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THE COURT STRIPPING BILLS:
THEIR IMPACT ON THE CONSTITUTION,
THE COURTS, AND CONGRESS

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Kenneth R. Kay ‡

I. Introduction

There is no doubt that in 1982 many Americans are concerned about the federal judiciary. The courts today are perceived as exceeding their traditional authority in numerous instances. The public is skeptical of federal judges who appear to be assuming the administration of some state functions. They are angered by what they view as sweeping judicial orders that effectively prevent individuals from exercising control over significant aspects of their daily lives. They are also disturbed by decisions which they regard as preventing state and local governments from exercising traditional powers.

Apart from these general misgivings, significant constituencies within our society have been alienated by specific Supreme Court decisions. The Court’s decision in Roe v. Wade, which prevented states from denying abortions, was the catalyst that transformed the pro-life movement into a significant American constituency. The Supreme Court’s decisions in Engel v. Vitale, and Abbington School District v. Schempp, which prevented states from requiring prayer in public schools, have been targets of fundamentalist religious groups like the “Moral Majority.” Finally, the Court’s decisions in Swann v. Charlotte-Mecklenberg Board of Education and the other cases which affirmed the power of the lower federal courts to issue mandatory busing orders have resulted in the creation of many grassroots organizations opposed to “forced” busing.

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The so-called "social issues" of abortion, school prayer and busing are the areas where the courts are viewed as most flagrantly overstepping their authority. There is a belief that an "imperial judiciary" is usurping functions that should be performed by Congress or state legislatures. Not only do some members of Congress have this perception, but certain constituent groups have aggressively pursued legislation designed to address this perceived abuse of authority by the courts. Therefore, the debate in Congress today is not focused on whether there exists an "imperial judiciary," but rather on what, if anything, Congress can do about it.

Until recently, the constituencies opposed to socially controversial Supreme Court decisions have sought the adoption of constitutional amendments to overturn them. This alternative, set out in article V of the Constitution, requires a resolution adopted by a two-thirds majority of Congress or a simple majority of two-thirds of the state legislatures followed in either case by ratification of three-fourths of the states. However, in the face of these rigorous requirements, these constituencies have failed to mobilize sufficient support for enacting constitutional amendments. Therefore, their focus has shifted to a set of bills which, although requiring only a majority of Congress and a presidential signature, may conceivably accomplish the same end as a constitutional amendment. Specifically, they seek the enactment of legislation which would remove federal court jurisdiction over particular controversial issues. If these bills are enacted, the federal courts will no longer be able to hear cases or enforce previous decisions in subject areas where a majority of Congress believed the courts should be precluded from functioning.

Several powerful constituencies are using these jurisdiction bills as legislative centerpieces in aggressive lobbying campaigns. Federal court jurisdiction has become the battlefield on which the most controversial "social issues" are being fought. It is critical that every American citizen undertake a thoughtful and thorough examination of the jurisdictional issues now pending before Congress. This opportunity to explore these issues as part of the Villa-

5. U.S. Const. art. V. Article V provides in pertinent part:

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

Id.
VANNOVA LAW REVIEW Symposium is therefore extremely timely and valuable.

This article explores whether the jurisdiction bills are consistent with the constitutional plan or represent wise public policy. After briefly examining previous Congressional consideration of similar proposals and their current status in the 97th Congress, the following questions will be addressed: 1) Do the jurisdiction bills represent an effective check on the judicial branch which is consistent with the constitutional plan designed by the Framers of our Constitution?; 2) Are the bills likely to have a beneficial impact on our judicial system?; 3) Is Congress likely to limit the exercise of its power over court jurisdiction to only the most flagrant cases of judicial excess?; 4) If the bills do not represent wise or responsible legislation, what can the Congress do to address perceived abuses by the judicial branch? Exploration of these questions leads to the conclusion that the jurisdiction bills represent a serious threat to our constitutional system. That is, these court stripping bills seek to remedy judicial abuses in a manner that is profoundly more damaging than the abuses themselves.

II. THE BACKDROP OF COURT STRIPPING

A. Previous Attempts at Court Stripping

Congressional attempts to remove the jurisdiction of the federal courts over controversial issues are not unique to the 97th Congress. In the last twenty-five years, several attempts to remove the Supreme Court's jurisdiction over specific subjects have failed.

In 1957, Senator William E. Jenner introduced a bill that would have disallowed Supreme Court review of Congressional action against a witness charged with contempt of Congress or a violation of a state law or regulation designed to combat subversive activities. The bill came as a response to a series of Supreme Court decisions in these areas. It was reported to the full Senate but a formal vote never occurred.

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In 1964, Congressman Tuck introduced a bill designed to remove Supreme Court and lower federal court jurisdiction over cases involving the apportionment of representation in state legislative bodies. This legislation was in response to the Court's rulings in *Baker v. Carr* and *Reynolds v. Simms*. The bill passed the House but was not considered by the Senate.

Another effort to remove the Court's jurisdiction occurred in 1968 with an amendment to the Omnibus Crime Control and Safe Streets Act. The amendment would have restricted the Supreme Court from review of state criminal proceedings involving *Miranda* issues. However, these provisions were dropped before final passage of the measure.

More recently in 1979, Senator Jesse Helms offered a floor amendment to remove Supreme Court and lower federal court jurisdiction over the issue of voluntary prayer in public schools. This amendment passed the then Democratically controlled Senate by a vote of fifty-one to forty. The House never took formal action although hearings on the Helms proposal were held by the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice.

Many other bills limiting the appellate jurisdiction of the Supreme Court have been introduced over the years. However, the amendment and bills described above represent the only ex-

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16. The Helms Amendment was originally offered to a bill establishing a Department of Education. S. 210, 96th Cong., 1st Sess. (1979). See 125 CONG. REC. S4129-32 (daily ed. Apr. 5, 1979). Identical language was offered to a bill providing greater discretion to the Supreme Court in selecting the cases it will review. S. 450, 96th Cong., 1st Sess. (1979). See 125 CONG. REC. S4138-65 (daily ed. Apr. 9, 1979). The Helms amendment to S. 210 was tabled when the provision passed the Senate as part of S. 450. See 125 CONG. REC. S4156 (daily ed. Apr. 9, 1979).
amples of such legislation that received substantial congressional consideration. It is difficult to speculate as to the precise reasons that each effort failed to pass both Houses of Congress. In the case of the Helms school prayer amendment, there was substantial bi-partisan opposition to the proposal within the House Judiciary Committee. The opposition appears to have been based on serious concerns over the constitutionality and wisdom of efforts to address controversial Supreme Court decisions by withdrawing the Court's appellate jurisdiction over the specific subject matter.

B. Court Stripping in the 97th Congress

In contrast to the sporadic introduction of court jurisdiction stripping bills in previous Congresses, the introduction and consideration of similar bills in the 97th Congress has been dramatic. There are currently more than thirty separate bills that have been introduced in this Congress which would remove the jurisdiction of the courts in one realm or another.18

Subcommittees of both the Senate and House Judiciary Committees have held hearings on the overall issue of congressional attempts to limit the jurisdiction of the federal courts.19


In addition, several bills have been introduced to remove or limit the jurisdiction of the federal courts in matters relating to abortion. See, e.g., S. 158, 97th Cong., 1st Sess. (1981); S. 583, 97th Cong., 1st Sess. (1981); S. 1741, 97th Cong., 1st Sess. (1981); H.R. 73, 97th Cong., 1st Sess. (1981); H.R. 900, 97th Cong., 1st Sess. (1981).

Finally, two bills have been introduced to remove or limit the jurisdiction of the federal courts in matters relating to the composition of the military. See H.R. 2365, 97th Cong., 1st Sess. (1981); H.R. 2791, 97th Cong., 1st Sess. (1981).

specifically, Senate subcommittee hearings were held on Senate 158, a bill restricting lower federal court jurisdiction in certain abortion cases.\textsuperscript{20} The passage of Senate 158 was recommended by the Senate Separation of Powers Subcommittee, and the bill is currently pending before the full Senate Judiciary Committee. An identical bill is pending on the Senate Calendar.\textsuperscript{21}

Two Senate subcommittees have conducted hearings on legislation which would restrict lower federal court jurisdiction to issue busing orders.\textsuperscript{22} Bills from each subcommittee, S. 1647 and S. 1760, are currently pending before the full Senate Judiciary Committee.\textsuperscript{23} A bill identical to S. 1647 is pending on the Senate Calendar for floor consideration.\textsuperscript{24}

During the first session of the 97th Congress, the Senate approved the Department of Justice Authorization bill,\textsuperscript{25} which included an amendment limiting instances in which a federal court could issue busing orders.\textsuperscript{26} The amended bill was adopted by

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\textsuperscript{21} S. 1741, 97th Cong., 1st Sess. (1981). Both S. 158 and S. 1741, which provide that human life shall be deemed to exist from conception, were introduced by Senator Jesse Helms (Rep. N.C.). S. 1741 was introduced on October 5, 1981, and was read a second time and placed on the Senate Calendar on November 2, 1981.

\textsuperscript{22} See Fourteenth Amendment and School Busing: Hearings on S. 528, S. 1147 and S. 1760 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981); Court Ordered School Busing: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981). The referral of bills to subcommittees is within the discretion of the Chairman of the Judiciary Committee. In the case of bills limiting the federal courts in the area of busing, S. 528, S. 1147 and S. 1647 were referred to the Separation of Powers Subcommittee, while S. 1005 and S. 1760 were referred to the Subcommittee on the Constitution.

\textsuperscript{23} S. 1647, which was recommended by the Separation of Powers Subcommittee, and S. 1760, which was recommended by the Constitution Subcommittee, are currently pending before the full Senate Judiciary Committee.

\textsuperscript{24} S. 1743, 97th Cong., 1st Sess. (1981). S. 1743, which was introduced by Senator Jesse Helms on October 15, 1981, was read a second time and placed on the Senate calendar on November 2, 1981. \textit{Id}.


\textsuperscript{26} On June 16, 1981, Senator Jesse Helms offered an amendment to S. 951, which provided in part that "[n]o part of any sum [appropriated hereunder to the Department of Justice] shall be used . . . to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home." 127 CONG. REC. S6274 (daily ed. June 16, 1981). For the revised text of the Helms amendment to S. 951, which limits the power of the federal courts to impose injunctive relief involving transportation of students, see 127 CONG. REC. S6645 (daily ed. June 22, 1981).
\end{quote}
the Senate by a vote of fifty-eight to thirty-eight.\textsuperscript{27}

At the beginning of the 97th Congress, Senator Helms introduced S. 481 which would remove Supreme Court and lower federal court jurisdiction over school prayer in public schools.\textsuperscript{28} The bill is currently pending before the Senate Judiciary Subcommittee on Separation of Powers. Identical legislation is also pending on the Senate Calendar.\textsuperscript{29} The language of these bills is similar to the language of the amendment offered by Senator Helms which passed the Senate in 1979.\textsuperscript{30} The Senate is currently engaged in a lengthy filibuster involving an identical provision offered by Senator Helms as an amendment to legislation providing for a temporary increase in the public debt limit.\textsuperscript{31}

House action in the 97th Congress has included subcommittee hearings on the overall subject of Congressional attempts to limit the federal courts and the introduction of more than twenty bills.\textsuperscript{32} The same House Judiciary subcommittee has held additional hearings on House Resolution 2047\textsuperscript{33} and the Johnston-Helms Amendment to Senate 951, both designed to limit court-ordered busing.\textsuperscript{34}

\textsuperscript{27} On February 4, 1982, after a lengthy floor debate, the Senate adopted a modified version of the Helms amendment which prohibited the Department of Justice from maintaining suits involving mandatory busing of school children and which established limits on the power of federal courts to impose injunctive relief involving the transportation of students. 128 CONG. REC. S414 (daily ed. Feb. 4, 1982). On March 22, 1982, S. 951, as amended, was referred to the House Committee on the Judiciary. 128 CONG. REC. H1005 (daily ed. Mar. 22, 1982).


\textsuperscript{29} S. 1742, 97th Cong., 1st Sess. (1981). S. 1742 was introduced on October 15, 1981 by Senators Helms and East and was read a second time and placed on the Senate Calendar on November 2, 1981.

\textsuperscript{30} See Helms Amendment to S. 450, 96th Cong., 1st Sess. (1979); note 16 supra.

\textsuperscript{31} See Helms Amendment to H.J. RES. 520, 97th Cong., 2d Sess. (1982), Amendment No. 2031 (as modified), at 128 CONG. REC. S10735 (daily ed. Aug. 18, 1982). See also Weicker Amendment No. 1252, \textit{id.} at S10739; Baucus Amendment No. 1253, \textit{id.} at S10740. The Baucus Amendment reads as follows:

\textit{It is the sense of the Congress that the federal courts must remain open to litigants whose claims arise out of the federal Constitution. Furthermore, it is emphatically the province and duty of the judicial department to say what the law is and Article 5 of the Constitution specifically provides a mechanism to respond to the Constitutional decisions of the Supreme Court.}

\textit{Id. at S10740.}

\textsuperscript{32} See note 18 and accompanying text supra.

\textsuperscript{33} H.R. 2047, 97th Cong., 1st Sess. (1981). H.R. 2047, introduced on February 24, 1981 by Representative Moore, establishes limits on the power of the courts to impose injunctive relief in matters involving busing of school children, and authorizes the Attorney General to institute suits to enforce such limits.

\textsuperscript{34} S. 951, 97th Cong., 1st Sess. (1981). S. 951, as amended, passed the Senate on February 4, 1982 and was referred to the House Committee on the
II. THE IMPACT OF THE COURT STRIPPING BILLS

A. Impact on the Constitution

The debate over the jurisdiction removal bills would not have progressed this far if there were not some credible arguments suggesting that Congress could engage in court stripping. Proponents of these bills have been able to rely both on specific provisions in the Constitution and on language in Supreme Court decisions.

With regard to Supreme Court jurisdiction, proponents of the jurisdictional bills cite article III, section 2 (the exceptions clause) which gives the Supreme Court appellate jurisdiction “with such exceptions and under such regulations as the Congress shall make.” 35 It is argued that the exceptions clause gives Congress power to withdraw specific categories of cases from the Court’s review. Furthermore, the argument is buttressed by the Supreme Court’s holding in Ex Parte McCardle 36 which recognized that the exceptions clause gives Congress some meaningful power to control the Supreme Court’s jurisdiction. In McCardle, the Court upheld the constitutionality of a Congressional statute which withdrew the Supreme Court’s jurisdiction to hear cases arising under an 1867 habeas corpus statute.37

Congressional power to remove the jurisdiction of lower federal courts presents less complications. Article III, section 2 38 gave

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35. U.S. Const. art. III, § 2. Article III, § 2 provides in pertinent part:
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 other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Id.

36. 74 U.S. (7 Wall.) 506 (1868).

37. Id. at 515. Chief Justice Chase, writing for the McCardle Court, concluded that “[i]t is quite clear, therefore, that this Court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal ....” Id. Chief Justice Chase went on to observe, however, that Congress had not removed Supreme Court jurisdiction over all habeas corpus matters, but only habeas corpus appeals under the 1867 statute. Id. Thus, the Court limited its decision by holding that the statute upheld in McCardle, only repealed so much of the 1867 statute as authorized appeals from the lower federal courts to the Supreme Court and did not affect the appellate jurisdiction of the Supreme Court over habeas corpus under the Constitution and earlier acts of Congress. Ex parte Yerger, 75 U.S. (8 Wall.) 85, 106 (1868).

Congress the power to create the lower federal courts. Arguably, this power to create these courts carries with it the lesser power to reduce or eliminate lower court jurisdiction.39

Opponents of the court stripping bills argue that these bills represent legislative encroachment on the judicial function and therefore violate the doctrine of separation of powers and the principle of judicial independence as articulated in Marbury v. Madison.40 Additionally, opponents have argued that the Court's holding in McCardle is limited by its holding in United States v. Klein.41 In Klein, the Court overturned a federal statute stating that Congressional authority to control jurisdiction did not include the power to tell the court how to determine cases within its jurisdiction.42

But reliance on Supreme Court precedence is not satisfactory because the cases are over one hundred years old and none of them directly address the legal issues presented by the legislation pending in the 97th Congress. Although McCardle and Klein have some relevance, they are clearly not dispositive. The general arguments concerning judicial independence and the doctrine of separation of powers have not been effective because these arguments are two sided. Proponents of the jurisdiction bills argue that the courts have been violating the separation of powers doctrine and these bills are simply a vehicle for redressing the imbalance that currently exists between the three branches.43 Thus far, arguments put forth in the debate do not appear to have dissuaded either side.

Most recently the controversy surrounding Congress' use of the exceptions clause has shifted its focus. Attention is now centered on two fundamental questions: 1) Did the Framers of the Constitution intend the exceptions clause to be used by the legislature as a majoritarian check on the perceived excesses of the judicial branch? and 2) Does the design of the exceptions clause provide an effective majoritarian check on the judicial branch?

40. 5 U.S. (1 Cranch) 137 (1803).
41. 80 U.S. (13 Wall.) 128 (1872).
42. Id. at 147-48. The Klein Court held unconstitutional a statute which required the Supreme Court to dismiss cases by claimants to property taken by the military when such claimants had been granted a presidential pardon. Id. at 136-37. Chief Justice Chase, writing for the Klein Court, observed that although the statute at issue was enacted in the name of congressional control of federal court jurisdiction, it was actually a congressional attempt to determine the outcomes of cases properly within the court's jurisdiction. Id. at 145.
A focus on the circumstances surrounding inclusion of the exceptions clause in the Constitution and an analysis of the limitations of the clause as a check on the judicial branch provides a useful perspective on the court jurisdiction bills.

Article VI, clause 2 of the Constitution, the supremacy clause, established the Constitution and federal law as the "supreme Law of the Land." However, the supremacy clause standing alone would have little, if any, meaning if there were no enforcement mechanism for its provisions. The Articles of Confederation also contained a supremacy clause similar to the one contained in the Constitution. However, the Articles provided no enforcement mechanism. Recognizing this deficiency of the Articles, the Framers of the Constitution intended that the Supreme Court enforce the supremacy clause.

Alexander Hamilton wrote in the Federalist Papers:

A circumstance which shows the defects of the confederation remains to be mentioned—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. . . . If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. . . . To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicature, all nations have found it necessary to establish one tribunal paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.

The proceedings of the constitutional convention give additional support to the premise that the Framers intended to design a judicial branch with one Supreme Court capable of enforcing the supremacy clause. Professor Lawrence Sager has recently written

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44. U.S. Const., art. VI, cl. 2. Article VI, clause 2 provides that:
This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Id.

45. U.S. Art. of Confed., art. XIII: Article XIII provided in part that "[e]very state shall abide by the determination of the United States, in Congress assembled, on all questions which by this confederation, are submitted to them. And the articles of this confederation shall be inviolably observed by every state." Id.

46. The Federalist No. 22 (A. Hamilton).
an important article on Congress' power to restrict federal court jurisdiction which includes an analysis of the convention's proceedings.\textsuperscript{47} Professor Sager notes that the convention adopted the supremacy clause in close to its final form on August 23, 1787.\textsuperscript{48} Then on August 27th, the convention spent the day addressing article III. In discussing the purpose of the clause, Professor Sager writes:

The exceptions and regulations language was also approved on August 27th, under circumstances that favor a limited view of its scope. . . . It was adopted by the convention on August 27th without a ripple of recorded debate, concern or explication. In light of this quiescence, it is hard to imagine that the Framers were consciously adopting a provision that could completely unravel one of the most basic aspects of the constitutional scheme to which they had committed themselves.

Thus, as the delegates to the Constitutional Convention made their peace on issue after issue, the Supreme Court's superintendence of state compliance with national law emerged as the fulcrum of the nation's government.\textsuperscript{49}

In a recent letter to Strom Thurmond, Chairman of the Senate Judiciary Committee, Attorney General William French Smith expanded on Professor Sager's analysis of the historical purpose of the exceptions clause.\textsuperscript{50} Like Sager, the Attorney General finds the absence of debate surrounding the constitutional convention's adoption of the clause proof that the Framers did not intend for the clause to give Congress the power to interfere with core functions of the Court. The Attorney General presents three arguments for this interpretation of the exceptions clause: 1) The Framers agreed without dissent on the necessity of a Supreme Court to secure national rights and national uniformity of judgments. Yet, there was no debate whatsoever concerning the meaning of the exceptions clause. Mr. Smith argues that if the Framers intended Congress to have plenary power under the clause, the obvious inconsistency between the presumed inviolate functions of the Supreme Court and plenary congressional power to control the


\textsuperscript{48} Id. at 49.

\textsuperscript{49} Id. at 50-51 (footnotes omitted).

Court, would have aroused debate. The creation and function of the lower federal courts were vigorously debated at the convention. Ultimately, it was resolved that lower federal courts would not be created by the Constitution but that Congress would have the power to create such courts, should Congress deem them necessary. Given the intensity of the debate regarding the lower federal courts, and the unanimity of the convention with regard to the role of the Supreme Court, it is unlikely that the convention would have adopted without comment the exceptions clause, which for practical purposes, would place the Supreme Court and the lower federal courts in the same position vis-a-vis Congress.

The Framers were extremely concerned with the concentration of power in one branch of the government. One of the basic principles of the Constitution was that each branch of government must be given the means of defense against encroachments by the other branches of government. Plenary congressional power under the exceptions clause would render the Supreme Court virtually defenseless. In view of the carefully structured doctrine of separation of powers, Mr. Smith argues that it is inconceivable that the Framers would have contemplated an expansive interpretation of the clause.

In addition to historical analysis of the purpose of the exceptions clause, one must consider how Congress' power under the

51. Id. at S4728. Mr. Smith notes that the Resolves agreed upon by the convention stated simply: “the jurisdiction [of the Supreme Court] shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace and harmony.” Id. (citations omitted). No mention was made in the Resolves of any congressional power to make exceptions to the Court's jurisdiction. The Committee on Detail which was charged with drafting a provision to implement these Resolves proposed the language of the exceptions clause. Mr. Smith notes that it would be unlikely that the Committee on Detail could have dramatically deviated from the convention's Resolve concerning the Court without creating much debate at the convention. Id.

52. Id. Article III of the Constitution provides that “[t]he 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.” U.S. Const., art. III, §1 (emphasis added). Mr. Smith notes that since the judicial power “shall be vested in the supreme Court,” plenary power under the exceptions clause (reducing the Supreme Court to a position of virtual impotence) would be inconsistent with the constitutional vesting of judicial power. 128 Cong. Rec. S4727 (daily ed. May 6, 1982).

53. 128 Cong. Rec. S4727 (daily ed. May 6, 1982). Mr. Smith states that in the minds of the Framers, the "concentration of power was . . . , 'the very definition of tyranny.'" Id. (citing The Federalist No. 47 (J. Madison)).
exceptions clause serves as a check on the judicial branch. The opponents of the jurisdiction stripping bills argue that the Framers' intent was not that the legislative branch would have a direct means of responding to court decisions. Had it been so, in view of the obvious and fundamental effect of such a design, the Framers would have included such a provision in the Constitution. Instead, the Framers authorized the appellate jurisdiction of the Supreme Court "with such Exceptions, and under such Regulations as the Congress shall make." 54 Alexander Hamilton explained in The Federalist Papers that the language was intended "to obviate and remove" the "inconveniences" likely to arise within the judicial system. 55 A clause designed to address "inconveniences" is a far cry from a clause intended to keep the Court from engaging in "unconstitutional" conduct.

More importantly the exceptions clause does not provide Congress with a direct check on the judicial branch. A direct check would permit Congress to directly veto or directly amend the substantive result of the Court's decision. By withdrawing the jurisdiction of the Supreme Court over particular issues through Congressional legislation, the issue remains unaddressed by Congress. The result of the divestiture of federal court jurisdiction is that fifty state supreme courts are free to decide the issue without ultimate resolution by the Supreme Court. However, it is important to note that Congress would be powerless to affect the outcome of the issue in the state courts.

Thus, the exceptions clause would be an odd creation—a legislative check on the judicial branch that does not return power to Congress. 56 Rather it would be a check on the federal judiciary that would merely give power to another set of courts. In addition, because state courts would become the ultimate decision makers, there could not be a monolithic response to fundamental constitutional questions and there are many such questions which require a monolithic response. 57 The Framers would not have designed a

54. U.S. Const., art. III, § 2. For the text of article III, § 2, see note 35 supra.
55. The Federalist No. 80 (A. Hamilton).
56. Compare this view of the exceptions clause's "checking power" with the provisions for constitutional amendment contained in article V. Article V permits Congress to respond substantively to constitutional decisions of the Court, but such constitutional revision contains super-majoritarian requirements. For the text of article V, see note 5 supra.
57. It would be intolerable, for example, to have the question of whether an individual is constitutionally qualified for the presidency left to fifty separate interpretations. Thus, would an individual be considered qualified as soon as twenty-six state supreme courts had held so?
check on the judicial branch which would be difficult for Congress to control and inappropriate in many critical situations.

These points were recently made most cogently by now Circuit Judge Robert Bork of the District of Columbia Court of Appeals. Mr. Bork, a distinguished conservative constitutional scholar, commented on these aspects of the jurisdiction bills at his confirmation hearings before the United States Senate Judiciary Committee. Part of the dialogue went as follows:

Senator Baucus. Could you also indicate to this committee why in your view it would be unconstitutional for Congress to pass a statute that would limit Supreme Court jurisdiction, say, in a Federal constitutional question?

Mr. Bork. Well, the attempt to eliminate Supreme Court jurisdiction as opposed to lower court jurisdiction would have to rest upon the exceptions clause of Article III of the Constitution, which allows Congress to make such exceptions and regulations of the Supreme Court's appellate jurisdiction as it desires. Literally, that language would seem to allow this result. However, I think it does not allow this result because it was not intended as a means of blocking a Supreme Court that had, in Congress' view, done things it should not. The reason I think it was not intended is that clearly in the most serious kinds of cases, where the Supreme Court might do something that the Congress regarded as quite improper, the exceptions clause would provide no remedy.

For example, if the Supreme Court should undertake to rule upon the constitutionality or the unconstitutionality of a war, and the Congress was quite upset, thinking that is not the Supreme Court's business as indeed I agree it is not, to use the exceptions clause to remove Supreme Court jurisdiction would have the result not of returning power to the Congress but of turning the question over to each of the State court systems. We could not tolerate a situation in which fifty states were deciding through their own judges the constitutionality of a war.

Senator Baucus. Well, as I hear you, I hear you address the question more on a policy ground. Apart from the policy ground—

Mr. Bork. No, I do not think that is a policy ground, Senator. I think that is a constitutional argument. One of the ways of construing the Constitution, as Chief Justice Marshall showed us so well in *McCulloch v. Maryland*, is
to argue from its structure: What is the necessity of government? Would the framers have done something that led to results like this?

I think the answer is that the framers would not have devised a check upon the judiciary which does not return power to the Congress but returns power to the state judiciary systems, from which it probably cannot be removed. When one perceives that that is the result, then I think one has to say the framers did not intend this as that kind of a check upon the Court. I do not know any way to apply the Constitution that I regard as legitimate other than in terms of the intent of the framers, as best as that can be determined. 58

This perspective on the exceptions clause is most instructive. The glaring deficiencies of the clause are an effective retort to the argument that it was intended to be used as a significant check on the judicial branch.

In the final analysis the deficiencies of the exceptions clause as a check on the judicial branch are much less troubling than its potential to undo the protections of the Constitution. While the Framers of the Constitution designed a judicial branch which could protect the supremacy of the federal government, they also designed the judiciary to assure that individual liberties would not be abridged. Alexander Hamilton stated in the seventy-eighth Federalist that the courts have a duty “to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.” 59

If Congress’ authority to remove subject matter jurisdiction over abortion or school prayer were upheld as constitutional, there is no “right” or “privilege” in the Constitution that could not be removed from Supreme Court review. Proponents of the jurisdiction removal bills have argued that this is an alarmist view. The exceptions clause would still be subject to other constraints contained in the Constitution. Yet, under the analysis offered by the proponents of these bills, Congress’ authority under the exceptions clause is virtually without limits. 60 Theoretically, Con-

59. The Federalist No. 78 (A. Hamilton).
60. See Rice, Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today, 65 Judicature 190 (1981). However, other authorities, while maintaining that use of the exceptions power is constitutional, find that Congress’ use of such power could not violate the equal
gress could dismantle any constitutional provision it wished, and paralyze the courts from reviewing such an act. It is this theoretical opening which makes the premise underlying the court stripping bills most distressing. Under this analysis, the Supreme Court is only free to enforce a constitutional guarantee if fifty-one percent of Congress does not preclude it from doing so.

B. Impact on the Courts

Notwithstanding these legitimate and seemingly overwhelming constitutional concerns, the court stripping bills are still being actively considered in the legislative process. This is in large part because some members of Congress believe the federal courts are continuing to engage in blatantly unconstitutional conduct and that something drastic must be done to rein in an "activist Court." They view Congress as constitutionally bound to address a constitutional crisis that has been brought about by federal judges who have been prone to expand constitutional rights beyond their historic parameters and prone to create new rights out of "whole cloth."

This view of the judicial branch leads to two concrete Congressional objectives. The first objective is to overturn or minimize the effect of previous activist decisions. The second objective is to encourage the judicial branch to engage in more traditional decision-making that relies on the language of the Constitution and on greater adherence to precedent. The proponents of the protection and due process guarantees in the Constitution. See, e.g., Redish, Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination, 27 VILL. L. REV. 900, 915-23 (1982).

61. See Nomination of Sandra Day O'Connor: Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981). Concern for traditional judicial decision-making was reflected at the recent confirmation hearings of Associate Supreme Court Justice, Sandra Day O'Connor. Id. At those hearings, Senate Minority Leader, Robert Byrd of West Virginia, commented as follows:

I do not think that I would have been critical of the Supreme Court of the United States in the recent past if I had felt that the Justices on that Court were adhering to the doctrine of stare decisis a little more closely than what they apparently, to me, at least, were demonstrating.

At another point in the proceedings, Senator Paul Laxalt of Nevada commented on this principle in a dialogue with the nominee:

I feel—and I think most lawyers do—the stability of the judicial system rests principally on adhering to precedent. You are going to be presented with that sitting on the Supreme Court I suppose in a greater proportion than you have ever been presented with it in the trial court and the appellate court. Justice Brandeis wrote: "Stare decisis is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than it be settled right."
jurisdiction bills cite both objectives as motives for their efforts. However, court stripping bills do not accomplish either one.

With regard to the first objective, it is clear that the jurisdiction bills do not have the effect of overturning previous court decisions. In fact, these bills could have precisely the opposite effect they are intended to have. Withdrawing court jurisdiction over abortion would not outlaw abortion. Withdrawing court jurisdiction over school prayer would not return prayer to the schools. Instead of prohibiting abortion or promoting school prayer, these bills could elevate the last Supreme Court decision on the subject to a “permanent” status of the law. ¹² There could be no future cases decided on an issue over which the court no longer had jurisdiction. *Roe v. Wade* ¹³ would still be the controlling Supreme Court decision on abortion policy. *Engle v. Vitale* ¹⁴ and *Abington School District v. Schempp* ¹⁵ would still be the controlling Supreme Court decisions on the school prayer issue.

Some of the proponents of the bills openly concede the deficiencies of the bills in providing a consistent Constitutional interpretation. Senator John East of North Carolina has observed:

> If Congress were to remove jurisdiction over abortion cases from the federal courts, such litigation would be conducted in the state courts. Some state courts might read the Constitution as all courts read it for two centuries prior to *Roe v. Wade*, and uphold state anti-abortion laws as constitutional. But many other state courts would probably regard the United States Supreme Court decision as a binding precedent. In these states, *Roe* would continue to be the effective law, and since the Supreme Court would never have occasion to hear another case

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¹² See Redish, *supra* note 59 at 915. However, another respected commentator reasons that once the appellate jurisdiction of the Supreme Court is removed, the lower courts would be free to disregard prior Supreme Court rulings and interpret the Constitution differently than the now “stripped” Supreme Court had done. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 *Vill. L. Rev.* 929, 936-38 (1982).

¹³ 410 U.S. 113 (1973).


the Court stripping bills involving abortion, it would be impossible ever to re-
store a uniform and correct interpretation of the Constitu-
tion.66 Any assessment of whether the bills would minimize the effect of
previous decisions would amount to speculation. No one really
knows precisely what impact they would have on a specific body
of law.67

This brings us back to the second objective. While the pro-
ponents claim that they want to restore more traditional and stable
judicial decision making, it is difficult to imagine any set of pro-
posals more inconsistent with the goals of certainty or stability than
the court stripping bills. The simple fact is that the court strip-
ning proposals remove federal court jurisdiction while offering
state court judges no real indication of what judicial standard they
should follow. It is ironic that those who are complaining about
judicial usurpation of the legislative function are promoting legis-
lative solutions devoid of any substantive direction and inviting
further and potentially more disparate pronouncements. Such a
vacuum of substantive standards is an open invitation to judicial
activism in its purest form. The more helpful solutions would be
ones that actually set a new substantive standard for the courts to
follow.

Not only do the court stripping bills fail to provide a substan-
tive legal standard, but they preclude the Supreme Court from
enforcing its previous decisions.68 The sponsors of these bills
realize that they cannot directly reverse a constitutional decision
of the Supreme Court. Instead, the sponsors are actually promot-
ing an open invitation to state court judges to alter or reverse the
controlling Supreme Court decisions.69

They want to withdraw the Supreme Court’s jurisdiction and
give the state courts a knowing wink and say, “go ahead—they
can’t touch you now.”70 This Congressional wink is not respon-
sible legislation. It is an open invitation to the state courts to
overrule decisions of the Supreme Court. Likewise it is an open
invitation for the general disrespect of the rule of law.

66. See J. EAST, supra note 48, at 34.
67. See note 62 supra.
68. See note 62 and accompanying text supra.
69. See Rice, supra note 42, at 197.
70. See Kay, Limiting Federal Court Jurisdiction: The Unforeseen Impact
on Courts and Congress, 65 JUDICATURE 185, 188 (1981); Sager, supra note 47,
at 41. Professor Sager notes that the jurisdiction bills are aimed at highly
charged political and social issues. Id. Thus when Congress divests the Court
of jurisdiction, it is as if “Congress were casting a lewd wink in the state courts’
direction.” Id.
In fact, the jurisdiction bills are more than an invitation to such disrespect—their success depends on it. The court stripping bills would have no substantive impact unless state court judges were willing to seize advantage of this opportunity. This aspect of the court stripping bills was recently criticized by the conference of state court chief justices. By a resolution adopted at their mid-year meeting in Williamsburg, Virginia, the chief justices raised serious concerns about the impact of these bills on state courts. Their resolution observed in part: “These proposed statutes give the appearance of proceeding from the premise that state court judges will not honor their oath to obey the United States Constitution, nor their obligations to give full force to controlling Supreme Court precedents.”

It is difficult to see how such proposals restore more traditional and stable decision making to our judicial system. A court stripping bill would throw a given body of law into total disarray. In the name of restoring “constitutional” decision making to the courts, the proposals in fact leave open the possibility of fifty unconstitutional decisions being pronounced by the state courts.

Not only do the jurisdiction bills fail to restore traditional “constitutional” judicial conduct, they also fail to provide any logical or consistent conception of how constitutional rights should be addressed by the courts. Today a citizen can vindicate a constitutional right in either state or federal court and in either instance has the right to appeal to the United States Supreme Court. But if Congress engages in court stripping, the current judicial system would fragment leaving four alternative and independent judicial systems for vindicating constitutional rights. Depending on which constitutional right was in question, the judicial process would be: 1) In state or lower federal court with a right of appeal to the Supreme Court (The current jurisdictional scheme); 2) In state or lower federal court with no right of appeal to the Supreme Court; 3) Only in a state court with a right of appeal to the Supreme Court; or 4) Only in a state court with no right of appeal to the Supreme Court.

The burden should be on the proponents of the court stripping bills to explain why one of these alternative jurisdictional schemes is an appropriate approach for vindicating a specific constitutional right. Even the various bills conflict as to which of the three new

72. Conceptually there are two additional possibilities for the vindication of constitutional rights: access only to lower federal court with and without the right of appeal to the Supreme Court.
alternatives is appropriate for a specific subject matter. There are bills pending on the issue of school prayer that advocate process 2) and process 4). There are bills pending on abortion that advocate process 3) and some that propose process 4). Similarly, there are bills pending on school desegregation that advocate process 3) and some that propose process 4).

Should Congress engage in continued court stripping, we would be left with a crazy quilt of rights and recourses. In the real world of litigation, it is also likely that an individual will not be pursuing a single constitutional issue at a time. Conceivably, a different part of a litigant's case could fall under each of the four options. Would it make sense to tell a citizen that the "due process" portion of his case can be brought in federal court but the "equal protection" part can only be brought in state court? Further, would it make sense to tell that same individual that the "due process" portion of the case can be appealed to the United States Supreme Court, but the "equal protection" portion cannot?

These bills are being offered without sufficient consideration of the ultimate impact on our judicial system. In light of the deleterious effects of court stripping bills, their proponents have failed to adequately explain why we should abandon the current constitutional scheme for vindicating rights. It is a burden which they must be forced to assume before moving any further toward dismantling a carefully constructed judicial system.

C. Impact on Congress

The impact of these jurisdiction limiting bills on the judicial system has been underestimated. The same is true of the impact of these bills on the Congress itself. If Congress decided to enter this arena, the pressure to respond to a wider range of constitutional issues will increase. Every constituency that feels victimized by an adverse constitutional ruling will come running to Congress for a jurisdiction removal bill. Proponents of the bills suggest that fears of Congressional abuse of the jurisdiction removal power are exaggerated. They argue that the jurisdiction bills each represent a narrow "surgical" removal of a limited area of jurisdiction. However, a review of the proposals being considered by the 97th

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Congress is illuminating as to how the Congress might actually utilize this power to remove court jurisdiction.

One bill underscores the unlikelihood of a narrow and "surgical" approach. It reads as follows:

No court of the United States that is established by Act of Congress under Article III of the Constitution of the United States shall have any jurisdiction to modify, directly or indirectly, any order of a court of a State if such order is, will be, or was, subject to review by the highest court of such State.76

This bill hardly represents a carefully circumscribed removal of federal jurisdiction. It would preclude any lower federal court challenge to any state court decision. For example, it would totally preclude federal court review of any habeas corpus case.

Another bill, the "Women's Draft Exemption Act," is equally instructive. It would remove Supreme Court and lower federal court jurisdiction over:

any case arising out of any statute, ordinance, rule, regulation, concerning—(1) establishing different standards on the basis of sex for the composition of the armed services or assignment to duty therein; or (2) establishing different treatment for males and females concerning induction, of individuals for training and service in the Armed Forces.77

This bill is troubling for two reasons. First and foremost, it is an excellent example of why the court stripping approach is inappropriate in many instances. The sponsor was attempting to maintain an all-male draft. However, the solution being offered is to leave the decision as to the composition of the armed services up to fifty separate state courts. The result is that women from Pennsylvania might be constitutionally required to be drafted while women from Arizona might be immune from induction. In fact, if the proposed statute had been enacted, the all-male draft would have been in more disarray and more discriminatory than if the Supreme Court had determined that an all-male draft violated the equal protection clause.

The second troubling aspect of this bill is its timing. This bill was introduced on March 24, 1981. At that time, the question of the constitutionality of the all-male draft was pending before the Supreme Court. The Court announced its decision in

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the case on June 25, 1981. Although the proponents of court stripping argue that Congress will only use its power to correct flagrant cases of judicial “excesses,” in the case of H.R. 2791, the jurisdiction removal was being proposed before the Supreme Court had rendered its decision. It is difficult to see what constitutional authority the Court had abused.

The author of H.R. 2791 feared the Court’s ruling on an all-male draft and the bill was written in anticipation of an adverse decision. His worst fears were not realized as the Court upheld the constitutionality of the all-male draft. One assumes that after June 25, 1981, the bill became moot and that the subject matter suddenly became appropriate for ongoing Supreme Court review. Thus, once the Court made the “correct” decision on the issue (i.e., what one Congressman saw as “correct”), there was no need to remove the subject from the court’s jurisdiction.

This highly questionable use of the power to remove court jurisdiction is only one step removed from the most cynical use of that power. After reviewing all the bills introduced in this Congress, the prediction that jurisdictional removal language will become a boiler-plate provision of much legislation is not wholly implausible. Any time a member of Congress is unsure whether the Supreme Court would uphold legislation, he or she could tack on a section denying the Court jurisdiction over that issue. This could apply to taxation and personal property as well as to social issues.

Jurisdiction limiting legislation is a politically two-edged sword. Although associated with the “New Right” in the 97th Congress, such legislation could very well be used in ways which would be anathema to the values of the “New Right.”

If Congress can remove Supreme Court jurisdiction over an all-male draft before the Court has ruled in the case, why can’t it pass stringent gun-control legislation and include a provision to prevent Supreme Court review of any case involving the “right to bear arms?” Why couldn’t Congress impose onerous and discriminatory taxes and include a provision to prevent Supreme Court review of the constitutionality of all federal taxation cases? Why couldn’t Congress attempt to totally preempt the States from engaging in conduct traditionally within their power and remove

78. Rostker v. Goldberg, 101 S. Ct. 2646 (1981). In Rostker the Supreme Court held that the all-male draft did not violate the due process clause of the fifth amendment. Id. at 2660. See Note, Gender-Based Discrimination—Separation of Powers—The Total Exclusion of Women From the Military Selective Service Act Does Not Violate Due Process, 27 VILL. L. REV. 182 (1981).
Supreme Court jurisdiction over cases arising under the tenth amendment?

These hypotheticals are the reasonable extension of the strategy being put forward in the court stripping bills, not fanciful ruminations. If one supports removal of Supreme Court jurisdiction over abortion or school prayer, one necessarily supports the possibility of Congress precluding review of any legislation that might run afoul of any constitutional principle, including those held most dear by current proponents of jurisdiction removal.

Furthermore, it is unlikely that Congress will use restraint and limit itself to neutral prospective removal of subject matter jurisdiction. A current example of more far reaching legislation is the proposed "human life statute." The statute in part states that:

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.79

This provision effectively keeps out litigants on one side of the issue and allows in litigants from the other. Challenges to statutes that restrict or prohibit abortions would not be permitted to be brought in the lower federal courts. Attempts to enjoin abortions from occurring, or challenges to statutes that fund abortions, could be brought in the lower federal courts. Professor Charles Alan Wright of the University of Texas Law School has observed:

I think Congress has very sweeping power over the jurisdiction of the inferior courts. . . . At the same time, I feel certain that Congress must exercise its power over federal jurisdiction, as it must its other powers, in a fashion consistent with constitutional limitations. . . . Under such cases as Hunter v. Erickson, and United States v. Klein, I do not think Congress has authority to close the federal court door in suits arising under laws that prohibit, limit, or regulate abortions, while allowing access to fed-

eral court for challenges to statutes that permit, facilitate, or aid in the financing of abortions.\textsuperscript{80}

Another court stripping bill pending before the Judiciary Committee goes far beyond a neutral, prospective removal of subject matter jurisdiction. Senate Bill 1647, as reported by the Separation of Powers Subcommittee, requires a court to dissolve a pending busing order upon the filing of a petition by an affected school board.\textsuperscript{81} Other provisions in S. 1647 attempt to utilize congressional power over federal court jurisdiction to influence closed and pending cases, and to prohibit courts from utilizing the contempt power to enforce busing orders.\textsuperscript{82}

After reviewing the jurisdictional proposals pending in the 97th Congress, the potential for abuse is apparent. While the simple introduction of a bill is not evidence of what fifty-one percent of the Congress would agree upon, it is instructive as to the possibilities should Congress continue in its attempt to respond to individual Supreme Court decisions by utilizing the jurisdictional removal device.

IV. ALTERNATIVES TO COURT STRIPPING: AN AGENDA FOR CONGRESS

It has been shown there are serious questions about the impact of these jurisdiction limiting bills on the Constitution, the judicial system and Congress itself. However, merely enumerating the dangers of these bills does not address the motivation behind

\textsuperscript{80} Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) (statement of Charles Alan Wright, William B. Bates Professor, University of Texas at Austin School of Law).

\textsuperscript{81} S. 1647, 97th Cong., 1st Sess. (1981).

\textsuperscript{82} Perhaps, as a matter of constitutional law, the Congress may in some circumstances be able to withdraw lower federal court jurisdiction. However, it is an entirely different matter for the Congress to interfere with the court's handling of cases over which the court has legitimate jurisdiction. The section of S. 1647 that provides for the dissolution of current busing orders runs afoul of the Supreme Court's holding in \textit{United States v. Klein}, 80 U.S. (13 Wall.) 128 (1872). As previously discussed, the \textit{Klein} Court found that Congress did not have the power to compel a certain decision by the Court. See notes 41 & 42 and accompanying text supra. Under S. 1647, Congress would require a court to dissolve a busing order without any opportunity for the court to review the case. Congress' power over the lower federal courts does not include the power to order courts to handle cases in a particular fashion, but this is precisely what S. 1647 seeks to do.

A separate provision of S. 1647 removes the court's power to issue contempt orders to enforce busing orders. The contempt power is an inherent judicial power. Congress' authority to control the jurisdiction of lower federal courts clearly cannot include the authority to remove the contempt power from the courts.
them. Thus, one additional question must be asked: If the Congress cannot or should not use the exceptions clause or its power over lower federal court jurisdiction to respond to individual decisions of the Supreme Court, then what alternatives does it have?

Here is the fundamental issue that the country and Congress should be addressing. Rather than responding to narrow constituencies in a highly charged political atmosphere, Congress should begin a more thoughtful review of its relationship with the courts. This should include consideration of whether the Constitution should be amended to provide any additional checks on the courts as well as a review of how Congress is exercising its current powers.

The Congress now has constitutional authority to respond to "unconstitutional," "unpopular" or "wrong-headed" decisions of the Supreme Court. Under article V, Congress can initiate the constitutional amendment process.

Several of the amendments to our Constitution have been direct responses to Supreme Court decisions. The eleventh amendment was a response to the Court's decision in *Chisholm v. Georgia* which subjected the states to law suits in federal courts. The fourteenth amendment was in response to the Court's decision in *Dred Scott v. Sanford* that the constitutional term "citizen" did not include Black Americans. The sixteenth amendment overturned the Court's interpretation of the constitutional term "direct taxes" in *Pollack v. Farmer's Loan and Trust Company*. And the twenty-sixth amendment was a response to the Court's holding in *Oregon v. Mitchell* that the Congress could not lower the voting age in state elections to 18 years of age. Since the *Chisholm* case was decided in 1793, this country has had a long and consistent history of responding to constitutional decisions of the Supreme Court.

Today, however, critics of the Court argue that article V is too unwieldy and too cumbersome a tool to effectively respond to the Court. This position is based on the argument that the Court can usurp legislative power by a simple five to four decision while it takes a two-thirds consensus in Congress and a ratification by

83. 2 U.S. (2 Dall.) 419 (1793).
84. 60 U.S. (19 How.) 393 (1857).
three-fourths of the states simply to get this power back via the amendment process. Thus, the courts arguably have an unfair advantage when permitted to judicially usurp legislative functions without a meaningful check on such conduct.

But this argument requires careful scrutiny. If the premise is accepted, then two major alternatives would appear to be available to Congress without invoking the constitutionally suspect and imperfect powers of the exceptions clause. One would be to make less burdensome the requirements of article V. The other would be to create a new legislative check on the judicial branch.

However, before an effort is made to ease the requirements of article V, the Congress should also examine the strengths of the current provision. The cumbersome requirements of the amendment process do have salutory effects. Provisions of the Constitution now have some permanence. The basic underpinnings of our government are thereby relatively fixed. Those parts of government that are designed to address short term problems can be designed and undone by the less cumbersome statutory process.

In addition, the cumbersome requirements make it less likely that the country can have violent and rapid swings on controversial issues. It would seem that the nation is well served by a process that permits a controversial decision to take hold and gives it a chance to operate before it is too rapidly undone. If the society as a whole determines that a Supreme Court decision is simply unacceptable, then a broad consensus can be put together quickly to reverse the Court's decision. For these reasons it may well be that changes in the amendment process are not the appropriate place for an additional legislative check on the judiciary.

Other proposals have been made to amend article III to provide in the Constitution a direct legislative check on the judiciary. One such proposal would provide for a two-thirds congressional override of Supreme Court decisions. Other proposals would provide for a direct check on the judiciary by eliminating life tenure and providing for popular elections of judges.

The purpose of raising these proposals here is not to advocate such changes, but to suggest the kinds of reforms the nation and the Congress should be debating. Congressional hearings on these and related proposals would help funnel the current anger over perceived abuses by the federal courts into an avenue of action that directly addresses the real problem and could possibly lead to a solution that is more consistent with the spirit and design of our Constitution.
While many may fear the outcome of a national dialogue on these issues, it would at least be clear to all that what is really being proposed are fundamental changes in how our judicial branch functions. The country can then make a conscious decision about the degree to which it desires to reduce or eliminate the current independence of the courts. The problem with the court stripping bills is that they effectively remove judicial independence without a public discussion of the merits or the drawbacks of such action.

In addition to these proposals, Congress ought to carefully review the other powers that it has over the judiciary and determine whether they are being used efficiently and properly. Congress' power to advise and consent to the judicial nominations of the President and its power to impeach judges are not considered meaningful today. Perhaps if these responsibilities were taken more seriously they could serve as more significant checks on the judicial branch. Congressional review and possible utilization of these two powers would be timely and appropriate.

The Congress should also carefully examine its responsibilities in the area of fashioning constitutional remedies. Much of the current frustration with the courts is not with their jurisdiction, but with the imposition of what may be considered extraordinary remedies. Although Congress must be careful not to interfere with the vindication of constitutional rights, it is not precluded from structuring a hierarchy of remedies which avoids the hasty imposition of a burdensome solution. Congress can also require the federal courts to consider specific criteria before imposing a remedy. For example, in busing cases Congress might well want to require a court to consider the impact of a busing order on the health and safety of the school children involved. Congress could even require the court to include individuals potentially affected by the order, such as school children or their parents, in the court's proceedings.89

Additionally, Congress should take partial responsibility for judicial imposition of unpopular remedies. In many instances the courts have been forced to resort to such remedies after Congress and state legislatures have failed to act in a given area. Congress should engage in the exploration of constructive alternative remedies rather than attempting to prevent the courts from utilizing remedies Congress does not like.

The Congress should also realize that it often has within its power the ability to find partial remedies to troubling Supreme

Court decisions. By utilizing its controls over the federal budget, Congress may effectively control government conduct even if the courts precluded governmental interference with private conduct. For example, many of those in Congress who opposed the Court's ruling in *Roe v. Wade* exercised their constitutional power to eliminate federal funding of most abortions.90

Finally, the Congress must keep in mind that Supreme Court review of its own decisions has served as a significant self-correcting mechanism. In many instances during its history, the Supreme Court has overturned its previous decisions, and this ongoing review process is perhaps the most effective and reliable mechanism for “correcting” decisions.91 Thus, it is ironic that the court stripping bills not only preclude the overturning of previous decisions, but prevent the Court from rendering additional decisions which would serve to significantly limit their original decisions.92 The Court's own capacity to correct its “mistakes” should not be ignored when assessing the need for Congressional interference with judicial decision-making.

The role of the Supreme Court and its interaction with the other two branches of government is a topic many find too removed from the immediate problems of the day. However, from time to time, such an institutional analysis of problems is necessary. In the late 1960's, the Senate Separation of Powers Subcommittee, then chaired by Senator Sam Ervin, engaged in a lengthy review of the role of the Supreme Court.93 Today, in 1982, the Senate

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90. See Harris v. McRae, 448 U.S. 297 (1980) (the Medicaid program does not require states to pay for medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment). See also S. 2148, 97th Cong., 1st Sess. (1981) (no funds appropriated by Congress shall be used directly or indirectly to fund abortions unless the mother's life is in danger). See also S. 2372, 97th Cong., 2nd Sess. (1982).


92. For example, the opponents of abortion would have substantially damaged their own cause if they had attempted and succeeded in removing Supreme Court jurisdiction over abortion in the wake of *Roe*, because the Court would have been unable to render its decision in *McRae* which held that Congress and state legislatures can constitutionally prohibit federal and state funding of abortions. See note 90 supra. Absent the holding in *McRae*, state supreme courts would have been free to declare that a state's funding of abortions was constitutionally required.

Similarly, it is generally agreed that current Supreme Court rulings do not preclude school periods of silent meditation. If Supreme Court jurisdiction over school prayer were removed, individual state supreme courts would be free to declare periods of silent meditation in schools unconstitutional. Thus, it is conceivable that an independent state supreme court could arrive at a more unacceptable— to proponents of prayer in the schools—state of the law than that which the Supreme Court has already declared.

and House Judiciary Committees should again undertake a comprehensive and thoughtful review of the relationship between Congress and the federal courts.

V. Conclusion

There is a critical need to address the institutional problems of the judicial branch outside the context of the court stripping bills. The jurisdiction removal proposals present such immediate and overwhelming constitutional concerns that we should be looking toward other solutions to address perceived problems with our federal courts. The impact of the court stripping bills on our judicial system and on the Congress itself has also been grossly underestimated. Congress would be far better off confronting the institutional problems of the federal courts directly, rather than pursuing court stripping bills that effectively destroy judicial independence without a public discussion of its merits or drawbacks.

When the full Senate voted on the Helms Amendment in April of 1979, the vote was perceived as a vote on school prayer. There was little awareness of the implications of the removal of Supreme Court jurisdiction over a constitutional issue. The votes on the issue took place without serious discussion and consideration of the role of the federal courts in the American system of government. The offering of the amendment came as a surprise to most members of the Senate and took place without committee hearings, without any committee consideration and without any input from constitutional scholars, the legal community, or interested organizations.

In the ensuing three years, public awareness and interest in the court stripping bills has increased. In August of 1981, the House of Delegates of the American Bar Association overwhelmingly approved a resolution opposing “the legislative curtailment of the jurisdiction of the Supreme Court of the United States or the inferior federal courts for the purpose of effecting changes in constitutional law.” 94 Since then the leadership of the organized bar has repeatedly spoken out and testified against the jurisdiction removal proposals.95 The President of the ABA has described the

court stripping bills as posing "a possible constitutional crisis that could prove the most serious since the Civil War." 96

The American College of Trial Lawyers has gone on record in opposition to the jurisdiction bills and observed:

The doors of the federal courts must remain open to litigants whose claims arise out of the federal Constitution. This issue should not divide conservatives and liberals or Democrats and Republicans. Nor should it divide those who support or disagree with one or another constitutional decision of the Supreme Court. 97

In fact, opposition to the court stripping bills has been bipartisan and has crossed ideological lines. Senator Barry Goldwater of Arizona has recently spoken out eloquently against the jurisdiction removal bills. He observed:

I am strongly opposed to the breakup of neighborhood schools. I think the unborn baby is entitled to some legal protection. And I believe schoolchildren should be allowed a few moments of voluntary prayer.

In my view, the Supreme Court has erred. But we should not meet judicial excesses with legislative excesses. . . .

What particularly troubles me about trying to override constitutional decisions of the Supreme Court by a simple bill is that I see no limit to the practice. There is no clear and coherent standard to define why we shall control the Court in one area but not another. The only criteria seems to be that whenever a momentary majority can be brought together in disagreement with a judicial action, it is fitting to control the federal courts. . . .

Whether or not Congress possesses the power of curbing judicial authority, we should not invoke it. As sure as the sun will rise over the Arizona desert, the precedent will return to oppress those who would weaken the courts. If there is no independent tribunal to check legislative or executive action, all the written guarantees of rights in the world would amount to nothing. 98

Unfortunately, the momentary majorities that Senator Goldwater speaks of are continuing to exert enormous pressure on Congress. Certain constituencies are continuing to pursue their

legislative “end-runs” of the Constitution. These constituencies are convinced that such short cuts are politically acceptable. It is not yet clear whether the concerns that have been raised about court stripping will take hold or whether more and more single-issue constituencies will find such legislative approaches a sound way of pursuing their substantive goals.

In the meantime, those who are deeply concerned about the profound implications of court stripping must continue to try to focus national attention on the fundamental governmental principles that are at stake. Our only alternative is to try to address the broader issues in the hope that we can reach a consensus that the court stripping proposals are dangerous and do not effectively address the problems they are designed to cure.

While the current proponents of court stripping represent a formidable political force, the nation has previously faced and withstood similar challenges to the independence of the federal judiciary. One such challenge occurred in 1937 when President Roosevelt proposed to increase the size of the Supreme Court. He felt that a series of Supreme Court decisions threatened the success of his national recovery program. By proposing to alter the Court’s composition, he hoped to force the Court to uphold the constitutionality of his economic plan. The people and Congress resoundingly defeated the Roosevelt plan. The “Court packing” plan was seen for what it was—a significant threat to the independence of the judicial branch. As we now consider the court stripping bills before us in the 97th Congress, we should keep in mind the wise words of those who successfully defended the Supreme Court in 1937. Senator Burton K. Wheeler of Montana delivered this warning which applies with equal force today:

So I say it is morally wrong to do by indirection what cannot be done by direction. It is morally wrong to change the Constitution by coercive interpretation. . . . Of course, Mr. President, there have been abuses in the Court. I have been one who has disagreed with them, and I expect to disagree with them again, but I am unwilling on the basis of some specious argument or of some subterfuge that defies the spirit of the Constitution to participate in setting one of the most dangerous precedents that has ever been conceived by this Congress or any other.99