger, Congress v. The Supreme Court (1978); E. Countryman, The Supreme Court of the United States 78-119 (1913); Merry, Scope of the Supreme Court's jurisdiction Historical Basis, 47 Minn. L. Rev. 53 (1962). Ex parte McCardle is, however, susceptible to a broader reading, since the Court did not expressly state that the alternative availability of appellate jurisdiction was critical to its holding. See generally Van Alstyne, A Critical Guide to Ex parte McCardle, 15 Ariz. L. Rev. 229 (1973).

In subsequent cases, the Court and some individual Justices have expressed divergent views on the scope of the Exceptions Clause. In United States v. Bitty, 208 U.S. 393, 399-400 (1908), the Court stated in dictum, "we can exercise appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make . . . What such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution" (emphasis added). The latter remark may be taken to suggest that other provisions of the Constitution impose limits on the exercise of power under the Exceptions Clause, but we believe that it is too vague to cite as authority with respect to the constitutionality of the bills under consideration. In a dissenting opinion in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949), Justice Frankfurter expressed the view that "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is sub judice." See also Yakus v. United States, 321 U.S. 414, 472-73 (1944) (Rutledge, J., dissenting) ("Congress has plenary power to confer or withhold appellate jurisdiction"). On the other hand, Justice Douglas, joined by Justice Black, doubted that Ex parte McCardle could "command a majority view today." Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962) (dissenting opinion). (In his concurring opinion in Flast

(fns. 33 & 34 on p. 24)

Clause permits Congress to remove the Court's authority to pass on the constitutionality of state and federal laws. It is appropriate, therefore, to examine the language and history of the Exceptions Clause.

2. Language and history of the Clause. Article III provides that "the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Some scholars have read this language to mean that Congress is authorized to make whatever exceptions it chooses to the Court's appellate jurisdiction. See Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001 (1965). Others have observed that the word "exception" was defined at the time the Constitution was adopted in the same way it is defined now: as "an exclusion from a general rule or law." Ash, Dictionary of the English Language (1775).

33/ (Cont.)
v. Cohen, 392 U.S. 83 (1968), Justice Douglas adhered to this position, noting that Congress' power over appellate jurisdiction was not plenary: "Congress may largely fashion [our appellate jurisdiction] as Congress desires by reason of the express provisions of Section 2, Art. III." Id. at 109 (emphasis added). If Justice Douglas had accepted the view that Congress' power is plenary, the modifying adverb "largely" would have been unnecessary.) Other expressions are basically unhelpful. See, e.g., St. Louis, I.M. So. Ry. v. Taylor, 210 U.S. 281, 292 (1908) ("Congress has regulated and limited the appellate jurisdiction of this court over the state courts by § 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power"); Stephan v. United States, 319 U.S. 423, 426 (1943) ("our appellate jurisdiction is defined by statute . . . ."); National Exch. Bank v. Peters, 144 U.S. 570, 572 (1892) ("Although the appellate powers of this court are given by the Constitution, they are nevertheless limited and regulated by acts of Congress").

34/ In United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), the Court ruled that Congress could not violate principles of separation of powers by using the Exceptions Clause to dictate the outcome of particular cases. In Klein, Congress had violated that principle by prescribing the effect of a presidential pardon. We do not believe the Klein principle is applicable here, since the proposed legislation does not appear to require the courts to follow any rule of decision or otherwise ordain the outcome of a suit. See pp. 6-7 supra.

(Cont. on p. 25)

Under the definitions given at the time of ratification, it was understood that "an exception cannot nullify the rule or description that it limits. In order to remain an exception, it must necessarily have a narrower application than that rule or description." Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 169 (1960) (citing, inter alia, Dyche, New General English Dictionary (1781); N. Webster, American Dictionary of the English Language (1828); Sheppards, Touchstone of Common Assurances 72-79 (1789)). See also Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364-65 (1953). Similarly, the power to "regulate" was regarded as limited to basic housekeeping matters. See J. Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 240 (Paul Freund ed. 1971); Ratner, supra, at 170-71 (citing Dyche, supra; Ash, supra; Webster, supra).

We believe that this reasoning offers some support for the limited proposition that Congress is not authorized to carve out so many exceptions as to engulf the general grant

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34/ (Cont.)

The Klein Court stated in dictum that if an act "simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient." 80 U.S., at 145. See also n.32 supra. In the context of the decision, however, it is not clear that the Court intended this statement to be applicable if the "particular class of cases" involved a series of constitutional claims. The Klein decision expressly noted that the legislation under consideration had as its "purpose . . . to deny to pardons granted by the President the effect which this court has adjudged them to have," id at 145, and that, "as impairing the effect of a pardon" the statute "infring[ed] the constitutional power of the Executive." Id. at 147. The implication is that the Exceptions Clause could not thus be employed to alter the powers granted by the Constitution.

It may be relevant that McCardle, Yerger and Klein, all written by Chief Justice Chase, appeared during a time of considerable political turmoil in the United States -- turmoil involving serious confrontations among the Legislative, Executive and Judicial Branches. The language of the opinions could conceivably have been influenced by a desire to reduce the tension among the Branches and couch decisions which may have been controversial in deferential terms.

of appellate jurisdiction to the Supreme Court envisioned by Art. III. That proposition does not, however, provide dispositive guidance on the constitutionality of the bills under consideration. Because the Supreme Court cases and the constitutional text are not determinative, it is appropriate to consider the history of the Exceptions Clause, as well as the Framers' approach to the general issues of judicial review and separation of powers.

Constitutional tradition and history suggest that the Supreme Court must exercise the critical function of reviewing state and federal actions for consistency with the Constitution.35/ The Framers believed that Supreme Court review was necessary to promote uniformity in the interpretation of federal law and to assure that the constitutional boundaries among the federal government, the States, and the people would be respected. In numerous contexts, delegates to the Constitutional Convention expressed the view that the Supreme Court would have the power to review state and federal statutes for conformance to the Constitution.36/ To take one example, Mr. Rutledge stated that the function of the "supreme national tribunal" would be to secure the "national rights & uniformity of Judgments." 1 Farrand, Records of the Constitutional Convention 124 (1911) (hereinafter "Farrand"). The Court's power of review was thus accepted as a critical element of the constitutional structure and the underlying principle of separation of powers.

In our view, that principle, as the Framers understood it, is inconsistent with a reading of the Exceptions Clause that would empower Congress totally to insulate its actions, as well as those of the states, from Supreme Court review for conformance to the Constitution. The separation of

35/ The history has been surveyed in great detail and it will not be rehearsed extensively here. See generally P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 9-11 (1973); R. Berger, Congress v. Supreme Court (1969); C. Beard, The Supreme Court and the Constitution (1911). One vigorous advocate of state's rights, for example, opposed a constitutional provision creating inferior federal courts on the ground that "the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal in the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments." 1 Farrand, Records of the Constitutional Convention 124 (1911) (hereinafter "Farrand").

36/ See nn. 37-39 infra; R. Berger, Congress v. The Supreme Court, supra, at 198-284, and sources there cited.

powers required exercise of the power of judicial review by judges removed from the political process and thus competent to evaluate constitutional claims in a detached manner.37/ The sole checks on judicial independence explicitly recognized by the Framers were the impeachment and appointments powers. See The Federalist No. 76 & 79. With the exception of these powers, there was no indication that the Court was subject to congressional control in performing its vital function of assuring a uniform interpretation of the Constitution.

Similarly, the Supremacy Clause, making the "Constitution, and the Laws of the United States . . . the Supreme Law of the Land," Art. VI, cl. 2, was intended to ensure, not only that state officials would obey federal law, but also that state laws would conform to the Federal Constitution.

37/ As Hamilton wrote in The Federalist No. 78:

> The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.
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> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. . . .

(Cont. on p. 28)

Supreme Court review of state laws provides uniformity in the interpretation of federal law.38/ The Framers thought that this authority was indispensable in order to avoid constitutional chaos as different courts reached different judgments on constitutional issues. 39/ As Alexander Hamilton

37/ (Cont.)
In our view, these statements, and the contemplated function of the judiciary, are incompatible with the notion that the Legislature could eliminate the Supreme Court's ability to perform its functions merely by the passage of laws.

38/ See The Federalist No. 82 (Hamilton) (stating that Supreme Court would review state court decisions to assure that the specified cases "receive their original or final determination in the courts of the union"). The same point was made in the Constitutional Convention, see, e.g., 3 Farrand 287, and in the ratification debates, see 4 J. Elliot, Debates in the Several State Conventions on the Adopting of the Federal Constitution 117 (1881) (hereinafter "Elliot").

39/ As the Court stated in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816):

> It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States . . . because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity . . . . [But a] motive . . . perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret the statute, or a treaty of the United States, or even the constitution itself: if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation or efficency, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention which formed the constitution.

Id. at 348-349 (emphasis added).

stated, "Thirteen independent courts of final jurisdiction over the same causes, arising under the same laws is a hydra in government from which nothing but contradiction and confusion can proceed." The Federalist No. 80. Hamilton went on to state in The Federalist No. 82 that the concept that the state courts would have the final word in the "enumerated cases of federal cognizance" where the "Constitution in direct terms gives an appellate jurisdiction to the Supreme Court" would be "entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government . . . . Nor do I perceive any foundation for such a supposition . . . . [T]he national and State systems are to be regarded as ONE WHOLE. The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the Courts of the Union." The Framers thus believed it critical for the Supreme Court to have the final authority to assess the constitutionality of state laws; if this authority were withdrawn, "jarring and discordant judgments" would result. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349 (1816). This result would be fundamentally inconsistent with the Framers' view of the functioning of the federal structure.40/

While the history of the Exceptions Clause cannot be said authoritatively to support any particular construction, it is fair to say that there is virtually no indication that the Clause was intended to authorize Congress to eliminate

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40/ The fact that the Court's appellate jurisdiction is largely discretionary does not diminish the force of this argument, for the Court exercises its discretion so as to minimize, within the constraints of time, the number or importance of the conflicts in the interpretation of federal law.

It has been suggested that the lack of uniformity that would result were the Supreme Court's appellate jurisdiction to be eliminated would be unfortunate, but not unconstitutional. See Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 Ariz. L. Rev. 229, 269 (1971). In our view, however, the Framers' understanding of the necessity of Supreme Court review of state laws is inconsistent with the position that the Clause was intended to permit Congress to remove the Court's authority in that regard. Mr. Justice Holmes, a firm advocate of judicial restraint, stated, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that determination as to the laws of the several states." O.W. Holmes, Collected Legal Papers 295 (1920).

the Court's vital functions in connection with interpreting the Constitution and enforcing the Supremacy Clause. 41/ In the debates over the Clause, there is little or no evidence that the Clause was designed as a congressional check permitting the national legislature to curb judicial excesses. Instead, the Clause was mainly supported on the ground that, in its absence, the Supreme Court would have power to overturn a jury's determinations of fact. See 3 Farrand 221; 3 Elliot 519, 572. Because of the varied practices in the states with respect to review of facts, arising out of differences between civil and common law modes of trial, the Framers "thought it better to leave all such regulations to the legislature itself." 4 Elliot 166. Time and again advocates of the Constitution, during the Convention and the ratification debates, expressed the view that the Clause was designed to permit Congress to insulate the jury's determinations of fact from Supreme Court review. 4 Elliot 144; id. at 260; 2 Elliot 488; 4 Elliot 166; 3 Elliot 576 ("The appellate jurisdiction might be corrected, as to matters of fact, by the exceptions and regulations of Congress"). See also n.42 infra. And the sole reference to the Exceptions Clause in The Federalist appears inconsistent with the view that the Clause was intended as an additional check on the Court, permitting Congress to remove the Court's power to review federal and state statutes for conformance to the Constitution.42/ Mr. Yates, a delegate

41/ The phrase "with such Exceptions and under such Regulations as Congress may make" appeared initially in the draft reported to the Convention by the five-member Committee on Detail, which met between July 26 and August 6, 1787, to propose a draft Constitution on the basis of resolutions adopted during the debate on the original Randolph plan. An amendment was offered to this provision, stating, "In all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct." 2 Farrand 425, 431. The amendment, which would have given Congress express plenary control over the appellate jurisdiction, was defeated by a six to two vote. The defeat of the amendment may arguably be construed as indicating that the Framers did not intend to give the Congress plenary control over the Court's appellate jurisdiction.

42/ It is . . . necessary that the appellate jurisdiction should, in certain cases [matters determinable under civil law], extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury because in the courts of some of the States all causes are tried in this mode; and such an exception would preclude the revision of matters of fact, as well where it might be proper

(Cont. on p. 31)

to the Convention, expressed the view that "the Supreme Court has the power, in the last resort, to determine all questions on the meaning. . . of the Constitution," and that the "legislature can not deprive the former of this right." E. Corwin, Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government 244 (1938). In the Virginia Convention, Mr. Tyler asked, "Is there any limitation of or restriction on the federal judicial power? I think not." 3 Elliot 638-639. Finally, the responses in the debates to those who feared that the Supreme Court would be too powerful reveal little indication that the Exceptions Clause was intended to authorize Congress to remove the Court's authority to interpret the Constitution. See The Federalist Nos. 80-82. Emphasis was instead placed upon the inherent weakness of the judiciary, "its total incapacity to support its usurpations by force," The Federalist No. 81, and the "important constitutional check" of impeachment. We believe that this silence is highly instructive. It is barely conceivable that, if the Framers intended Congress to have the power to strip the Court of virtually all of its authority, this power would not be mentioned in response to those who expressed concern over the power of the judiciary.

More generally, in the writings and debates on the function and role of the Supreme Court, we have found no indication that the Exceptions Clause was designed to permit Congress to insulate state or federal laws from review by the Supreme Court. The Supreme Court's authority in this regard, as discussed above, was viewed by the Framers as a

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42/ (Cont.)

> as where it might be improper. To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

The Federalist No. 81 (Hamilton) (emphasis in original). See generally R. Berger, Congress v. Supreme Court, supra, at 287-88; Merry, Scope of the Supreme Court's Jurisdiction: Historical Basis, 47 Minn L. Rev. 53 (1962). We do not, of course, contend that Congress' power under the Clause is limited to factual issues, a conclusion rejected in Ex parte McCardle. But the Framers' emphasis on appellate review of facts strongly supports the negative inference that the Clause was not designed to give plenary power to Congress with respect to constitutional cases.

critical element in guaranteeing the separation of powers among the three Branches, the supremacy of federal law, and the preservation of the basic constitutional structure. In contrast to other constitutional provisions, the Exceptions Clause received comparatively scant attention from the Framers. It would be remarkable indeed for the Framers to have intended that this Clause allow Congress to remove all the appellate jurisdiction of the Supreme Court and yet not have discussed the issue more openly and in some detail. An intent to enable Congress to eviscerate the judicial power of the United States is certainly not consistent with the importance that the Framers expressly attached to the powers of the Court. The history of the Clause and of Art. III thus affords little or no basis for the view that the Clause grants Congress plenary power to withdraw the Court's jurisdiction over constitutional cases generally or over certain classes of constitutional cases specifically, and affords substantial inferential support to the contrary.

3. Historical practice. This section contains a discussion of the historical practice with respect to the Exceptions Clause, with particular emphasis on the practice in the decades immediately succeeding ratification of the Constitution. The historical practice in that period provides additional inferential support for the conclusion that the Exceptions Clause was not intended to give Congress plenary power to control the Court's appellate jurisdiction. If the Clause had been understood to have that effect, it is likely that the Clause would have been used or at least referred to as a means of accomplishing objectives that Congress was considering on a number of occasions. Instead, in a variety of contexts, Congress failed to employ or sometimes even to mention this method of accomplishing the desired result.

For example, it is significant that the first Congress, containing among its members many delegates to the Constitutional Convention, articulated the Supreme Court's appellate jurisdiction over constitutional cases in the First Judiciary Act.43/ The

43/ The Act did not give the Supreme Court jurisdiction in cases in which a state court decided in favor of a constitutional challenge to a state law, see § 25, but this does not affect our conclusion. In the Framers' conception, a primary function of the Supreme Court was to ensure that state laws inconsistent with the Federal Constitution would be invalidated. The Court was necessary in large part because the Framers feared that state courts might adopt parochial interpretations or otherwise disregard the provisions of the Federal Constitution. Under this conception, there was little need for Supreme Court review of state court decisions that favored the party relying upon the Constitution. Supreme Court review of such decisions was not necessary to provide full assurance of the supremacy of the Federal Constitution. Nor was Supreme Court review of

(Cont. on p. 33)

debates underlying this Act, which centered mainly on whether to create and give certain powers to the lower federal courts, contain no reference to possible use of the Exceptions Clause as a means of immunizing certain categories of decisions from Supreme Court review. Instead, Members of Congress appeared uniformly to assume that Supreme Court review was necessary as a means of carrying into effect the constitutional plan of assuring the supremacy of federal law. For example, Mr. Smith of South Carolina stated:

> If the State courts are to take cognizance of those cases which, by the constitution, are declared to belong to the judicial courts of the United States, an appeal must lie in every case to the latter, otherwise the judicial authority of the Union might be altogether eluded. To deny such an appeal, would be to frustrate the most important objects of the Federal Government, and would obstruct its operations. The necessity of uniformity in the decision of the federal courts is obvious; to assimilate the principles of national decisions, and collect them, as it were, into one focus, appeals from all the State courts to the Supreme Court would be indispensable.

1 ANNALS OF CONGRESS 829 (1789). Responding to those who deemed lower Federal courts necessary, Senator Jackson stated in a similar vein:

> It has been said in this debate, that the State Judges would be partial, and that there were no means of dragging them to justice. Shall I peremptorily tell the gentlemen who hold this opinion, that there is a constitutional power in existence to call them to account. Need I add

43/ (Cont.)
state court decisions favorable to the Constitution necessary to assure uniformity. In the Framers' view, the state courts might be hostile to the Constitution and it was not imagined that they would give the Constitution a more expansive reading than the Supreme Court of the United States. The important point is that the First Congress gave the Court jurisdiction in cases in which a State law was upheld against a constitutional claim, and that the power to hear such cases was understood to be critical to the constitutional structure. For a detailed discussion of the First Judiciary Act as allowing the Court to exercise its essential constitutional functions, see Ratner, supra, at 183-201.

> that the Supreme Federal Court will have the right to annul these partial adjudications? Thus, then, all these arguments fall to the ground, on the slightest recollection.

Id. at 861 (emphasis added). That Congress accorded to the Court full jurisdiction over constitutional cases, see n.43 supra, and that no reference was made to the Exceptions Clause, provide at least inferential support for the conclusion that the Clause was not understood to furnish the plenary power sometimes claimed for it.

What was apparently the first proposal to limit the Court's jurisdiction by statute came in response to the decision in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), that § 25 of the Judiciary Act gave the Court appellate jurisdiction over a suit between a state and one of its citizens. Judge Spenser Roane of Virginia advocated repeal of the Supreme Court's power to review state court judgments. But James Madison, although no friend of the course charted by the Supreme Court under Chief Justice Marshall, nevertheless strongly opposed repeal of § 25:

> The Gordian Knot of the Constitution seems to be in the problem of collision between the Federal and State powers, especially as eventually exercised by their respective tribunals. If the Knot cannot be untied by the text of the Constitution, it ought not certainly to be cut by any political Alexander.

Quoted in 1 C. Warren, The Supreme Court in United States History 554 (1937). In a letter to Thomas Jefferson in 1823, Madison stated his belief that the Constitutional Convention

> regarded a provision within the Constitution for resolving in a peaceable and regular mode all cases arising in the course of its operation as essential to an adequate system of government; that it intended the authority vested in the Judicial Department as a final resort in relation to the States in cases resulting to it in the exercise of its functions. . . and that this intention was expressed by the Articles declaring that the Federal Constitution and laws shall be the supreme law of the land and that the Judicial power of the United States shall extend to all cases arising under the [Constitution]. . . .

Id. at 555 n.1. As late as 1833 Madison expressed the same views even more strongly:

> The jurisdiction claimed for the federal judiciary is truly the only defensive armor for the Federal Government, or rather for the Constitution and laws of the United States. Strip it of that armor, and the door is wide open for nullification, anarchy, and convulsion, unless twenty-four States, independent of the whole and of each other should exhibit the miracle of a voluntary and unanimous performance of every injunction of the parchment compact.

Id. at 740.

Roane's proposal was introduced in Congress in 1821 but resulted in no action. Id. at 659. Similar proposals to restrict the Court's jurisdiction were introduced in 1822, 1824, 1831, 1846, 1867, 1868, 1871, 1872, and 1882; with the sole exception of the anomalous 1868 statute upheld in McCardle,44/ none of the proposals passed the Congress. See Warren, Legislative and Judicial Attacks on the Supreme Court of the United States--A History of the Twenty-Fifth Section of the Judiciary Act, 47 Am.L.Rev. 1, 3-4 (1913).

The debate on these and related proposals was, from the first, strongly influenced by constitutional considerations. Daniel Webster set the tone for these debates, arguing against the doctrine that each state had the right to interpret the Constitution for itself. In his famous reply to Hayne, Webster stated that

> [Under the Supremacy Clause] no State law is to be valid which comes in conflict with the Constitution or any law of the United States. But who shall decide

44/ But see Message of Veto, President Andrew Johnson, CONG. GLOBE, 40th Cong., 2d Sess. 2165 (1868):

> The legislation proposed is not in harmony with the spirit and intention of the Constitution. It cannot fail to affect most injuriously the just equipoise of our system of government; for it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation. Thus far during the existence of the Government the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation it combines judicial wisdom and

(Cont. on p. 36)

> this question of interference? To whom lies the last appeal? This, sir, the Constitution itself decides also, by declaring "that the judicial power shall extend to all cases arising under the Constitution and laws of the United States." These two provisions, sir, cover the whole ground. They are, in truth, the key-stone of the arch. With these, it is a constitution; without them, it is a confederacy. In pursuance of these clear and express provisions, Congress established, at its very first session, in the Judicial Act, a mode for carrying them into full effect, and for bringing all questions of constitutional power [within] the final decision of the Supreme Court. It then, sir, became a Government. It then had the means of self-protection; and, but for this, it would, in all probability, have been now among things which are past.

6 Reg. Debates in Congress 78 (1830) (emphasis added).

A similar constitutional debate occurred the following year between the majority and dissenting members of the House Committee on the Judiciary, in a report accompanying a bill to repeal § 25 of the Judiciary Act, which gave the Supreme Court jurisdiction over state cases. H.R. Rep. No. 43, 21st Cong., 2d Sess. (1831). The majority of the Committee contended that § 25 was itself unconstitutional because the Supreme Court had no authority under Article III to review state cases. The dissenters contended that "it was the imperious duty of Congress to make such a law [i.e., § 25 of the Judiciary Act], and it is equally its duty to continue it. . . ." Id. at 12 (emphasis in original). The dissenters observed that repeal of § 25 would endanger individual liberties, would cause a lack of uniformity in the construction and administration of the Constitution, and would seriously imperil the Union itself by depriving the federal government, through its courts, of the power to give effect to the Constitution, treaties, and laws. Id. at 14-15. The dissenters prevailed, for the bill failed by an overwhelming majority in the House of Representatives.

44/ (Cont.)

> impartiality in a greater degree than any other authority known to the Constitution; and any act which may be construed into or mistaken for an attempt to prevent or evade its decisions, on a question which affects the liberty of the citizens and agitates the country, cannot fail to be attended with unpropitious consequences.

We are not aware of any attempts to limit the Court's jurisdiction during the first half of the Twentieth Century.45/ In the years between 1953 and 1968, however, over sixty bills were introduced to eliminate the jurisdiction of the federal courts over certain subjects. None was enacted. See Hart & Wechsler, supra, at 360. In 1957, for example, a bill was introduced that would have eliminated the Court's appellate jurisdiction in cases involving, among other things, the federal employees' security program, state subversive legislation, and state bar admissions. S. 3386, 85th Cong., 2d Sess. (1958). The bill was narrowly defeated. See Murphy, Congress and the Court (1962). Similar bills on reapportionment were introduced in 1964 in response to Baker v. Carr, 369 U.S. 186 (1962) and Reynolds v. Sims, 377 U.S. 533 (1964). The so-called Tuck bill, H.R. 11926, 88th Cong., 2d Sess., was passed by the House; it would have precluded federal review of apportionment cases. See also S. 3069, 88th Cong., 2d Sess. It was eliminated by the conference committee. See McKay, Court, Congress, and Re-Apportionment, 63 Mich. L. Rev. 255 (1964).

In 1968, the Senate Judiciary Committee reported out a bill that would have deprived all federal courts of "jurisdiction to review . . . a ruling of any trial court of any State in criminal prosecution admitting in evidence as voluntarily made an admission or confession of any accused," S. 917, 90th Cong., 2d Sess. (1968), but the provisions were eliminated on the floor of the Senate. In 1972, Senator Griffin introduced a bill depriving all federal courts of authority to require pupil transportation on the basis of race, color, religion, or national origin, but the bill was defeated by a 50 to 47 vote. Finally, in 1979 the Senate attached to the bill creating the Department of Education, S. 210, 96th Cong., 1st Sess. an amendment that would have removed from the federal courts all suits challenging state-sanctioned voluntary school prayers. The bill passed the Senate but not the House.

The historical practice with respect to the Exceptions Clause does not, of course, establish that the Clause was

45/ As far as we are aware, the intense controversy over the Court which led to and followed in the wake of President Roosevelt's 1937 court-packing plan did not generate any serious proposals for restricting the Supreme Court's jurisdiction. Instead, the proposal (S. 1392 and a substitute proposal) offered in 1937 would have given the President power to appoint additional federal judges. Under the circumstances, it is noteworthy that no jurisdictional limitation was seriously considered.

not intended to confer plenary power on Congress. However, the facts that many members of Congress have expressed constitutional reservations over the years, and that no Congress except during 1868 ever decided to exercise the supposed power, are not without significance. The debates underlying the First Judiciary Act, the views of Madison, Webster, and President Andrew Johnson, as well as Congress' unwillingness to exercise the supposed power, do, when taken as a whole, suggest a meaningful reluctance on the part of Congress to remove the Court's jurisdiction in constitutional cases.

4. Structural considerations. We also believe that the structure of the Constitution is inconsistent with the view that the Exceptions Clause confers plenary power on Congress to eliminate the Supreme Court's jurisdiction to adjudicate constitutional questions. The Constitution sets up a delicate balance among the three Branches of Government, making it difficult but not impossible for one Branch to override the check of another, and providing that the Court is relatively, but not completely, immunized from political supervision. The tenure and salary provisions of Article III assure that the Court will render its judgments with comparative insulation from political pressures. On the other hand, the appointments and impeachment clauses furnish a measure of political control over the Court. The Supreme Court can decide only questions presented to it in the form of a case of controversy; it cannot reach out to decide whatever questions interest it. Perhaps most important, Art. V provides a mechanism for constitutional amendments to overturn decisions of the Court.46/ Taken together, these provisions guarantee that the Court will have considerable immunity from incursions by the political Branches of government, but at the same time that there will be some procedure for political control if the Court is thought to have overstepped its bounds.

An additional check--in the form of open-ended congressional power to remove the Supreme Court from consideration of a class of constitutional cases--would seriously distort the constitutional structure. Simply by enacting a statute, with the approval of the President or over his veto, Congress could write the Judicial Branch out of the constitutional

46/ Supreme Court decisions have been overturned by constitutional amendment on four occasions in our history. See U.S. Const. Amend. 11, reversing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); U.S. Const. Amend. 14, reversing Dred Scott v. Sandford, 60 U.S. (13 How.) 393 (1857); U.S. Const. Amend. 16, reversing Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895); U.S. Const. Amend. 26, reversing Oregon v. Mitchell, 400 U.S. 112 (1970).

scheme. The consequence could be chaotic; injustice and inequality could result, and the delicate constitutional balance could be unsettled. Congress could enact laws and, at the same time, provide that the federal courts could not decide whether those laws were constitutional. The states could pass laws with the assurance that there would be no federal judicial review of those laws; there could conceivably be fifty separate decisions on the meaning and scope of federal constitutional provisions. A person's federal constitutional rights could come to depend on the state in which he resided or acted. In a situation such as that presented by H.R. 2365 and H.R. 2791, whether a person was subject to registration for the draft could depend on the state in which he lived. Congress could remove the only means of resolving conflicts between the Executive and Legislative branches of Government, between the federal government and the states, or among the states. Moreover, the law would be frozen at the stage in which the Court rendered its last decision on the subject. There would be no possibility of reversal or change over time; lower courts would have to adhere to the Court's most recent decisions. Without the possibility of reversal in the Supreme Court, some state courts might be tempted to adopt parochial interpretations which could discriminate against out of state residents and thus create tensions among the several States. The Supremacy Clause could be considerably weakened. We do not believe that the Founding Fathers intended the Constitution to tolerate such inconsistent, unpredictable and chaotic results. As Justice Story observed (see n. 39, supra), "the public mischiefs that would attend such a state of things would be truly deplorable, and it cannot be believed, that they could have escaped the enlightened convention which formed the Constitution."

Professor Henry Hart invoked some of these basic considerations in articulating the view that the Exceptions Clause does not authorize Congress to eliminate the Supreme Court's role in the constitutional structure. His reasoning on the point, expressed in the form of an imaginary dialogue, bears quotation at length:

> Q. . . . The McCardle case says that the appellate jurisdiction of the Supreme Court is entirely within Congressional control.
>
> A. You read the McCardle case for all it might be worth rather than the least it has to be worth, don't you?
>
> Q. No, I read it in terms of the language of the Constitution and the antecedent theory that the Court articulated in explaining its decision. This

seems to me to lead inevitably to the same result, whatever jurisdiction is denied to the Court.

A. You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether. How preposterous!

Q. If you think an "exception" implies some residuum of jurisdiction, Congress could meet that test by excluding everything but patent cases. This is so absurd, and it is so impossible to lay down any measure of a necessary reservation, that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress.

A. It's not impossible for me to lay down a measure. The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan. McCardle, you will remember, meets that test. The circuit courts of the United States were still open in habeas corpus, and the Supreme Court itself could still entertain petitions for the writ which were filed with it in the first instance.

Q. The measure seems pretty indeterminate to me.

A. Ask yourself whether it is any more so than the tests which the Court has evolved to meet other hard situations. But whatever the difficulties of the test, they are less, are they not, than the difficulties of reading the Constitution as authorizing its own destruction?

Q. Has the Supreme Court ever done or said anything to suggest that it is prepared to adopt the view you are stating?

A. No, it has never had any occasion to. Congress so far has never tried to destroy the Constitution.

Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialetic, supra, 66 Harv. L. Rev. at 1364-1365 (emphasis added).47/

47/ Throughout the Dialogue, the views expressed by "A" are generally those of Professor Hart. The "essential role" theory espoused by "A" was, during Professor Hart's lifetime, and continues to be regarded as Professor Hart's own position.

(Cont. on p. 41)

It has sometimes been suggested that the words of the Constitution do not alone lead to this conclusion, and that the words alone should be controlling. It is, however, a familiar principle of constitutional interpretation that the literal language of the document is not always sufficient to show its meaning. History, structure, logic, and philosophy are sometimes necessary interpretative tools. This principle has been applied in numerous areas of constitutional law. Alexander Hamilton declared, for example: "That there ought to be one court of supreme and final jurisdiction is a proposition which is not likely to be contested." The Federalist No. 81. At the same time, he observed that there was "not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution . . ." Id. (emphasis in original). Instead, he suggested that that principle could be deduced "from the general theory of a limited Constitution." Id. (emphasis added). Similarly, the Court has rejected the view that the First Amendment should be construed as an absolute bar to congressional limitations on free speech; considerations of history and logic have led the Court to conclude that the Framers did not intend to enact so broad a prohibition.

In a similar vein, limitations on Congress' power effectively to eliminate the Supreme Court from the constitutional scheme can be deduced, not from the literal language of the Exceptions Clause, but from the structure, theory, and plan of the document taken as a whole. These guides, we believe, justify the conclusion that Congress was not intended to possess plenary power over the appellate jurisdiction of the Supreme Court.

Although the question is not free from doubt, our examination of the Exceptions Clause leads us to conclude that Professor Hart's approach, in one form or another, would most probably

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47/ (Cont.)

Professor Ratner has elaborated on this position in an exhaustive study of the history and purpose of the Exceptions Clause. Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, supra. In Professor Ratner's view, "legislation that precludes Supreme Court review in every case involving a particular subject is an unconstitutional encroachment on the Court's essential functions." The Clause does not authorize Congress to enact legislation allowing "the courts of each state to determine for themselves the constitutionality of state statutes and regulations on the specified subjects and . . . permanently forclos[ing] Supreme Court resolution of inconsistent state and federal decisions concerning the application of the federal constitution and laws to such matters. The exceptions and regulations clause does not give Congress power thus to negate the essential functions of the Supreme Court." Id. at 201-02.

be embraced by the Supreme Court. Professor Hart's position is consistent with the language, history, and judicial interpretation of the Clause. Most importantly, it conforms to the constitutional role of the Supreme Court, to the manifest structure of the Constitution in creating three relatively equal branches, and to the underlying principle of separation of powers. In our view, the Supreme Court would most probably hold an interpretation allowing its virtual elimination to be both unsupported by constitutional history and contrary to the constitutional framework. We believe that the Court would hold that, in making exceptions to the appellate jurisdiction of the Supreme Court, Congress may not enact provisions that eliminate the Court's essential functions of declaring the constitutional boundaries dividing the federal government, the States, and the people, and assuring uniformity in the interpretation of the Constitution.

B. The Constitutionality of the bills

1. School Prayer.

The school prayer bills contain two principal provisions. The first, to be added as 28 U.S.C. § 1259, would deprive the Supreme Court of jurisdiction to review "any case arising out of any State statute, ordinance, rule, regulation, or part thereof, or arising out of any act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, or part thereof, which relates to voluntary prayers in public schools and public buildings." The second provision, to be added as 28 U.S.C. § 1364, would withdraw the jurisdiction of the district courts over any case in which the Supreme Court has been deprived of jurisdiction under proposed § 1259.

Since we believe the Supreme Court would hold that the Exceptions Clause may not be used to remove the Court's basic authority in the constitutional structure, the question presented is whether the school prayer bills would have that impermissible effect. Proponents of such measures have urged that they are only limited intrusions on the Court's authority, restricted as they are to a particular category of cases. Under this view, the essential role of the Court is not imperiled so long as Congress exempts the Court's jurisdiction over constitutional cases in narrow classes of suits.

We disagree. First, the school prayer bills, despite their limited character, would prohibit the Supreme Court from interpreting the First Amendment in school prayer cases. By depriving the Court of jurisdiction over these cases,

such bills would authorize the courts of the fifty states to render final judgments on the meaning and scope of the Establishment and Free Exercise Clauses. The consequence would predictably be inconsistency and confusion in the interpretation of the Constitution and an effective obstacle to the enforcement of the Supremacy Clause. As Mr. Justice Holmes stated, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that determination as to the laws of the several states." O.W. Holmes, Collected Legal Papers 295 (1920). The result of the school prayer bills would precisely be to remove the Court's authority to review state laws.

Moreover, an argument based on the notion that the school prayer bills are only a limited intrusion on the Court's essential role is not susceptible to a logical stopping-point. If the governing rule is that the Court's authority may be withdrawn over specific constitutional issues so long as other constitutional issues remain within the appellate jurisdiction, then the Court will have to undertake the nearly impossible task of determining at what point a number of withdrawals 48/ in the aggregate exceeded Congress' authority under the Exceptions Clause. We believe it far more likely that the Court would conclude that a withdrawal of jurisdiction over a specific constitutional issue is itself impermissible under the Clause.

For these reasons, we conclude that the principles of separation of powers and federal supremacy would be impermissibly undermined if the school prayer bills were enacted. The enactment of the bills would prevent the Court from exercising its essential role of assessing whether state laws conform to the Constitution. The result would be a profound and unprecedented alteration of the allocation of power within the constitutional structure. We do not believe that that alteration would be held to be constitutionally permitted.49/

48/ See, for example, H.R. 2791, H.R. 2365 (bills withdrawing jurisdiction over claims of sex discrimination in draft registration cases).

49/ In our view, this conclusion necessarily means that such a withdrawal would be unconstitutional on its face, even if the legislative history suggests that Congress intended the state courts to conform to prior decisions of the Supreme Court. The argument in the text rests on the necessity for Supreme Court review of state court determinations of federal constitutional law, not on an unlawful congressional motive in enacting a jurisdictional limitation.

(Cont. on p. 44)

2. Abortion

Only one bill proposed in the 97th Congress of which we are aware would restrict the Supreme Court's jurisdiction over cases involving abortion. Under H.R. 867, the Court would be deprived of jurisdiction over cases "arising out of any State statute, ordinance, rule, regulation or any part thereof, or arising out of any Act [sic] interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, which relates to abortion."

For reasons stated above, we believe that this bill would probably be held unconstitutional. It would deprive the Court of its authority to ensure uniformity in constitutional law in the area of the extent of the states' powers to regulate abortions after Roe v. Wade. The potential consequence could be fifty different decisions on the states' authority to interfere with the constitutional rights arising out of the termination of pregnancy. Since different states could have wholly disparate rulings, the woman's right under the Fourteenth Amendment would be contingent on the State in which she resided. Supreme Court review would be unavailable to ensure either consistent decisions or the supremacy of federal law. We do not believe that that result would be upheld as constitutionally permissible.

3. School Desegregation

a. Background

Somewhat different questions are raised by bills which limit the power of the federal courts, including the Supreme Court, to order remedies in school desegregation cases. H.R. 1079 and 1180 provide in simple terms that "no court of the United States shall have jurisdiction to require the attendance at a particular school of any student because of race, creed, color, or sex." H.R. 869 removes the Supreme Court's "jurisdiction to review, by appeal, writ of certiorari, or otherwise any case arising out of a State statute, ordinance, rule, regulation, or any part thereof, or arising out of any act interpreting, applying, or enforcing a State statute, ordinance, rule, regulation, which relates to assigning or requiring any public school student to attend a particular school because of his race, creed, color, or sex." It also deprives the district courts of jurisdiction over the same category of cases.

49/ (Cont.)

Because of our conclusion, we do not discuss the argument that the school prayer bills would violate the First Amendment.

S. 528, containing three major provisions, is more complicated. The first major provision, Section 2, consists of a statement of findings and purposes to the effect that court orders requiring transportation remedies have been ineffective, resulted in the exodus of children from public school systems, and wasted petroleum fuels and other resources. The statement also includes a finding that the "pursuit of racial balance at any cost is without constitutional or social justification" and that it causes racial imbalances and separation of students by race. Accordingly, the "assignment of students to schools closest to their residence (neighborhood public schools) is the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution." Section 2 also declares that S. 528 is based on § 5 of the Fourteenth Amendment.

Section 3 bars all federal courts, including the Supreme Court, from ordering "directly or indirectly any student to be assigned or to be transported to a public school other than that which is nearest to the student's residence" unless the assignment or transportation is provided "incident to a purpose directly and primarily related to an educational purpose," is "voluntary," is furnished for specialized or individualized training, or is "reasonable." Such assignment or transportation is expressly declared not to be reasonable if:

> (i) there are reasonable alternatives which involve less time in travel, distance, danger, or inconvenience;
>
> (ii) such assignment or transportation requires a student to cross a school district having the same grade level as that of the student;
>
> (iii) such transportation plan or order or part thereof is likely to result in a greater degree of racial imbalance in the public school system than was in existence on the date of the order for such assignment or transportation plan or is likely to have a net harmful effect on the quality of education in the public school district;
>
> (iv) the total actual daily time consumed in travel by schoolbus for any student exceeds by 30 minutes the actual daily time consumed in travel by schoolbus to and from the public school with a grade

level identical to that of the student and which is closest to the student's residence;

(v) the total actual round trip distance traveled by schoolbus for any student exceeds by 10 miles the total actual round trip distance traveled by schoolbus to and from the public school closest to the student's residence and with a grade level identical to that of the student."

Section 4 of the bill would authorize the Attorney General to institute litigation, in certain situations, when he is informed that a person has been required to attend or to be transported to a public school in circumstances other than those authorized by the Act.

b. The Constitutionality of the Desegregation Bills

There are two possible sources for Congress' power to enact the bills under consideration: (1) the authority to enforce the provisions of the Fourteenth Amendment; and (2) the authority to make exceptions and regulations with respect to the Supreme Court's appellate jurisdiction under Art. III. If busing is never a constitutionally required remedy, however, the argument in favor of the bills' constitutionality is much stronger. The first issue, then, concerns the status of busing as a remedy for segregated school systems.

(i). The status of busing as a remedy in school desegregation cases. Under current law, courts must employ desegregation remedies only to the limited extent that those remedies are necessary in order to vindicate the constitutional rights of school children attending segregated schools. Such remedies may be imposed only when justified by the nature and scope of the constitutional violation. See Milliken v. Bradley, 418 U.S. 717, 746 (1974). In the usual case, in which "mandatory segregation by law of the races in the schools has long since ceased," federal courts must "first determine whether there was any action in the conduct of the business of the School Board which are intended to, and did in fact, discriminate against minority pupils, teachers or staff." Dayton Board of Education v. Brinkman, 433 U.S. 406, 420 (1977). If such discriminatory conduct is found, the court may nonetheless not order a busing remedy until it has determined "how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when the distribution is compared to what it would have been in the absence of such constitutional violations." Id. at 447-48. The "remedy must be designed to redress that

difference, and only if there has been a systemwide impact may there be a systemwide remedy." Id. at 420.

As the Court has consistently recognized, however, the overriding responsibility of school authorities in areas where there has been intentional racial segregation is "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green v. New Kent County School Board, 391 U.S. 430, 437-38 (1968). "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979). Where the duty has not been fulfilled, reassignment and some transportation of students may be the required remedy even if school segregation has been a contributing cause of housing segregation. See id. at 465, n.13; Keyes v. School Dist. No. 1 413 U.S. 189, 202-03 (1973); Swann v. Charlotte-Mecklenburg, 402 U.S. 1, 20-21 (1971). A school board's obligation is "'to come forward with a plan that promises realistically to work . . . now . . . until it is clear that state-imposed segregation has been completely removed,'" Columbus Bd. of Educ. v. Penick, supra, at 459 (citations omitted) (emphasis in original). See also Dayton Bd. of Educ. v. Brinkman, 443 U.S. 521 (1979).

These decisions strongly suggest that, at least in certain contexts, reassignment of students and some transportation may be necessary remedies for past discrimination and an integral part of the right to a non-segregated school system. The Supreme Court appeared to reach this conclusion in the decision dealing most directly with the constitutional necessity for assignment by race and busing remedies, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971). At issue in that case was a state statute providing that no "student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion, or national origin. Involuntary bussing of students in contravention of this article is prohibited, and pubic funds shall not be used for any such bussing." N.C. Gen. Stat. § 115.176.1 (Supp. 1969). The Supreme Court held the statute unconstitutional. According to Chief Justice Burger, writing for a unanimous Court, the statute's prohibition,

> against the background of segregation, would render illusory the promise of Brown v. Board of Education. Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race

> be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.

Id. at 45-46. The Chief Justice stated in broad terms that "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." Id. at 46. See also Swann v. Charlotte-Mecklenburg, supra, at 29.

The Court's decisions plainly suggest that realignment of school districts is sometimes required as a last resort in order to remedy unconstitutional segregation. Such realignment might be thought to constitute "assignment by race." Moreover, an incidental consequence of redistricting may be additional busing of students, the busing of different students or, in some cases, the busing of a student to a different (perhaps a closer) school. In short, where there has been intentional segregation, where reassignment of students is necessary to eliminate segregation, and where bus transportation is the only practical way to transport students to the schools to which they have been assigned, busing becomes the only way to redress and eliminate the constitutional violation. In those cases, the unavoidable conclusion to be drawn from the Supreme Court's decisions is that the only effective remedy may not be eliminated.

While H.R. 1079, 1180, and S. 528 might be held to violate Swann, they may be construed as not inconsistent with that case if accompanied with the appropriate legislative history. The bills would be constitutional if, by preventing courts from "requiring" assignment by race, they did not intend to bar the issuance of any remedy that would lead to reassignment of students to schools and the bus transportation which sometimes necessarily accompanies such reassignment. Under this reading, the courts would retain the power to inform a school district that the remedies it has proposed are inadequate. They would also retain coercive power to ensure that school districts comply with constitutional requirements, including the power of criminal and civil contempt in cases in which an adequate remedy -- including reassignment by race and bus transportation -- has not been proposed by the school district. A reading of the bills that would only prohibit the courts from requiring racial assignments when those remedies are not constitutionally

required would probably save them from a Fifth Amendment challenge. Moreover, if this construction were supportable on the basis of the legislative history, the bills would raise no serious issue under the Exceptions Clause.

Different considerations are raised by H.R. 869, which prohibits the Supreme Court from hearing any case relating to assignment by race. On its face, this broad prohibition would include cases in which state officials have made unconstitutionally discriminatory assignments.

(ii). Congressional power under § 5 of the Fourteenth Amendment. Since H.R. 869 excludes the Supreme Court from considering any case relating to assignment by race, the next issue is whether, if the Supreme Court regards racial assignments as a required remedy for school desegregation, Congress may revise or supersede that judgment under § 5. The leading case is Katzenbach v. Morgan, 384 U.S. 641 (1966). There, the Court characterized § 5 as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," id. at 651, so long as the Court is merely "able to perceive a basis upon which the Congress might resolve the conflict as it did," id. at 653. At the same time the Court stated that "§ 5 does not grant Congress power to exercise discretion in the other direction and . . . to restrict, abrogate, or dilute these guarantees." Id. at 651, n.10. We believe that Katzenbach states the controlling law and that Congress is therefore without power to revise the Court's constitutional judgments if the effect of the revision is to "restrict, abrogate, or dilute" Fourteenth Amendment guarantees as recognized by the Supreme Court. Any bill intended to prohibit courts from taking steps to assure desegregation through assignment by race or school busing would be held, under the Court's decisions, to have that effect, and would thus be an impermissible exercise of congressional power under § 5.

(iii). Congressional power under Article III. The final issue is whether Congress' power under the Exceptions Clause authorizes the prohibitions in H.R. 869. In Section II A of this memorandum, we expressed the view that the Exceptions Clause would not be held to authorize Congress to withdraw the Supreme Court's jurisdiction to decide constitutional cases. It follows that Congress may not exercise its powers under the Exceptions Clause to bar the Court from assuring that constitutional rights are vindicated in school desegregation cases. If the Court was so barred, the potential result would be fifty separate conclusions on the meaning and scope of the state's duty to remedy the effects of school systems maintained in violation of the Equal Protection Clause. In

our view, that result would be fundamentally inconsistent with the Framers' purposes in adopting Article III.50/

(iv). Summary. The cases establish that Congress has no power to abridge the right against discriminatory and segregated schools. In order to implement that right, the courts have ruled that some reassignment and incidental busing of students is constitutionally required. Such reassignment has been characterized in the broad category of "busing" and considered to constitute assignment of students by race. While we believe that the Court would invalidate any law that prohibited it from exercising remedial power to assure that the federal courts have the necessary tools to vindicate constitutional rights, the courts might construe H.R. 1079, 1180, and S. 528 as not violating this basic rule. Under this construction, the bills would be understood merely to prohibit the federal courts from proposing or ordering racial assignments or busing remedies when alternative remedies would vindicate the constitutional rights at stake. If so interpreted, these bills would not remove the court's power to use other remedies in order to bring about a unitary school system, even if that system includes reassignment of students. So construed, the bills would not violate the Exceptions Clause. H.R. 869, however, would probably be held to violate that Clause by prohibiting the Court from hearing any case relating to assignment by race, including cases of discriminatory school assignments.

4. Draft cases.

H.R. 2365 and 2791 would deprive all federal courts of jurisdiction in cases in which sex discrimination is alleged in the Selective Service System. As noted above, these bills may be withdrawn in light of Rostker v. Goldberg, 101 S.Ct. (1981), where the Court held that Congress' broad powers over the military allowed it to require the registration of men, and not women, for the draft. If enacted, however, we believe that the bills would be held unconstitutional. As the Court emphasized in Rostker, Congress' extensive authority in the area of military affairs does not immunize its actions from constitutional scrutiny. Under these bills, there could thus be dozens of different rulings on the obligations of

50/ Supreme Court decisions permitting congressional limitations on the issuance of certain remedies do not support the constitutionality of the bills at issue. See Lockerty v. Phillips, 319 U.S. 182 (1943); Yakus v. United States, 321 U.S. 414 (1944); Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938). None of those cases dealt with an attempted prohibition on the Supreme Court's authority to order remedies to ensure compliance with constitutional requirements.

potential registrants under the Selective Service Act and the Constitution. In one state, both men and women might be required to register; in another state, only men might be so required; and in a third, it might be held that any registration requirement was unenforcable in light of the distinction drawn on the basis of sex. We believe that this result would be inconsistent with the intentions underlying the Supremacy Clause and Article III. As a result, these bills would probably be held unconstitutional.

CONCLUSION

Unless the legislation in question violates some other constitutional provision, such as the due process or equal protection clause, or violates the separation of powers, Congress has plenary power to limit the jurisdiction of the inferior federal courts. On the other hand, legislation which would deprive the Supreme Court of authority to hear challenges to the constitutionality of state or federal laws and thus to enforce the supremacy clause would probably be held unconstitutional.

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EXHIBIT A: JURISDICTION LIMITING BILLS

SENATE BILLS

TITLE	SPONSOR	SUBJECT	LIMITATIION
S. 481	Helms & East (R. N.C.)	School Prayer	All federal courts
S. 583	Hatch (R. Utah)	Abortion	All federal courts
S. 158	Helms (R. N.C.)	Abortion	Lower federal courts
S. 528	Johnston (D. La.)	School Desegregation	All federal courts

HOUSE BILLS

H.R. 340	Holt (R. Md.)	School Desegregation	All federal courts
H.R. 761	McDonald (D. Ga.)	School Desegregation	All federal courts
H.R. 869	Crane (R. Ill.)	School Desegregation	All federal courts
H.R. 1079	Hinson (Resigned) (R. Miss.)	School Desegregation	All federal courts
H.R. 1180	Ashbrook (R. Ohio)	School Desegregation	All federal courts
H.R. 2047	Moore (R. La.)	School Desegregation	All federal courts
H.R. 72	Ashbrook (R. Ohio)	School Prayer	All federal courts
H.R. 73	Ashbrook (R. Ohio)	Abortion	All federal courts
H.R. 867	Crane (R. Ill.)	Abortion	All federal courts
H.R. 900	Hyde (R. Ill.)	Abortion	Lower federal courts

TITLE	SPONSOR	SUBJECT	LIMITATION
H.R. 3225	Mazzoli (D. Ky.)	Abortion	Lower federal courts
H.R. 311	Hansen (R. Idaho)	School Prayer and Teacher Qualifications	Supreme Court only
H.R. 326	Holt (R. Md.)	School Prayer	All federal courts
H.R. 408	Quillen (R. Tenn.)	School Prayer	All federal courts
H.R. 865	Crane (R. Ill.)	School Prayer	All federal courts
H.R. 989	McDonald (D. Ga.)	School Prayer	All federal courts
H.R. 1335	Nichols (D. Ala.)	School Prayer	All federal courts
H.R. 2347	Crane (R. Ill.)	School Prayer	All federal courts
H.R. 2365	Evans (D. Ga.)	Sex-bias in Selective Service System	All federal courts
H.R. 2791	Evans (D. Ga.)	Sex-bias in Selective Service System	All federal courts