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# Restoring School Prayer by Eliminating Judicial Review: An Examination of Congressional Power to Limit Federal Court Jurisdiction

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# COMMENT

## Restoring School Prayer by Eliminating Judicial Review: An Examination of Congressional Power to Limit Federal Court Jurisdiction

### I. INTRODUCTION

Since the ratification of the United States Constitution the legislative and judicial branches of the federal government have engaged in recurring conflicts over their relative power and respective areas of authority. Within the past several decades the Supreme Court has greatly expanded the role of the judicial branch through constitutional interpretations providing legal rights and remedies in areas previously considered to be matters of policy within the control of Congress and the individual states. Many of these Supreme Court holdings have concerned controversial issues and have sparked vocal opposition and widespread efforts to blunt their impact. One tactic employed increasingly by members of Congress to overcome the effects of these Court decisions has been the introduction of proposals to limit federal court jurisdiction.[1] These bills are designed to remove federal district court or Supreme Court jurisdiction over specific matters about which the federal courts have made rulings or fashioned remedies considered objectionable.

In recent years the areas in which members of Congress have sought to restrict federal court jurisdiction include state and local regulation of subversive activities,[2] state apportionment of legislative districts,[3] standards for the use of confessions in criminal trials,[4] state court obscenity rulings,[5] local deci-

1. More than sixty bills to limit federal court jurisdiction were introduced between 1953 and 1968. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Weschsler's The Federal Courts and the Federal System 360 (2d ed. 1973). Approximately two dozen such proposals are pending in the Ninety-seventh Congress, including the following: S. 158, S. 481, S. 528, S. 1005, S. 1147, S. 1741, S. 1742, S. 1743, H.R. 72, H.R. 73, H.R. 114, H.R. 326, H.R. 408, H.R. 761, H.R. 865, H.R. 867, H.R. 869, H.R. 989, H.R. 1079, H.R.1180, H.R. 1335, H.R. 2347, H.R. 2365, H.R. 2791, 97th Cong., 1st Sess. (1981).

See Nagel, Court-Curbing Periods in American History, 18 Vand. L. Rev. 925 (1965) (historical and statistical analysis of congressional attempts to limit the power of the Supreme Court).

2. See S. 2646, 85th Cong., 1st Sess. (1957). The Jenner Amendment was inspired by McCarthy era sentiment and further fueled by Supreme Court decisions protecting those persecuted. See Elliott, Court-Curbing Proposals in Congress, 33 Notre Dame Law. 597 (1958).

3. See H.R. 3238, 93d Cong., 1st Sess. (1973); H.R. 11,926, 88th Cong., 2d Sess. (1964). These bills were proposed to counter the reapportionment cases of Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 533 (1964).

4. See S. 917, 90th Cong., 2d Sess. (1968). This proposal by former North Carolina Senator Ervin was to be added to the 1968 Crime Control Bill. It was designed to overcome the decision in Miranda v. Arizona, 384 U.S. 436 (1966), mandating safeguards for the use of confessions in criminal cases.

5. See H.R. 81, 93d Cong., 1st Sess. (1973); S. 4058, 90th Cong., 2d Sess. (1968). These bills were inspired by expanded Supreme Court protection of publications attacked as obscene. See, e.g., Redrup v. New York, 386 U.S. 767 (1967).

sions regarding school busing,[6] laws regulating abortion,[7] and cases concerning prayer in the public schools.[8] This list of some of the most controversial current issues with which the federal courts have dealt highlights the fact that the success and ultimate constitutionality of these congressional attempts to remove jurisdiction have critical implications beyond the resolution of these specific issues. These bills strike at the independence and viability of courts, and particularly the Supreme Court, as the ultimate defenders of the individual rights guaranteed by the Constitution.[9]

## II. THE VOLUNTARY SCHOOL PRAYER ACT

Although none of these bills has yet been enacted, and therefore the Supreme Court has not had an opportunity to determine the legitimacy of such a measure, recognition of the ramifications of these bills has sparked considerable debate among legal scholars concerning their constitutionality.[10] In further exploring the potential effects and constitutional validity of these proposals to limit federal court jurisdiction, analysis of one bill provides a useful vehicle for clariying the issues involved. The bill, titled the Voluntary School Prayer Act of 1981[11] and sponsored by Senator Helms of North Carolina, is an attempt to remove federal court jurisdiction over cases concerning "voluntary prayers in public schools and public buildings."[12] This representative attack

6. See H.R. 13,915, 92d Cong., 2d Sess. (1972). This bill, recommended by President Nixon, provided that no desegregation order could increase the amount of busing in a given school district. A companion bill, H.R. 13,916, 92d Cong., 2d Sess. (1972), proposed a moratorium on federal judicial busing orders. Federal court busing orders such as the one upheld in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), prompted these proposals. A revival of this sentiment in the Ninety-seventh Congress has produced two bills to limit busing. A bill drafted by Senator Helms of North Carolina would prohibit any federal district court busing orders to achieve racial balance. See S. 1743, 97th Cong., 1st Sess. (1981). The Neighborhood School Act of 1981, proposed by Senator Johnston, would restrict busing to that school closest to a student's home, subject to certain exceptions. This bill was approved by the Senate by a vote of 58 to 38 on February 4, 1982 as an amendment to a Department of Justice appropriations bill. See 128 Cong. Rec. S319-414 (daily ed. Feb. 4, 1982).

7. See H.R. 933, 96th Cong., lst Sess. (1979). This proposal was designed to counter Roe v. Wade, 410 U.S. 113 (1973), which restricted state laws prohibiting abortion.

8. See notes 12 & 13 infra.

9. Much debate in the media has focused on these bills restricting judicial protection of constitutional rights. See, e.g., Buchanan, How Supreme Is the Court?, N.Y. Daily News, Apr. 16, 1979. This editorial was submitted by Senator Garn for inclusion in the Congressional Record after the Senate passed the Helms Amendment. See 125 Cong. Rec. S5670-71 (daily ed. May 10, 1979).

See also Time, Sept. 28, 1981, at 93.

10. See, e.g., R. Berger, Congress v. The Supreme Court (1969); Brant, Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause, 53 Or. L. Rev. 3 (1973); Forkosch, The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter Be Limited by Congressional Power Under the Former?, 72 W. Va. L. Rev. 238 (1970); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953); Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960); Strong, Rx for a Nagging Constitutional Headache, 8 San Diego L. Rev. 246 (1971); Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001 (1965). See also Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. (1968) [hereinafter cited as Hearings].

11. S. 481, 97th Cong., 1st Sess., 127 Cong. Rec. S1284 (daily ed. Feb. 16, 1981).

12. The relevant text of the bill follows:

on controversial Supreme Court holdings has been chosen as a focus because it almost passed the Ninety-sixth Congress[13] and has been reintroduced in the Ninety-seventh Congress.[14] It is also a useful example because, unlike some jurisdiction-limiting bills, the Voluntary School Prayer Act removes both federal district court and Supreme Court review of a class of cases.

By eliminating federal court challenges to state-sponsored school prayer, the Helms bill is designed both to circumvent and to prevent further extension of United States Supreme Court decisions restricting school prayer.[15] Two landmark Supreme Court cases, *Engle v. Vitale*[16] and *School District v. Schempp (Abington School District)*,[17] define the law concerning prayer in public schools. In these cases the Court held that public schools could not support or advance religion by requiring prayer or Bible reading at the beginning of each day.[18] The Court ruled that laws requiring schools to present this material, with or without compulsory participation by each student, violate the

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Sec. 2. (a) Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1259. Appellate jurisdiction; limitations

"(a) Notwithstanding the provision 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, regulations, 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.

"For the purposes of this section, the term 'voluntary prayer' shall not include any prayer composed by an official or any employee of a state or local governmental agency.".

(b) The section analysis at the beginning of chapter 81 of such title 28 is amended by adding at the end thereof the following new item:

"1259. Appellate jurisdiction; limitations.".

Sec. 3. (a) Chapter 85 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1364. 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.".

(b) The section analysis at the beginning of chapter 85 of such title 28 is amended by adding at the end thereof the following new item:

"1364. Limitations on jurisdiction.".

Sec. 4. The amendments made by sections 11 and 12 of this Act shall take effect on the date of the enactment of this Act, except that such amendments shall not apply with respect to any case which, on such date of enactment, was pending in any court of the United States.

Id.

13. See S. 450, 96th Cong., 1st Sess. (1979). This earlier bill, known as the Helms Amendment, originally was attached to S. 210, 96th Cong., 1st Sess. (1979), which created the Department of Education. Before passage, the Amendment was transferred to S. 450, 96th Cong., 1st Sess. (1979), a bill designed to give the Supreme Court more control over its docket by converting all appeals to certiorari or discretionary jurisdiction. The bill passed the Senate by a vote of fifty-one to forty but stalled in the House Judiciary Committee a few dozen signatures short of the majority necessary to bring it to the floor for a vote.

14. See notes 11 & 12 supra.

15. 125 Cong. Rec. S4128-31 (daily ed. Apr. 5, 1979) (remarks of Sen. Helms).

16. 370 U.S. 421 (1962).

17. 374 U.S. 203 (1963).

18. *Abington School Dist.*, 374 U.S. at 223-25; *Engel*, 370 U.S. at 424-25.

United States Constitution's first amendment prohibition against government "establishment of religion."[19] The advocates of the Helms bill theorize that by removing the jurisdiction of the federal courts over school prayer cases, the bill would allow states to restore school-sanctioned prayers free from the threat of federal court enforcement of the limits enunciated in *Engle* and *Abington School District*.[20] Although purporting to restore "the true spirit of the first amendment" and "the fundamental right of voluntary prayer in the public schools,"[21] the proposed bill, in the opinion of many, would restrict unconstitutionally the power of the federal courts to interpret the United States Constitution.[22]

In examining the constitutionality of Senator Helms' bill, it is necessary first to consider the guidance provided by the Constitution's provisions establishing the federal judiciary. The scope of authority of the federal judiciary is set out in article III of the United States Constitution. The first sentence of article III, section 2 declares that the judicial power of the federal courts "extends to All Cases in Law and Equity arising under this Constitution. . . ."[23] Claims that school prayer violates the first and fourteenth amendments clearly fall within this category of cases. Helms bill advocates claim, however, that other language in article III limits this grant of power to the federal courts by authorizing congressional revocation of jurisdiction.[24] Because the Helms bill denies jurisdiction over school prayer cases to both the federal district court and the Supreme Court,[25] and because the power of Congress over these two jurisdictional levels derives from separate clauses,[26] they must be considered separately.

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19. *Abington School Dist.*, 374 U.S. at 223-25; *Engle*, 370 U.S. at 424-25. See U.S. Const. amend. I: "Congress shall make no law respecting an establishment of religion . . . ."

20. State courts would still provide a forum for suits challenging school-sanctioned prayer. Presumably, however, some state courts would differ in their future application of Supreme Court decisions interpreting the establishment clause. State court departure from these decisions would be required for the Helms bill to effect any change in the status of school prayer. Its sponsors must be anticipating that at least some state courts will ignore the Supreme Court precedents of *Engle* and *Abington School District*. See 127 Cong. Rec. S1281-84 (daily ed. Feb. 16, 1981) (remarks of Sen. Helms).

21. 125 id. S4130 (daily ed. Apr. 5, 1979) (remarks of Sen. Helms).

22. For example, this conclusion was reached by John M. Harmon, former Assistant Attorney General. Hearings on S. 450 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, 96th Cong., 2d Sess. 34-37 (1980) (statement of John M. Harmon, Assistant Attorney General).

23. U.S. Const. art. III, § 2, cl. 1.

24. See 127 Cong. Rec. S1283 (daily ed. Feb. 16, 1981) (remarks of Sen. Helms); 125 id. S4130-31 (daily ed. Apr. 5, 1979) (remarks of Sen. Helms).

25. See note 12 supra for text of the bill. Proposed section 1259 of title 28 of the United States Code would remove Supreme Court jurisdiction over school prayer cases, and section 1364 would remove district court jurisdiction.

26. Congressional control over the scope of lower federal court jurisdiction derives from article III, section 1, while control over Supreme Court jurisdiction derives from article III, section 2, clause 2.

## III. The Power of Congress to Withdraw Federal District Court Jurisdiction

The language of article III indicates that the framers of the Constitution intended Congress to have broad power over the scope of the lower federal court system. Article III, section 1 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."[27] Thus, the federal judicial power vested in the Supreme Court may be supplemented by the establishment of lower federal courts by Congress. This view of congressional descretion over the existence of federal district courts has been supported by the Supreme Court.[28] As a corollary, the Supreme Court also has held that Congress can withdraw federal district court jurisdiction from an entire class of cases, at least in some circumstances.[29] For example, administrative tribunals set up by congressional acts have replaced federal district court jurisdiction over specific types of cases.[30]

Under this traditional view of federal judicial power, if the Voluntary School Prayer Act only denied the federal district courts jurisdiction over voluntary prayer cases without imposing the same restriction on the Supreme Court, the requirements of article III would be satisfied. State courts would still be available to provide an initial forum for claims challenging the constitutionality of state authorization of school prayer. State court holdings could be given final review in a federal forum, the Supreme Court. Presumably, this possibility of final review would provide adequately for federal judicial power over constitutional cases as mandated by article III, and the Court could maintain the supremacy of the federal Constitution by requiring a fair and uniform adherence to the Constitution throughout the entire nation.[31]

Some commentators have challenged this view of congressional power to establish and disband lower federal courts with complete discretion.[32] They argue that Congress is limited when it acts to deny federal courts the practical power to vindicate rights guaranteed by the Constitution. A law that dismantles the entire lower federal court system would be of questionable constitutional validity considering the modern federal court system's caseload. In that situation the Supreme Court would be unable to review adequately all of the

27. U.S. Const. art. III, § 1.

28. See, e.g., Lockerty v. Phillips, 319 U.S. 182 (1943); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). See generally Comment, Congressional Power Over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples, 49 N.Y.U. L. Rev. 131, 137-43 (1974).

29. "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938).

30. See, e.g., Norris-La Guardia Act of 1932, 29 U.S.C. §§ 101-115 (1976). See also Yakus v. United States, 321 U.S. 414 (1944).

31. Under the original Judiciary Act of 1789 some categories of federal question cases could only be brought in state courts, subject to review by the Supreme Court. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73.

32. See Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974); Thompson & Pollitt, Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on Busing Orders, 50 N.C.L. Rev. 809, 836-41 (1972).

state cases to uphold the supremacy of the Constitution and of federal laws. In essence, the federal court system would be a hollow and meaningless shell.[33] The Helms bill falls far short of this total disbandment, excepting only one narrow area from the federal district courts' jurisdiction. If the bill did not restrict final review by the Supreme Court, the increase that would occur in the Court's caseload in reviewing all state court school prayer rulings probably would not be sufficient to trigger a claim that the federal court system could not handle adequately all of the cases assigned to it by article III.[34] It is important to note, however, that removal of lower federal court jurisdiction should not be considered limitless although it might be applied legitimately to a narrow area.

Even application to a limited area may be unconstitutional if jurisdiction is manipulated merely to affect the outcome of cases rather than to aid in efficient judicial administration. Removing jurisdiction as a way to circumvent judicial holdings is far different from setting up a neutral standard for the exclusion of a case, such as a monetary limit. Lack of a fair opportunity to raise a constitutional issue in a neutral forum would conflict with the procedural component of due process guaranteed by the fifth amendment. At least one court of appeals decision has recognized that jurisdiction cannot be manipulated in this manner.[35] If it could be demonstrated that state courts would not follow the guidelines of *Engle* (as supporters of the Helms bill hope) and that a loaded record or Supreme Court docket pressures would deny effective review, the removal of jurisdiction would be unconstitutional.[36] Apart from the actual effect of the jurisdictional denial, the mere attempt to affect the substantive outcome of a constitutional issue by manipulation of jurisdiction may be unconstitutional. The Supreme Court has never allowed this.[37] The equal protection clause also would present a constitutional obstacle to removal

33. Eisenberg, supra note 32, explains the impossibility of effective review if the Supreme Court has the sole responsibility for vindicating federal rights through appeals from state courts. With the expansion of rights protected under the Constitution as well as other increased demands on the federal judiciary, it is now impossible to abolish the lower federal courts. Otherwise, enforcement of Constitutional rights would be watered down substantially.

34. Determining exactly when too many constitutional issues have been removed from federal district court jurisdiction would be a difficult task. However, in considering allowing one exception, it is important to note how many other jurisdiction-limiting bills have been proposed. See notes 1-8 and accompanying text supra.

Also, the dilution of enforcement of constitutional rights that would be caused by removal of federal district court jurisdiction in an area in which individualized remedies are an integral part of enforcing a constitutional guarantee may be unacceptably severe. For example, Supreme Court supervision over all school desegregation plans, without lower federal court involvement, would be a substantially greater burden than enunciating a relatively set limit on the presence of religion in public schools. See Thompson & Pollitt, supra note 32.

35. "[W]hile Congress has undoubted power to give, withhold and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty or property without due process of law." Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (footnotes omitted).

36. In Yakus v. United States, 321 U.S. 414 (1944), the Supreme Court recognized the possibility that removal of federal district court jurisdiction could result in a denial of due process if the alternative forum could be shown in advance to be unfair. Id. at 434. See notes 99-102 and accompanying text infra.

37. See notes 58-70 and accompanying text infra.

of lower federal court jurisdiction over a constitutional issue. A law eliminating lower federal court jurisdiction over one specific issue while not similarly restricting access in cases involving other constitutional rights could result in weakened enforcement of a particular constitutional guarantee. This effective impingement of a constitutional right would have to be justified by a compelling governmental interest.[38]

## IV. THE POWER OF CONGRESS TO WITHDRAW SUPREME COURT APPELLATE JURISDICTION

The Helms bill's jurisdictional restrictions not only apply to the lower federal courts but also deny to the United States Supreme Court the power to review voluntary school prayer cases. The various state courts would be the only available, and final, forums for ruling on the constitutionality of state acts that allegedly violate the first amendment. Whatever power Congress has to limit the jurisdiction of the Supreme Court derives from a clause in article III of the Constitution known as the "exceptions clause."

As the initial step in a detailed analysis of this clause, its exact context within the Constitution should be noted. Section 2 of article III outlines the classes of cases over which the federal judiciary should have jurisdiction. These classes of cases are then subdivided into those that shall fall within the original jurisdiction of the Supreme Court and those that are heard under the appellate jurisdiction of the Court. Article III provides that "[i]n 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*."[39]

### *A. Reconstruction Cases Dealing with Congressional Exceptions Power*

Beyond relying on the language of the exceptions clause, supporters of these jurisdiction-limiting bills claim that the Supreme Court previously has recognized that this clause grants Congress plenary power to limit Supreme Court jurisdiction.[40] The Supreme Court case regularly cited for this proposi-

38. The purpose of the Helms bill—to hinder the enforcement of constitutional rights—should not qualify as a legitimate governmental interest to justify this law. See Van Alstyne, A Critical Guide to *Ex parte McCardle*, 15 Ariz. L. Rev. 229, 264-65 (1973); Comment, Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity?, 1969 Duke L.J. 291, 310-13.

39. U.S. Const. art. III, § 2, cl. 2 (emphasis added).

40. See 125 Cong. Rec. S4131 (daily ed. Apr. 5, 1979) (remarks of Sen. Helms). See also Wechsler, supra note 10, at 1005-06.

Former Supreme Court Justice Owen Roberts was so convinced of the potential power of Congress to use the exceptions power that he proposed an amendment to the Constitution to patch this "loophole" by altering the exceptions clause. Roberts, Fortifying the Supreme Court's Independence, 35 A.B.A.J. 1 (1949). The text of the amendment would have changed the wording of article III to read as follows: "The Supreme Court shall have appellate jurisdiction in all cases arising under the Constitution of the United States, both as to law and fact, with such exceptions and under such regulations as *it* shall make." Proceedings of the House of Delegates: September 6-9, 1948, 34 A.B.A.J. 1069, 1072 (1948) (emphasis added).

In addition to citing Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868), Roberts based his fears

tion is *Ex parte McCardle*,[41] a decision rendered at the end of the Civil War.

In *McCardle* the Supreme Court considered whether it had jurisdiction over a habeas corpus case brought under the 1867 Habeas Corpus Act.[42] McCardle was a civilian challenging his imprisonment by military authorities acting under the Reconstruction Acts. While McCardle's habeas corpus appeal was pending before the Supreme Court, the 1867 Habeas Corpus Act was repealed.[43] This was done specifically to avoid having the Supreme Court reach the merits of the habeas corpus petition for fear that in the process of ruling on the claim, the Court would declare the Reconstruction Acts unconstitutional.[44] In a unanimous opinion, the Court, referring to the exceptions clause, declared that it had no jurisdiction. Chief Justice Chase explained the Court's reasoning:

> The provision of the act of 1867, affirming the appellate jurisdiction of this Court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of a positive exception.
>
> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.[45]

Should *McCardle* stand for the broad proposition that Congress has absolute power to regulate the appellate jurisdiction of the Supreme Court, it would clearly be a precedent for the congressional power asserted in the Voluntary School Prayer Act. Further analysis, however, demonstrates that such an expansive reading of *McCardle* is suspect. The repeal of the 1867 Habeas Corpus Act did not result in a complete denial of a federal forum for habeas corpus claims. Only jurisdiction based on the 1867 Act was withdrawn, leaving open an alternative avenue for habeas corpus appeals to reach the federal courts. This avenue was the original Judiciary Act of 1789,[46] which was not affected by the repeal of the 1867 Act. The Supreme Court in *McCardle* recognized this and explicitly limited its holding: "The act of 1868 [did] not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."[47]

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on dicta in early Supreme Court cases stating that Congress rather than the Constitution grants the Supreme Court its areas of jurisdiction. See, e.g., The Francis Wright, 105 U.S. 381 (1881), a maritime case dealing with the review of facts by the Court. See also Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810), in which the Court stated that it gets its power from the Constitution but that it can be limited by acts of Congress.

41. 74 U.S. (7 Wall.) 506 (1868).

42. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

43. Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

44. For an in-depth discussion of the circumstances surrounding the *McCardle* case, see C. Fairman, Reconstruction and Reunion, 1864-1868, Part 1, in 6 History of the Supreme Court of the United States 433-514 (P. Freund ed. 1971).

45. 74 U.S. (7 Wall.) at 514.

46. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73.

47. 74 U.S. (7 Wall.) at 515. Forkosch, supra note 10, makes the point that *McCardle* is more an example of a regulation than an exception. After *McCardle* a means for the vindication of

In fact, one year later, in *Ex parte Yerger*,[48] the Judiciary Act of 1789 was invoked successfully to obtain Supreme Court jurisdiction in another habeas corpus appeal by a civilian arrested by military authorities. Chief Justice Chase, with the support of the identical Court that decided *McCardle*, made it clear in the *Yerger* decision that the repeal of the 1867 Act did "not purport to touch the appellate jurisdiction conferred by the Constitution" and implemented by the Judiciary Act of 1789.[49] This alternative route was still available for habeas corpus claims to reach the Supreme Court.[50]

In contrast, the Helms bill, by cutting off all federal review of state acts dealing with voluntary prayer, presents a vastly different question from the partial restrictions considered in *McCardle*. The totality of the Helms limitations would foreclose all avenues to a federal forum for claims brought to enforce a specific constitutional guarantee. The result would be equivalent to excising part of the first amendment as far as the federal courts are concerned.

The broad *McCardle* dicta on the potency of the congressional exceptions power, followed almost immediately by the limitation expressed in the *Yerger* case, can be understood more completely in the political context of the time. This contextual analysis is also helpful in evaluating *McCardle*'s precedential value for the proposition that Congress has plenary power over Supreme Court jurisdiction. In the post-Civil War period Congress was the most assertive branch of the federal government,[51] imposing its plan for Reconstruction in the face of strong opposition by President Andrew Johnson.[52] Although the Supreme Court tried to remain outside of this political controversy for fear of retaliation by Congress, the Court declared unconstitutional several laws passed by the Reconstruction Congress.[53] Congress then repealed the 1867 Act granting the Supreme Court jurisdiction over McCardle's habeas corpus petition specifically to avoid giving the Supreme Court a chance to strike down the Reconstruction Acts.[54]

Several actions in addition to this repeal demonstrate Congress' assertive-

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rights by way of habeas corpus still existed. Repeal of the 1867 Act only altered the procedure for habeas corpus appeals.

48. 75 U.S. (8 Wall.) 85 (1868).

49. Id. at 105.

50. Although it was not necessary in *Yerger* to reach the key question of the ability of Congress to except all jurisdiction over habeas corpus, the Court emphasized the fundamental nature of the right of habeas corpus relief. Id. at 95-96. Further, the Court narrowly construed the 1868 Act as only denying the 1867 avenue of appeal and not appeals brought under the authority of the original Judiciary Act of 1789 even though it was argued that the 1868 Act cut off all habeas corpus jurisdiction. Id. at 96-97, 105-06.

The Court went so far as to state that even if the 1789 Act had been repealed by the 1867 Act, it would imply that the 1868 Act revived the 1789 Act. It is also significant that the Court noted three times that the Constitution was the source of its authority. "The jurisdiction of this court is conferred by the Constitution." Id. at 96. See also id. at 105-06.

51. See generally K. Stampp, The Era of Reconstruction 1865-1877 (1965).

52. Id. at 83-154.

53. Examples of Supreme Court avoidance of the conflict between the President and Congress include Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866), and Georgia v. Stanton 73 U.S. (6 Wall.) 50 (1867). However, in Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), the routine practice of military trials for civilians was struck down.

54. In reference to the repeal of the 1867 Act while *McCardle* was pending, the Court stated,

ness during Reconstruction. It was an inopportune time for the Court to rebuff Congress by questioning the denial of jurisdiction over McCardle's appeal. The tension of the period is indicated by the fact that the determination of the *McCardle* case was delayed by the duties of Chief Justice Chase in presiding over the Senate's impeachment of Andrew Johnson.[55] The House of Representatives also was considering the impeachment of at least one Supreme Court Justice.[56] Congress had further shown its hostility to the Supreme Court by the introduction of two bills designed to curb its powers.[57]

In light of these considerations, the Court's language in *McCardle* can be viewed more as an attempt to avoid a confrontation with Congress than as a concession that Congress had absolute power over the Court's jurisdiction.

Further doubt concerning the extent of congressional exceptions power over Supreme Court jurisdiction is cast by another Reconstruction Era case, *United States v. Klein*.[58] Klein, the administrator of the estate of a Confederate whose property had been seized during the Civil War, successfully sued in the United States Court of Claims, invoking a presidential pardon to secure his right of recovery.[59] The Supreme Court had held previously in *United States v. Padelford*[60] that a presidential pardon would clear the way to recovery for these claims. In *Klein* the government appealed the recovery, invoking an 1870 act[61] designed to reverse the outcome of the Court of Claims' decision favorable to Klein and prevent future recoveries as allowed in *Padelford*. The 1870 Act instructed the courts to dismiss for lack of jurisdiction claims for recovery of property taken during the Civil War if the claim were based on a presidential pardon. The courts were directed to consider the pardon as conclusive evidence of disloyalty, which would trigger the dismissal.[62]

In *Klein* the Supreme Court declared the 1870 Act unconstitutional, rejecting an argument based on congressional power under the exceptions clause. The Court recognized that although phrased in terms of jurisdiction, in reality the Act's "great and controlling purpose [was] to deny pardons granted by the President the effect which this Court had adjudged them to have."[63] The Court did not allow Congress to reverse the Court's construction of a Presidential pardon by withholding jurisdiction "as a means to an end."[64]

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"Its language is general, but, as was universally known, its purpose was specific." 74 U.S. (7 Wall.) at 510.

55. Id. at 509.

56. Cong. Globe, 40th Cong., 2d Sess. 862-63 (1868).

57. Act of July 23, 1866, ch. 201, § 1, 14 Stat. 209. This Act reduced the number of Justices on the Supreme Court from ten to seven. H.R. 379, 40th Cong., 2d Sess. (1868), was a failed effort to require the Supreme Court to decide by an extraordinary majority before it could invalidate a congressional act.

58. 80 U.S. (13 Wall.) 128 (1871).

59. Id. at 132.

60. 76 U.S. (9 Wall.) 531 (1869).

61. Act of July 12, 1870, ch. 251, 16 Stat. 230.

62. Id.

63. 80 U.S. (13 Wall.) at 145.

64. Id.

It declared that this was an unconstitutional exercise of power because Congress had invaded the province of the courts to give effect to the pardon.

In the words of the Court, Congress had "passed the limit which separates the legislative from the judicial power."[65] Although not expounding on what might be legitimate uses of the exceptions clause, the Court held that federal jurisdiction could not be manipulated by Congress to dictate the outcome of a case.[66] The Court prevented Congress from effectively reversing its rulings through the use of congressional control over jurisdiction.

Although a more indirect attempt to affect the merits of a case than *Klein*, the Helms bill arguably suffers from the same infirmity found unconstitutional in 1872.[67] The law struck down in *Klein* attempted to reverse the meaning of a pardon. The Helms bill does not attempt to change directly the legal meaning of evidence before a court. It does, however, deny jurisdiction over a particular issue for the purpose of altering the substantive outcome of a particular type of case. In both situations, once the court determines that a particular set of facts exists, the court must dismiss the case rather than proceed with an independent inquiry into the merits of the claim.

The Supreme Court has ruled that school-sanctioned prayers violate the first amendment.[68] The avowed purpose of the Prayer Act is to circumvent this ruling by regulating federal jurisdiction. The bill is a clear invitation to state governments to restore prayer in public schools, and to state courts to

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65. Id. at 147. The Court posed the following hypothetical: "Can it [Congress] prescribe a rule in conformity with which the Court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." Id.

The Court noted that in addition to invading the realm of the judiciary, the Act also violated the President's right to pardon. Id.

66. Id.

67. During the Senate debate on the Helms bill, Senator Mathias argued that the Helms bill's real purpose and intent were similar to the situation declared to be unconstitutional in *Klein*. 125 Cong. Rec. S4142 (daily ed. Apr. 9, 1979) (remarks of Sen. Mathias). Congress' lack of power over the President's power to pardon can be compared to its lack of power over rights guaranteed by the Constitution. Although Congress can repeal a statute it has previously enacted thereby taking away federal court jurisdiction over the subject, it cannot repeal presidential pardon power or the first amendment. Nor can Congress, according to *Klein,* bring about the same result by enacting a rule of decision, whereby if certain facts exist the Court must dismiss the case. For an analysis of the applicability of *Klein* to the proposed busing moratorium, see Thompson & Pollitt, supra note 32, at 836.

See also United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). A congressional act that provided for waiver of a technical legal defense (res judicata) survived a challenge based on *Klein*. The Act did not restrict the Court from deciding the substantive merits of the claim. Id. at 2736. In contrast to this, the Helms bill cuts out the heart of a substantive constitutional claim. The federal court must dismiss the claim if based on the establishment clause of the first amendment, which prohibits school-sponsored prayers.

Section 4 of the Helms bill was inserted possibly as an attempt to avoid the prohibition of jurisdiction manipulation expressed in *Klein*. However, as discussed above, the problem in *Klein* was not that Congress enacted a statute to deny jurisdiction which would affect a pending case, but that jurisdiction was used to affect an area over which Congress had no control. Any statutory right can be repealed in a pending case, denying the litigant the benefit of that right. Therefore, the fact that the case was pending in *Klein* cannot be the basis of the Supreme Court finding that the jurisdictional removal was unconstitutional.

68. E.g., Engle v. Vitale, 370 U.S. 421 (1962). See text accompanying notes 16-19 supra.

uphold this practice, free from the fear of federal court reversal.[69] Under the Helms bill, any claim brought to the federal courts challenging the constitutionality of state acts that authorize voluntary prayers would be dismissed for lack of jurisdiction. As in *Klein*, the Supreme Court would be instructed to dismiss a case once it identified the specified set of facts rather than uphold rights previously protected by the Court. The Prayer Act therefore would determine the judicial outcome of school prayer cases by guaranteeing that no state laws or state court decisions in favor of school-sanctioned prayers could be struck down in the federal courts as directed by *Engle* and *Abington School District*. This manipulation of jurisdiction as a means to an end should be accepted no more readily than the act struck down in *Klein*.

A fair reading of the *McCardle-Yerger-Klein* line of cases leads to the conclusion that Congress does not have unbridled exceptions power as asserted by supporters of the Prayer Act. The current Supreme Court, in ruling on the constitutionality of the Prayer Act, would not be constrained by these holdings to rule in favor of Congress. Even if the dicta in *McCardle* could be interpreted to voice approval of the plenary exceptions power, the current Court would be free to ignore it because of the limits placed on it by later Court decisions, the circumstances of the arguable judicial duress surrounding the case, and the fact that enough time has passed that an outright overruling, if necessary, would not seem capricious.[70] In deciding whether all federal courts could be denied jurisdiction over a constitutional claim, the Court would be free to make a fresh inquiry into the meaning of the exceptions clause. In reaching a decision, the court could consider historical evidence on the intention of the framers of the Constitution, other clauses in the Constitution that might relate to or limit the exceptions clause, as well as the general nature of the relationship between Congress and the federal courts in our system of government.

### *B. The Intent of the Framers of the Exceptions Clause*

Examination of historical evidence on the meaning of the exceptions clause has led legal writers to diverse conclusions regarding the intent of the framers. Those who interpret the exceptions clause as a plenary grant of power to Congress argue that the clause was inserted with an obvious and legitimate purpose. They assert that this powerful method of congressional control over the federal courts is part of the system of checks and balances

69. See notes 20-21 and accompanying text supra.

70. Even if the *McCardle* line of cases had held that Supreme Court jurisdiction could be excepted from review of congressional acts, it would not be a precedent for the constitutional issue raised by the Helms bill. Unlike the post-Civil War cases, which dealt with review of acts of Congress, the Helms bill cuts off Supreme Court review of state court decisions. This type of jurisdiction denial brings into play more compelling uniformity and supremacy considerations. See text accompanying notes 86-96 infra.

A more pragmatic approach was suggested by an article responding to Justice Roberts' call for a constitutional amendment, see note 40 supra, eliminating congressional exceptions power. "The Court has overruled, or disregarded, far more convincing opinions than the *McCardle* opinion. Why worry about it?" Grinnell, A Reply to Roberts, 35 A.B.A.J. 648, 651 (1949).

established between the branches of government by the Constitution.[71] According to this theory, when Congress disagrees with court rulings, it can control the federal courts by not allowing them to decide particular types of cases in the future. Conceivably, a mere congressional threat to remove jurisdiction in the future also would be a legitimate control device, influencing the federal courts to make rulings more in accord with the wishes of Congress.

Broad statements in Alexander Hamilton's Federalist No. 80 may be interpreted as supporting plenary exceptions power. Hamilton refers to congressional power "to make such *exceptions* and prescribe such regulations necessary to obviate and remove these inconveniences" in federal judicial power.[72] The Judiciary Act of 1789[73] is said to be further evidence of the intent of the framers to provide vast congressional control over the federal courts. As the first act of Congress, the Judiciary Act outlined the scope of jurisdiction of the various courts in the first federal judicial system. This Act has been offered as evidence that federal juidicial power ultimately derives from Congress, rather than from the Constitution.[74] As a result of this view, a theory arose known as the "negative pregnant" doctrine.[75] The core of this doctrine asserts that, since the federal courts (including the Supreme Court) possess only that power which Congress chooses to grant them through judiciary acts, then whatever jurisdiction is not explicitly granted by Congress is implicitly excepted. From this perspective, plenary congressional exceptions power is a logical complement. Absolute power to take away jurisdiction logically follows from the power to grant it.

The initial premise for this conclusion, however, is that all federal judicial power arises only through acts of Congress rather than from the Constitution

71. During debate in the Senate, Senator Helms argued that the framers gave Congress exceptions power "in anticipation of judicial usurpations by the Supreme Court." 125 Cong. Rec. S4130 (daily ed. Apr. 5, 1979). See also Wechsler, supra note 10, at 1005-06.

This hypothesis avoids the fact that plenary exceptions power would act essentially as a veto over Court decisions rather than a mere "check." If an "exception" were made to Court jurisdiction over one or more acts of Congress, the federal courts' only source of control over Congress concerning that act would be lost. No balance would exist between these supposedly co-equal branches. Without plenary exceptions power, each branch retains some control over the other. See notes 103-09 and accompanying text infra.

72. The Federalist No. 80, at 505 (A. Hamilton) (B. Wright ed. 1961) (emphasis in original). This language is vague, especially in the context of the entire essay. Earlier Hamilton had referred to Congress' removing partial inconveniences in court jurisdiction as a way to protect the judicial system if unforeseen problems arose. This sounds more like a beneficial regulation of jurisdiction than a court-curbing power.

73. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73.

74. However, an equally plausible interpretation is that the Judiciary Act does not deny a more fundamental constitutional basis for federal court jurisdiction but merely organized these powers. The language of article III vesting judicial power in the Supreme Court is worded as a mandate. Accordingly, one author holds the view that the Judiciary Act was passed to bolster support for the newly created federal judiciary, although it was not essential to vest in the Supreme Court authority over the types of cases outlined in article III. Brant, supra note 10, at 12.

75. This doctrine can be attributed to Chief Justice Marshall's dictum in United States v. More, 7 U.S. (3 Cranch) 159, 170-71 (1805). Significantly, in *More* the Court did not deny jurisdiction. Also, it did not deal with the power of the Supreme Court to hear an appeal from a state court.

itself, a debatable interpretation of article III.[76]

Several legal historians argue that plenary exceptions power would be anomalous in view of the history and framework of the Constitution, especially the explicit article III grant of national judicial power to the federal courts over enumerated classes of cases.[77] Various alternative opinions on the intended purpose of the clause have been expressed. One theory is based on a large body of historical evidence that the framers were concerned with federal appellate courts reversing findings of fact reached by juries.[78] Under this view, the exceptions clause language was inserted to prevent Supreme Court usurpation of the role of juries. Court review of factual conclusions could be checked by congressional legislation permitted by the exceptions clause. This explanation arguably conflicts with the punctuation of the clause "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."[79] This has been explained as a mere misplacement of the commas, which leads to the erroneous reading that the exceptions apply to the removal of court review of legal as well as factual questions.[80] If the comma were correctly placed after the word "Law" rather than after "Fact," the defect would have been corrected.

Yet another theory asserts that the exceptions clause was intended not to permit congressional removal of any substantive area of federal court jurisdiction, but merely to allow Congress to redistribute classes of cases between original and appellate jurisdiction.[81] The types of cases that are explicitly named in article III, section 2, clause 2 as falling within the federal judicial power could be redistributed from the original jurisdiction of the Supreme Court to its appellate jurisdiction as needed. Under this theory the exceptions clause could be used as a safety valve to alleviate the pressures on the Supreme Court as its original jurisdiction duties become too burdensome. Congress could delegate these cases to the lower federal courts, subject to ultimate review by the Supreme Court. In effect jurisdiction would be redistributed with-

76. See, e.g., Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868) (see text accompanying notes 48-50 supra); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-33 (1816).

77. E.g., Berger, supra note 10, at 289 (noting that no indication was found in the records of the Constitutional Convention that the exceptions clause was designed to withdraw federal court review over congressional legislation); Forkosch, supra note 10 (concluding that federal judicial power over constitutional issues was granted by the framers' Constitution); Grinnell, supra note 70 (pointing out the deliberate conceptual change made by the framers of the Constitution to get away from the British system of direct legislative control over the judiciary).

78. The evidence for this theory is explained in detail in Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53 (1962). See also Berger, supra note 10, at 285-89.

79. U.S. Const. art. III, § 2, cl. 2.

80. Brant, supra note 10, at 6. There is also support for this theory in Alexander Hamilton's The Federalist No. 81. Hamilton mentions that the exceptions power of Congress could be used appropiately to check the Court's reinterpretation of factual conclusions arrived at by juries. The Federalist No. 81, at 514 (A. Hamilton) (B. Wright ed. 1961).

81. See 1 W. Crosskey, Politics and the Constitution in the History of the United States 616 (1953); Van Alstyne, A Critical Guide to *Marbury v. Madison*, 1969 Duke L.J. 1, 32.

out diminishing the ultimate authority of the Supreme Court in these areas. Alternatively, if a particular type of case originally slated for initial hearing in the federal district courts became of critical importance, this class would be transferred to the Supreme Court's original jurisdiction. This interpretation can be supported by the placement of the exceptions clause within article III. The first sentence of article III, section 2, clause 2 concerns the original jurisdiction of the Supreme Court. The following sentence gives the Supreme Court appellate jurisdiction in all other types of cases under its control, setting off the exceptions clause provision at the end with commas.

A related argument is based on reading the words "exceptions" and "regulations" conjunctively rather than with separate meanings. Under this theory the word "exception" should not be read to mean exclusion of classes of cases, but only variation in the manner in which cases reach the federal courts. Congress could enact any jurisdictional rule short of blocking some ultimate federal court review of every constitutional issue.[82]

No matter which theory is used to justify limiting the scope of the congressional exceptions power, historians agree that the framers, in writing the Constitution, were reacting to a strong need for increased national uniformity and federal control over the states. They were abandoning the weak and unworkable Articles of Confederation. Article III of the Constitution, providing for a federal judiciary, was an integral part of this plan to strengthen the federal government.[83] Whether or not the Constitution was originally meant to grant the Supreme Court a power of judicial review over congressional acts,[84] there was a strongly held belief that the laws of the states should be subject to final review by the Supreme Court. Alexander Hamilton expressed this sentiment in his statement in the Federalist that

> there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observence of them? This power must either be a direct negative on the state laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of the Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former . . . .[85]

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82. Hearings, supra note 10, at 68. See also Strong, supra note 10, at 246. Strong, however, reaches this conclusion by relying on a need for federal supremacy rather than evidence of the intent of the framers in writing the exceptions clause. He feels that in the rush to finish writing the Constitution, the framers came to no consensus on what this clause really would mean. Id. at 263.

83. Plenary exceptions power would give Congress authority to return the judiciary to its condition under the Articles of Confederation with regard to whatever issues Congress might choose. For these issues (nothing would prevent Congress from applying exceptions power to all constitutional issues), the state courts would be the only available judicial tribunals even if those issues were of national importance or subject to state bias.

84. This power was first recognized by the Supreme Court in the landmark case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

85. The Federalist No. 80, supra note 72, at 500. This essay also emphasized the necessity of the uniformity provided by one final and authoritative interpretation of federal law.

In light of this recognition of a need for final authority in the federal government on federal matters, it would be contradictory for the framers to insert in the Constitution an exceptions power provision to allow Congress to block, at will, federal court review of state laws that might conflict with the Constitution.

### C. *Harmonizing the Exceptions Clause with Other Constitutional Provisions*

In addition to an historical inquiry, the meaning of the exceptions clause can be illuminated by its examination relative to other parts of the Constitution. Because the Constitution was written as a unified charter with the intent that its various provisions complement each other, analysis of other sections of the Constitution can aid in defining the meaning and limits of the exceptions clause. In this approach, the Constitution must be considered not only from the perspective of needs envisioned in 1789 but also as the flexible charter it was intended to be.

Entrusting the states with the role of making final interpretations of the Constitution, under the alleged authority of the exceptions clause, is inconsistent with several other constitutional provisions. The supremacy clause in article VI provides that the "Constitution . . . shall be the supreme Law of the Land."[86] Removal of federal jurisdiction under the exceptions clause would leave final interpretation of the Constitution on certain issues to the state courts. Some commentators do not consider this to be a problem. They point out that the supremacy clause binds state courts as well as federal courts to follow the federal laws and the Constitution over conflicting state law.[87] They assume that state courts are as dependable as the federal courts in upholding the mandates of the Constitution. This argument places great faith in the ability of state courts to render unbiased decisions concerning federal and constitutional law once they are free from the threat of reversal. As pointed out previously, the underlying rationale of the Helms bill, if it is to provide effectively for a departure from the prohibition on school-sponsored prayer, must be an assumption that the state courts will depart from the established Supreme Court cases of *Engle* and *Abington School District*.[88] These cases, as an interpretation of the first amendment by the Supreme Court, are the supreme law of the land on the school prayer issue.[89]

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86. "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." U.S. Const. art. VI, cl. 2.

87. E.g., Wechsler, supra note 10, at 1005-06. Professor Weschler sees no supremacy clause or due process restrictions with this arrangement. He points out that state courts, as well as federal, are bound to uphold the Constitution by the supremacy clause.

Van Alstyne, supra note 38, at 267-69, takes an intermediate position, finding no supremacy clause limitations, but adding qualifications to prevent manipulation of jurisdiction that would force the Supreme Court to decide cases contrary to the Constitution.

88. See note 20 and accompanying text supra.

89. See note 92 infra.

Implicit in the concept of federal supremacy is the realization of the need for uniformity concerning federal law. There is no reason to asssume that, left on their own, the fifty highest state courts would interpret any constitutional provision in an identical fashion.[90] The Helms bill would set the stage for differing constitutional interpretations depending on a citizen's residence. Acceptance of the rationale of the Helms bill conceivably would authorize, for example, an exercise of congressional exceptions power that would leave to each state the power to decide to what extent the Bill of Rights should apply within its borders. This result, although an extreme case, highlights the essential function of the federal courts in enforcing the supremacy clause.

Early landmark Supreme Court decisions interpreting the article III power of the federal courts also contradict the exceptions clause interpretation envisioned by the Prayer Act. The Court has broadly interpreted its article III grant that "[t]he judicial Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution."[91] In *Marbury v. Madison*[92] Chief Justice John Marshall settled any doubt that the Supreme Court has the power to review the constitutionality of acts of Congress. Thirteen years later in *Martin v. Hunter's Lessee*,[93] the role of the Supreme Court as the final arbiter of the constitutionality of state laws and state court decisions was confirmed. The Court in *Martin* recognized the necessity of federal judicial review to counter state biases that might interfere with a neutral interpretation of the Constitution.[94] It also emphasized the role of federal judicial review in ensuring a uniform interpretation of the Constitution throughout the country.[95]

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90. The Supreme Court itself periodically changes its interpretation of constitutional language when it overrules its prior holdings. Leaving the interpretation to the states would only multiply the confusion over what actions violate a particular provision of the Constitution such as the establishment clause.

91. U.S. Const. art. III, § 2, cl. 1 (emphasis added). "If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power.*" Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330 (1816) (emphasis in original). See also Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949).

92. 5 U.S. (1 Cranch) 137 (1803). "It is emphatically the province and duty of the judicial department to say what the law is." Id. at 177. This role has been affirmed repeatedly to the present day. The Court recently reasserted that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." Cooper v. Aaron, 358 U.S. 1, 18 (1958). The Court in *Cooper* made this statement in reply to a different example of dissatisfaction with and refusal to abide by Supreme Court interpretation of the Constitution. The Supreme Court was answering the contention of Arkansas officials that they were not bound by the Supreme Court's landmark desegregation decision of Brown v. Board of Education, 347 U.S. 483 (1954).

93. 14 U.S. (1 Wheat.) 304 (1816). "The courts of the United States can, without question, revise [*sic*] the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity." Id. at 344.

94. "The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice." Id. at 347.

95. "A motive of another kind . . . is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." Id. at 347-48 (emphasis in original).

Uniformity is especially important when essentially federal issues, such as constitutional rights, are involved. See Letter from former Assistant Attorney General Alan Parker to Representative Rodino, Chairman, House Judiciary Committee (June 19, 1980) reprinted in Hearings on S.

By withdrawing the Supreme Court's power to review state laws dealing with the first amendment, the Prayer Act directly conflicts with the principles set forth in *Marbury* and *Martin*. It also conflicts with the general trend of the federal government, including the Supreme Court, to strengthen rather than weaken its constitutional authority over the laws of the states.[96] Conceivably there would be no limit to congressional tampering with the Supreme Court's jurisdiction through the exceptions clause. There is no reason why the exceptions power would not be applicable to federal review of congressional acts as well as state laws. Therefore, Congress could pass a law that is clearly unconstitutional and then add a proviso that no federal court would have jurisdiction to review its constitutionality. This would negate the power of judicial review asserted in *Marbury v. Madison* and seems contrary to a system of government established with three co-equal branches having separate functions to perform. A congressional veto over the federal courts' role is not consistent with this framework.

Another constitutional bar to a broad reading of the exceptions clause is the fifth amendment.[97] Several circuit courts of appeals have held that procedural due process requirements limit the power of Congress to regulate the jurisdiction of the federal courts.[98] The Helms bill would foreclose all federal forums for the vindication of substantive constitutional rights even if state courts ignored *Engle* and *Abington School District*. State court refusal to follow these Supreme Court rulings, coupled with the inability to appeal, arguably would deny access to a fair forum for the adjudication of a first amendment claim. Lack of access, either initially or by appeal, to an impartial tribunal that will follow the law as determined by the Supreme Court violates the procedural requirements of the due process clause.

Although the Court has rejected due process challenges to the replacement of lower federal courts by administrative tribunals, in these cases there

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450 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 12-13 (1980).

96. See C. Black, Structure and Relationship in Constitutional Law 74-76 (1969). Black states that there is no more legitimate function of the federal courts than to review state acts for consistency with the Constitution. The fear of the consequences of leaving to the states the final interpretation of the Constitution has been stated forcefully by Justice Oliver Wendell Holmes. "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 declaration as to the laws of the several States." O. Holmes, Collected Legal Papers 295-96 (1920).

Former Assistant Attorney General John Harmon expressed a similar sentiment to the House Judiciary Committee: "The Exceptions Clause properly allows Congress to regulate the appellate jurisdiction in a way that is consistent with the Supremacy Clause, with other Constitutional provisions, and with the Constitutional scheme as a whole. But I do not believe that the Framers of the Constitution intended that the Exceptions Clause be used, as the 'school prayer amendment' would use it, to undermine this pillar of the Constitution—the Supreme Court's role in protecting the integrity and supremacy of federal law." Hearings on S. 450 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 37 (1980) (statement of John M. Harmon, Assistant Attorney General).

97. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

98. See, e.g., Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948). This case also suggests that Congress' power over federal court jurisdiction does not extend to the Supreme Court at all. Id. at 257. See also articles cited at note 38 supra.

was no advance warning that the intent was that the replacement tribunals would ignore the settled law in exercising their authority. Significantly, the Supreme Court still retained the power to review the decisions of these administrative tribunals. In *Yakus v. United States*[99] the Supreme Court upheld the World War II era Emergency Price Control Act provision for an administrative review board that displaced a federal court adjudication. The Court held that it cannot be assumed in advance that the board would be so unfair as to deny due process.[100] More important, the Court emphasized its own power to review board decisions, stating that any "[a]ction taken by them is reviewable in this court and if contrary to due process will be corrected here."[101] The Helms bill, by encouraging states to ignore Supreme Court mandates with the denial of Supreme Court review, destroys this procedural due process safeguard.[102]

While several provisions of the Constitution serve as potential limits on congressional power to eliminate part of the Supreme Court's appellate jurisdiction, the Constitution does not leave Congress powerless to check perceived excesses in the Supreme Court's interpretation of the Constitution. This power, however, operates indirectly to maintain an independent judiciary free from congressional veto or other immediate political manipulation. Congres-

99. 321 U.S. 414 (1944).

100. Id. at 434-35. "Only if we could say in advance of resort to statutory procedure that it is incapable of affording due process to petitioners could we conclude . . . that their constitutional rights have been or will be infringed." Id. at 435.

101. Id. at 434.

102. The equal protection component of the due process clause of the fifth amendment, see, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954), might also be an obstacle to the removal of Supreme Court jurisdiction. One commentator used an equal protection argument to attack a bill to restrict federal court review of obscenity verdicts. See Comment, supra note 38, at 310-11. Under the proposed restrictions, one aspect of the first amendment would receive no federal protection, while all other aspects of the first amendment, and all other constitutional rights, still would be subject to Supreme Court scrutiny without any legitimate legislative purpose to justify the disparate treatment. It can hardly be maintained that preventing the Supreme Court from applying the first amendment is a valid justification. To satisfy the equal protection clause, it is suggested that the alternative would be to eliminate all Supreme Court review of the Bill of Rights, a politically unfeasible option. This argument is equally applicable to the denial of review of establishment clause cases.

An argument based on the fourteenth amendment is offered by supporters of the Helms bill in support of their contention that Congress can shape the federal courts' enforcement of constitutional rights. They contend that section 5 of the fourteenth amendment, which permits Congress to enforce the fourteenth amendment with appropriate legislation, could be used to protect the first amendment right of free exercise of religion, which they claim was infringed by the Supreme Court in *Engle* and *Abington School District*. It is reasoned that the removal of jurisdiction would be appropriate congressional legislation under section 5 to accomplish the purpose of "restoring free exercise" of religion in schools. See Methvin, Should Prayer Be Restored to Our Public Schools?, Readers Digest, Sept. 1979, at 88, reprinted in 125 Cong. Rec. 14,735 (1979). See also News & Observer (Raleigh, N.C.), Apr. 16, 1979, at 6, col. 1, reprinted in 125 Cong. Rec. S5453 (daily ed. May 7, 1979).

This argument misconstrues the purpose of section 5 of the fourteenth amendment. Senator Helms is trying to redefine rather than enforce constitutional rights. The Court has ruled that school-sponsored prayer is not a component of free exercise and that it violates the establishment clause. Although Congress can pass legislation "to secure the guarantees of the Fourteenth Amendment," Katzenbach v. Morgan, 384 U.S. 641, 651 (1966), it cannot pass laws to restrict them. Id. at n.10. The Helms bill would curtail the right to be free from government establishment of religion.

sional control is exercised principally through Senate confirmation of Supreme Court nominees[103] and through the power to impeach Supreme Court justices.[104] In addition, a far more powerful congressional tool is provided by the Constitution to overrule Supreme Court rulings perceived to be objectionable. This power, outlined in article V, authorizes Congress to initiate constitutional amendments.[105] If a particular Supreme Court holding is sought to be circumvented or overruled, an amendment explicitly can prevent the continued adherence to the Supreme Court's interpretation of a constitutional provision. Enacting a constitutional amendment is, by design, a difficult process. The framers recognized that the fundamental charter should not be changed by the views of a simple majority and that the rights of those with unpopular positions should not be cast aside by the feelings of a simple majority of legislators with the acquiescence of the President. A proposed amendment must be favored by a two-thirds vote in both houses of Congress, in addition to ratification by three-fourths of the state legislatures. Under the Helms interpretation of the exceptions clause, Congress could remove issues of constitutional law from federal court jurisdiction with the simple majority required to pass any bill. Assuming that state courts' interpretations of the Constitution would differ from those of the Supreme Court, this effectively amounts to a change in the meaning of the Constitution without following the more arduous process of congressional passage and state ratification of a constitutional amendment. An interpretation of the exceptions clause that would so severely undercut the protection provided by article V raises serious questions concerning its validity.

If the Congress and the people of this country have an overwhelming desire to abolish the church/state separation as outlined in the first amendment and interpreted by the Supreme Court, they are not without legitimate means to do so. In fact, a constitutional amendment concerning "voluntary" prayer was proposed in 1979,[106] but it was defeated. The constitutional amendment process should not be bypassed by veiled efforts to enact rejected amendments by a mere majority vote.[107]

To allow circumvention of article V by a majority vote would set a precedent that could be applied to other rights.[108] The exceptions power could be

103. U.S. Const. art. III, § 2, cl. 2.

104. Id. art. I, § 3, cl. 6.

105. "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . ." U.S. Const. art. V.

At least four amendments have been enacted to overcome Supreme Court decisions. For example, the eleventh amendment was proposed and eventually enacted in response to Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

106. 125 Cong. Rec. S17640 (daily ed. Nov. 30, 1979) & H190 (daily ed. Jan. 18, 1979). This constitutional amendment has also been proposed several times in the past. See Rice, The Prayer Amendment: A Justification, 24 S.C.L. Rev. 705 (1972).

107. As expressed by Senator Mathias, "What the amendment is really trying to do is find a back door for changing the organic law of the country. It bypasses article V of the Constitution. Constitutional interpretations are subject to change either by the process provided within the Constitution itself or when the Supreme Court alters one of its prior constitutional holdings." 125 Cong. Rec. S4142 (daily ed. Apr. 9, 1979) (statement of Sen. Mathias).

108. See id. S4140 (remarks of Sen. Kennedy).

used to pass a law preventing the Supreme Court or any other federal court from reviewing a congressional act or state authorization of blatant discrimination against a particular religion or race, or the imposition of government censorship. In the most extreme case, an exception to Supreme Court jurisdiction conceivably could bar the Court from interpreting the entire Constitution. Plenary exceptions power in the Constitution would be self-defeating to the point of making the Constitution superfluous beyond whatever nonreviewable respect might be accorded it by Congress and individual state courts.[109]

### *D. The Ineffectiveness of the Exceptions Clause in Countering Objectionable Supreme Court Holdings*

Apart from the apparent unconstitutionality of the Helms bill, congressional passage would render it enforceable law for at least some period before judicial scrutiny could be completed. Even during this interim, the Helms bill might not accomplish its goal of restoring school prayer.[110] Because the term "voluntary prayer" is not self-defining, the Helms bill would necessitate that federal courts accept school prayer cases to determine whether the case fell within the area over which they are forbidden to take jurisdiction. Rather than neatly removing a class of cases from federal court jurisdiction, the bill would embroil the federal courts in the very issue Congress intended to remove from their scrutiny. Nothing would prevent the federal courts from again ruling that school-sanctioned prayer is not voluntary, as was held in *Engle* and *Abington School District*.[111]

It must be stressed that, theoretically, removal of federal court jurisdiction in voluntary prayer cases should not automatically change the law. State courts still would be bound to interpret the first amendment establishment clause in accord with the guidelines set by the Supreme Court in *Engle* and *Abington School District*. Only by ignoring the precedents that the the supremacy clause requires them to follow could state courts uphold laws allowing school-supervised prayers. Although supporters of the Helms bill advocate this position,[112] it seems a dangerous and divisive tactic that would have a negative impact on the integrity of the entire judicial system, which is

109. Professor Hart argues that the exceptions power cannot be used by Congress to destroy the "essential role of the Supreme Court in the constitutional plan." Hart, supra note 10, at 1365. See generally Ratner, supra note 10. It could be argued that an exception relating to one small area would not destroy this "essential role." It is difficult, however, to see when a line could be drawn between a permissible and an impermissible number of exceptions to constitutional rights. Therefore, Supreme Court review of all constitutional issues is essential.

110. Of course these practical obstacles to Senator Helms' goal cast doubt on the plausibility of a constitutional interpretation of the exceptions clause that would bring them about.

111. The meaning given to "voluntary prayer" by the backers of the Helms bill is especially misleading in light of the Supreme Court decisions holding that school-sponsored prayer is not voluntary. It is possible, but unlikely given the clear legislative intent, that the Supreme Court would interpret the Helms bill so as not to conflict with *Engle* and *Abington School District*.

112. See notes 20 & 21 and accompanying text supra. See also C. Rice, Congress and Supreme Court Jurisdiction 20 (March 1980) (pamphlet published by the American Family Institute).

intended to operate under the rule of law. It is highly unpredictable in which states, if any, the Prayer Act would accomplish its goal.

Assuming that state courts would not deviate from Supreme Court precedents, the Helms bill could not accomplish its goal. Ironically, it would foreclose any possibility of realizing the goals it is trying to effect. Without federal court jurisdiction, "[f]ederal law would be frozen in whatever state it happened to be at the moment."[113] New constitutional interpretations of the establishment clause would be impossible. The Supreme Court would have no way to overrule or modify *Engle* and *Abington School District*. Any opportunity for a "full and fair airing of the issues"[114] involved and for possible doctrinal changes[115] would be precluded so long as the Helms bill was binding law.

## V. CONCLUSION

If the Voluntary School Prayer Act were passed by Congress, it would provide an excellent opportunity for the Supreme Court to decide squarely the extent of power conferred on Congress to exclude specific constitutional issues from the federal courts. In that determination the Supreme Court should hold the Act unconstitutional. It conflicts with both the historical and the modern understanding of judicial power established in the Constitution. Further, it is an impractical vehicle for implementing the goal sought. Undoubtedly the Supreme Court will realize the potential harm implicit in unlimited congressional exceptions power. The Court cannot allow a precedent that could be used to remove important constitutional questions from federal judicial control. Nor can it take the first step towards the inevitable judicial chaos that would result from a judicial system functioning without uniform decisionmaking. The Supreme Court should not surrender its paramount role as the final arbitrator of the meaning of the Constitution.[116]

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113. See 125 Cong. Rec. S4144 (daily ed. Apr. 9, 1979) (statement of Sen. Kennedy, quoting letter from Attorney General Griffin Bell to Sen. Ribicoff, Chairman of Senate Government Operations Committee (Apr. 9, 1979)).

114. Id.

115. Justice Brennan's concurrence in *Abington School District* raises several possible solutions to accommodate the right of free exercise with the prohibition of the establishment clause. 370 U.S. at 294-304 (Brennan, J., concurring). Time could be set aside by schools for meditation or rest and could be used by individuals to pray by themselves.

116. It has been predicted that the Court would not "submit to its own emasculation." See Grinnell, supra note 70, at 651 (responding to Justice Roberts' proposed constitutional amendment to eliminate congressional exceptions power). In retrospect, Justice Roberts' amendment, see note 40 supra, would have eliminated a great deal of subsequent uncertainty. It would have put an end to a series of bills of highly questionable constitutionality, designed to curtail the Supreme Court's role in protecting individual rights.