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MARRIAGE PROTECTION ACT OF 2004

JULY 19, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3313]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3313) to amend title 28, United States Code, to limit Federal court jurisdiction over questions under the Defense of Marriage Act, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

	Page
The Amendment	2
Purpose and Summary	2
Background and Need for the Legislation	3
Hearings	19
Committee Consideration	19
Vote of the Committee	19
Committee Oversight Findings	21
New Budget Authority and Tax Expenditures	21
Congressional Budget Office Cost Estimate	22
Performance Goals and Objectives	22
Constitutional Authority Statement	22
Section-by-Section Analysis and Discussion	23
Changes in Existing Law Made by the Bill, as Reported	23
Markup Transcript	23
Dissenting Views	145

29–006

THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Marriage Protection Act of 2004".

SEC. 2. LIMITATION ON JURISDICTION.

(a) IN GENERAL.—Chapter 99 of title 28, United States Code, is amended by adding at the end the following:

"§ 1632. Limitation on jurisdiction

"No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C or this section.".

(b) AMENDMENTS TO THE TABLE OF SECTIONS.—The table of sections at the beginning of chapter 99 of title 28, United States Code, is amended by adding at the end the following new item:

"1632. Limitation on jurisdiction.".

PURPOSE AND SUMMARY

H.R. 3313 prevents Federal courts from striking down the provision of the Defense of Marriage Act (28 U.S.C. § 1738C) that provides that no state shall be required to accept a same-sex marriage license granted in another state.

H.R. 3313, the Marriage Protection Act, as amended, creates a new 28 U.S.C. § 1632 that provides that:

> No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C [1] or this section.

H.R. 3313 would prevent unelected, lifetime-appointed Federal judges from striking down the protection for states Congress passed in the Defense of Marriage Act ("DOMA")—by the overwhelming margin of 342–67 in the House and 85–14 in the Senate—that provides that no state shall be required to accept same-sex marriage licenses granted in other states.

H.R. 3313 does not attempt to dictate results: it only places final authority over whether states must accept same-sex marriage licenses granted in other states in the hands of the states themselves. H.R. 3313 stands for the proposition that lifetime-appointed Federal judges must not be allowed to rewrite marriage policy for the states.

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[1] Section 1738C of Title 28 of the United States Code is the provision of the Federal Defense of Marriage Act that states "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." Section 1738C of Title 28 of the United States Code was passed under Congress's authority under Article IV, section 1, of the Constitution, known as the "Full Faith and Credit Clause." That clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; *And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.*" U.S. Const., Art. IV, § 1 (emphasis added).

BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 3313 is necessary to prevent a handful of lifetime-appointed Federal judges from overturning the considered judgment of state citizens and their elected legislatures.

Currently, Federal judges are poised to overturn state marriage laws that rest on the principle that marriage is the union of one man and one woman. Yet today, 44 states (so far) have enacted laws that provide that marriage shall consist only of the union of a man and a woman.[2] These 44 states constitute 88% of the states, and they include 86% of the U.S. population.

At least 38 states (so far) specifically reject by statute the recognition of same-sex marriage licenses granted out of state.[3] These states enacted such laws in reliance on 28 U.S.C. § 1738C, the section of DOMA that H.R. 3313 protects from Federal interference.

However, last year the Supreme Court in *Lawrence* v. *Texas*[4] struck down a state law criminalizing only same-sex sodomy, holding such a law violates the Due Process Clause. In *Lawrence*, the Court held that homosexuals have the right to "seek autonomy"[5] in their relationships and cited "personal decisions relating to marriage"[6] as an important area of personal autonomy. The Court also held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting that practice."[7] The logic of *Lawrence* suggests sexual autonomy may eventually be treated by the courts as akin to the right to have an abortion. Justice Kennedy, in his opinion for the Court, stated that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and that the Constitution demands respect

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[2] Thirty-seven states enacted Defense of Marriage Act laws following enactment of the Federal DOMA. *See* Ala. Code § 30–1–19; Alaska Stat. § 25.05.013; Ariz. Rev. Stat. Ann. § 25–101; Ark. Code Ann. § 9–11–107; Cal. Fam. Code § 308.5; Colo. Rev. Stat. Ann. § 14–2–104; Del. Code Ann. Tit. 13, § 101; Fla. Stat. Ann. § 741.212; Ga. Code Ann. § 19–3–3.1; Haw. Rev. Stat. § 572–1; Idaho Code § 32–209; 750 Ill. Comp. Stat. Ann. 5/212; Ind. Code § 31–11–1–1; Iowa Code § 595.2; Kan. Stat. Ann. § 23–101; Ky. Rev. Stat. Ann. § 402.040; La. Civ. Code Ann. Art. 89; Md. Code, Family Law, § 2–201; Me. Rev. Stat. Ann. Tit. 19–a, § 701; Mich. Comp. Laws Ann. § 551.1, .271; Minn. Stat. Ann. § 517.01; Miss. Code Ann. § 93–1–1; Mo. Rev. Stat. § 451.022; Mont. Code Ann. § 40–1–401; Neb. Const. Art. I, § 29; Nev. Const. Art. I, § 21; N.C. Gen. Stat. § 51–1.2; N.D. Cent. Code § 14–03–01; Ohio Rev. Code § 3101.01; Okla. Stat. Ann. Tit. 43, § 3.1; 23 Pa. Cons. Stat. Ann. § 1704; S.C. Code Ann. § 20–1–15; S.D. Codified Laws § 25–1–1; Tenn. Code Ann. § 36–3–113; Tex. Fam. Code Ann. § 6.204; Va. Code Ann. § 20–45.2; Wash. Rev. Code Ann. § 26.04.020; W. Va. Code Ann. § 48–2–603. An additional six states—Connecticut, Maryland, New Hampshire, Utah, Wisconsin, and Wyoming—have laws recognizing marriage as the union between a man and a woman that predate the enactment of the Federal Defense of Marriage Act. *See* Ct.St. § 45a–727a; Md.Family § 2–201; N.H.St. § 457:1–2; Utah Code Ann. § 30–1–2; Wi.St. § 765.01; Wy.St. § 20–1–101. Vermont's law, while allowing same-sex civil unions, also defines marriage as the union of a man and a woman. *See* Vt.St. T.15 § 8.

[3] *See* Ala. Code § 30–1–19; Alaska Stat. § 25.05.013; Ariz. R.S. § 25–112; Ark. Code Ann. § 9–11–107; Cal. Fam. Code § 308.5; Colo. Rev. Stat. Ann. § 14–2–104; Ct.St. § 45a–727a; Del. Code Ann. Tit. 13, § 101; Fla. Stat. Ann. § 741.212; Ga. Code Ann. § 19–3–3.1; Hawaii St. § 572–3; Idaho Code § 32–209; Ind. Code § 31–11–1–1; Iowa Code § 595.20; Kan. Stat. Ann. § 23–101; Ky. Rev. Stat. Ann. § 402.040; La. Civ. Code Ann. Art. 3520; Md. Code, Family Law, § 2–201; Me. Rev. Stat. Ann. Tit. 19–a, § 701; Mich. Comp. Laws Ann. § 551.1, .271; Miss. Code Ann. § 93–1–1; Mo. Rev. Stat. § 451.022; Mont. Code Ann. § 40–1–401; Neb. Const. Art. I, § 29; Nev. Const. Art. I, § 21; 2004 New Hampshire Laws Ch. 100 (S.B. 427); N.C. Gen. Stat. § 51–1.2; N.D. St. § 14–03–08; Ohio Rev. Code § 3101.01; Okla. Stat. Ann. Tit. 43, § 3.1; 23 Pa. Cons. Stat. Ann. § 1704; S.C. Code Ann. § 20–1–15; Tenn. Code Ann. § 36–3–113; Tex. Fam. Code Ann. § 6.204; Utah Code Ann. § 30–1–4; Va. Code Ann. § 20–45.2; Wash. Rev. Code Ann. § 26.04.020; W. Va. Code Ann. § 48–2–603.

[4] 123 S.Ct. 2472 (2003).

[5] *Id.* at 2482.

[6] *Id.* at 2481.

[7] *Id.* at 2483 (quoting *Bowers* v. *Hardwick*, 478 U.S. 186, 216 (Stevens, J., dissenting)).

for "the autonomy of the person in making these choices."[8] The Court then quoted its abortion decision in *Planned Parenthood* v. *Casey*, stating that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[9]

Justice Scalia, in his dissent in *Lawrence*, pointed out that "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" are all "called into question by [the Court's *Lawrence*] decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding . . . *Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions,* insofar as formal recognition in marriage is concerned . . . This case does not involve the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court . . ."[10]

The *Lawrence* decision points ominously to a day when the Supreme Court may strike down as unconstitutional DOMA's provision protecting states from having to recognize same-sex marriage licenses granted out-of-state on the grounds that such a provision violates either the Due Process Clause, the Equal Protection Clause, the Full Faith and Credit Clause, or some other constitutional provision.

To protect state laws that reject the recognition of same-sex marriage licenses granted in other states from the threats posed by Federal court decisions, Congress must exercise its constitutional authority to limit the jurisdiction of the Federal courts to ensure that the states, and not unelected Federal judges, have the final say on whether they must accept same-sex marriage licenses issued in other states. Congress must preclude Federal courts from striking down the shield Congress gave the states to use in rejecting same-sex marriage licenses granted in other states before Federal courts strike down that protection and set adverse judicial precedents that have effects across multiple states and cannot be reversed.

AMERICA'S GREATEST LEADERS HAVE LONG BEEN CONCERNED ABOUT LIMITING FEDERAL JUDGES' ABUSE OF THEIR AUTHORITY

Deep concern that Federal judges might abuse their power has long been noted by America's most gifted observers, including Thomas Jefferson and Abraham Lincoln.

Thomas Jefferson lamented that "the germ of dissolution of our Federal Government is in the constitution of the Federal judiciary; . . . working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped . . ."[11] In Jefferson's view, leaving the protection of individuals' rights to Federal judges employed for life was a serious

[8] *Id.* at 2481.
[9] *Ibid.*
[10] *Id.* at 2490, 2498 (Scalia, J., dissenting) (emphasis added).
[11] XV Thomas Jefferson, Writings of Thomas Jefferson, at 331–32 (Albert E. Bergh, ed. 1903) (letter from Thomas Jefferson to Charles Hammond (Aug. 18, 1821)).

error. Responding to the argument that Federal judges are the final interpreters of the Constitution, Jefferson wrote:

> You seem . . . to consider the [federal] judges as the ultimate arbiters of all constitutional questions, a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps . . . *[T]heir power [is] the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control.* The constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party its members would become despots.[12]

Jefferson strongly denounced the notion that the Federal judiciary should always have the final say on constitutional issues:

> If [such] opinion be sound, then indeed is our Constitution a complete felo de se [act of suicide]. For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation . . . The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.[13]

Abraham Lincoln said in his first inaugural address in 1861, "The candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers having, to that extent, practically resigned their government into the hands of that eminent tribunal."[14]

CONGRESS HAS THE CLEAR AUTHORITY TO PASS H.R. 3313

A remedy to abuses by Federal judges has long been understood to lie, among other places, in Congress's authority to limit Federal court jurisdiction. As eminent Federal jurisdiction scholar Herbert Wechsler has stated, "Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction . . . [E]ven a pending case may be excepted from appellate jurisdiction."[15] Indeed, the Supreme Court has upheld a statute removing jurisdiction from it in a pending case.[16]

Regarding the Federal courts below the Supreme Court, Article III, Section 1, clause 1 of the Constitution provides that "The judicial Power of the United States, shall be vested in one supreme

[12] XV The Writings of Thomas Jefferson 277–78 (Andrew A. Lipscomb and Albert Bergh, eds. 1904) (letter from Thomas Jefferson to William C. Jarvis (September 28, 1820)) (emphasis added).

[13] XV The Writings of Thomas Jefferson (Albert Bergh, ed. 1903) at 213 (letter from Thomas Jefferson to Judge Spencer Roane (September 6, 1819)).

[14] Abraham Lincoln's First Inaugural Address (March 4, 1861) in 4 The Collected Works of Abraham Lincoln 268 (Roy P. Basler, ed. 1953).

[15] Herbert Wechsler, "The Courts and the Constitution," 65 Colum. L. Rev. 1001, 1005 (1965).

[16] *See Ex parte McCardle,* 74 U.S. (7 Wall.) 506 (1868).

Court, and in such inferior Courts *as the Congress may from time to time ordain and establish.*" [17]

Regarding the Supreme Court, the Constitution provides that only two types of cases are within the original jurisdiction of the Supreme Court.[18] Article III, Section 2, clause 2 provides that "[i]n all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases . . . 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.*" [19]

Consequently, the Constitution provides that the lower Federal courts are entirely creatures of Congress, as is the appellate jurisdiction of the Supreme Court, excluding only "cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." [20]

The Founders of our Nation carefully crafted a republic in the Constitution. They articulated their defense of that document to the voters in the ratifying states in a series of newspaper articles that became known as the *Federalist Papers.*

In Federalist No. 80, Alexander Hamilton made clear the broad nature of Congress's authority to amend Federal court jurisdiction to remedy perceived abuse. He wrote:

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[17] This provision of the Constitution makes clear that the Constitution itself vests judicial power in the manner prescribed in the Constitution, not that the Constitution mandates Congress to vest complete jurisdiction in the Federal courts. The Constitution itself "vests" in the Supreme Court only its limited, original jurisdiction "[i]n all cases affecting Ambassadors, other public Ministers and consuls, and those in which a State shall be Party . . ." U.S. Constitution, Article III, Section 2, clause 2. The word "shall" in this provision is not addressed to Congress, just as the words "shall" in the constitutional clauses vesting the legislative and executive authorities are not addressed to Congress. *See* U.S. Constitution, Article I , Section 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); Article II, Section 1 ("The executive Power shall be vested in a President of the United States of America."). Similarly, where the Constitution provides that "The judicial power shall extend" to certain cases, it can only mean that such power shall extend to such cases insofar as either the Constitution vests original jurisdiction in the Supreme Court or as the Constitution vests power in Congress to create lower Federal courts and Congress has in fact exercised that power by statute. *See also* U.S. Const. Art. I, § 8, clause 9 ("The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court."). *See also* Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) at 348 ("Although Article III states that 'the judicial Power of the United States *shall* be vested' (emphasis added), Congress possesses significant powers to apportion jurisdiction among state and Federal courts and, in doing so, to define and limit the jurisdiction of particular courts.").

[18] The Constitution does not grant the Supreme Court exclusive original jurisdiction. *See California* v. *Arizona,* 440 U.S. 59, 65 (1979); *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 93 (1972); *Ohio ex rel. Popovici* v. *Agler,* 280 U.S. 379, 383 (1930).

[19] Article III, Section 2, clause 2's reference to cases in which "a State shall be Party" does not include suits by citizens against states. *See United States* v. *Texas,* 143 U.S. 621, 643–44 (1892) ("The words in the constitution, 'in all cases . . . in which a state shall be party, the supreme court shall have original jurisdiction' . . . *do not refer to suits brought against a state by its own citizens or by citizens of other states, or by citizens or subjects of foreign states, even where such suits arise under the constitution, laws, and treaties of the United States,* because the judicial power of the United States does not extend to suits of individuals against states.") (emphasis added). The Eleventh Amendment provides that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." U.S. Const. Amend. XI.

[20] By statute, the original and exclusive jurisdiction of the Supreme Court is confined to "all controversies between two or more States." 28 U.S.C. § 1251 ("(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States. (b) The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens.").

> From this review of the particular powers of the Federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, *it ought to be recollected that the national legislature will have ample authority to make such EXCEPTIONS, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.*[21]

Alexander Hamilton also wrote in Federalist No. 81 that "To avoid all inconveniencies, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction [that] shall be subject to such EXCEPTIONS and regulations as the national legislature may prescribe. *This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.*"[22]

Roger Sherman, whom eminent historian Clinton Rossiter considered one of the most influential members of the Constitutional Convention,[23] also wrote that:

> It was thought necessary in order to carry into effect the laws of the Union, to promote justice, and preserve harmony among the states, to extend the judicial powers of the United States to the enumerated cases, under such regulations and with such exceptions as shall be provided for by law, *which will doubtless reduce them to cases of such magnitude and importance as cannot safely be trusted to the final decision of the courts of particular states . . .*[24]

FROM THE FIRST JUDICIARY ACT OF 1789 TO THE PRESENT, CONGRESS'S USE OF ITS AUTHORITY TO LIMIT FEDERAL COURT JURISDICTION HAS BEEN CONSISTENT AND BIPARTISAN

Congress has always made clear that it can limit the jurisdiction of the Federal courts, starting with the very first Judiciary Act of 1789.[25] As has been observed by the authors of the leading treatise on Federal court jurisdiction, "the first Judiciary Act is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress's constitutional obligations concerning the vesting of Federal jurisdiction."[26]

The first Congress made clear that Federal court jurisdiction over constitutional claims was not unlimited. As the Congressional Research Service has written:

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[21] Federalist No. 80 (Hamilton) at 481 (Clinton Rossiter ed., 1961). Hamilton elaborated further in Federalist No. 81, stating that "We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes [cases affecting ambassadors, ministers, and consuls, and cases in which a State is a party], and those of a nature rarely to occur. In all other cases of Federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction, 'with such EXCEPTIONS and under such REGULATIONS as the Congress shall make.'" Federalist No. 81 (Hamilton) at 488 (Clinton Rossiter ed., 1961).

[22] Federalist No. 81 (Hamilton) at 490 (Clinton Rossiter ed., 1961).

[23] *See* Clinton Rossiter, 1787: The Grand Convention, chapter 10 (1966).

[24] Roger Sherman, Observations on the New Federal Constitution (A Citizen of New Haven, II) (December 25, 1788) (emphasis added), reprinted in Essays on the Constitution of the United States, at 240–41 (P. Ford, ed. 1892).

[25] 1 Stat. 85.

[26] Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) at 28.

> There is significant historical precedent . . . for the proposition that there is no requirement that all jurisdiction that could be vested in the Federal courts should be so vested. For instance, the First Judiciary Act implemented under the Constitution, the Judiciary Act of 1789, is considered to be an indicator of the original understanding of the Article III powers. That Act, however, falls short of having implemented all of the "judicial powers" which were specified under Article III. For instance, the Act did not provide jurisdiction for the inferior Federal courts to consider cases arising under Federal law or the Constitution. Although the Supreme Court's appellate jurisdiction did extend to such cases when they originated in state courts, its review was limited to where a claimed statutory or constitutional right had been denied by the court below.[27]

The Judiciary Act of 1789[28] provided that the Supreme Court, regarding constitutional challenges to Federal law, could review only those final decisions of the state courts that held "against [the] validity" of a Federal statute or treaty.[29] Consequently, under the Judiciary Act of 1789, if the highest state court held a Federal law constitutional, no appeal was allowed to any Federal court, including the Supreme Court. The Supreme Court dismissed a case early in its history under such provision.[30] (The Judiciary Act of 1789 did not provide jurisdiction to the lower Federal courts to consider cases arising under Federal law or the Constitution.)[31] As one commentator has written, "Under the Judiciary Act of 1789, cases could arise that clearly fall within the judicial power of the United States but that were excluded from the combined appellate and original jurisdiction of the Federal courts," including cases in which a state court erroneously voided a state statute for violating the Federal constitution.[32] In sum, "the first Congress's allocation of jurisdiction in the Judiciary Act is *inconsistent* with the thesis that the Constitution requires the entire judicial power of the United States to be vested in the aggregate in the Supreme Court and lower Federal courts."[33]

In the first Congress, fifty-four members had been delegates to the Constitutional Convention or their state ratification conventions.[34] That same Congress overwhelmingly voted to place significant restrictions on Federal court jurisdiction that prevented many constitutional and other claims from ever being heard in a Federal court. James Madison, for example, spoke in favor of the Judiciary Act of 1789 during House debate on the legislation,[35] and at the

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[27] Kenneth Thomas, Congressional Research Service, CRS Report for Congress, "Limiting Court Jurisdiction Over Federal Constitutional Issues: 'Court-Stripping'" (updated May 19, 2004) at 7.

[28] 1 Stat. 85.

[29] *See Martin* v. *Hunter's Lessee,* 14 U.S. 304, 352 (1816).

[30] *See Gordon* v. *Caldcleugh,* 7 U.S. 268 (1806).

[31] *See* Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) at 29 ("[T]he 1789 Act . . . made no use of the grant of judicial power over cases arising under the Constitution or laws of the United States . . . In the category of cases arising under Federal law, Congress provided no general Federal question jurisdiction in the lower Federal courts. Nor, under section 25, did the Supreme Court's appellate jurisdiction extend to cases originating in the state courts in which the Federal claim was *upheld*.") (emphasis in original).

[32] William R. Casto, "The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction," 26 B.C.L. Rev. 1101, 1118 (1985).

[33] *Id.* at 1120 (emphasis added).

[34] Encyclopedia of American History 145 (R. Morris 6th ed. 1982).

[35] *See* 1 Annals of Congress 812–13 (J. Gales ed. 1789).

conclusion of the debate he gave the legislation his endorsement.[36] Although there is no rollcall vote on passage of the Judiciary Act of 1789 in the House recorded in the Congressional Record,[37] the Judiciary Act of 1789 passed the Senate by a vote of 14–6, with eight of the ten former delegates to the Constitutional Convention voting for it.[38]

Shortly after the Judiciary Act of 1789 became law, Congress asked Edmund Randolph, the first Attorney General of the United States, to submit a report and recommendation on "matters relative to the administration of justice under the authority of the United States."[39] In that report, Attorney General Randolph recommended that the Judiciary Act of 1789 be amended such that even more cases within the judicial power of the United States be prohibited from being filed in Federal court and from being appealed to a Federal court, citing the broad authority the Constitution granted Congress to limit Federal court jurisdiction.[40] Indeed, as a leading treatise has pointed out, "Beginning with the first Judiciary Act in 1789, Congress has never vested the Federal courts with the entire 'judicial Power' that would be permitted by Article III."[41]

On both sides of the political spectrum, calls have been made to limit the jurisdiction of Federal courts to avoid abuses. Senate Minority Leader Daschle has supported provisions that would deny all Federal courts jurisdiction over the procedures governing timber projects in order to expedite forest clearing and save forests from destruction.[42] Those provisions became part of Public Law 107–

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[36] *See* Gazette of the United States (September 19, 1789) at 3, col. 2.

[37] *See* I Debates and Proceedings in the Congress of the United States at 928–29 (Thursday, September 17, 1789) ("The bill for establishing the Judicial Courts of the United States was read the third time and passed.").

[38] *See* I Debates and Proceedings in the Congress of the United States at 52 (Friday, July 17, 1789) (Bassett, Ellsworth, Few, Johnson, Morris, Paterson, Read, and Strong voting for, Butler and Langdon voting against). While one cannot know from such votes whether those voting against it did so because they believed it was unconstitutional, surely no one who voted for it did so believing it was unconstitutional.

[39] 2 Annals of Congress 1719 (1790).

[40] *See* William R. Casto, "The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction," 26 B.C.L. Rev. 1101, 1122 (1985).

[41] Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) at 349. Such less-than-full vesting includes statutes that preclude Federal review of diversity cases in which the amounts in controversy are below statutorily defined minimums. *Id.* Further, the law has generally developed in a variety of additional ways that make clear there are many types of cases in which not only are Federal courts precluded from conducting constitutional review, but all constitutional review is precluded. For example, the Supreme Court has found constitutional claims to be beyond judicial review because they involve "political questions." *See Coleman* v. *Miller,* 307 U.S. 433, 443–46 (1939); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District,* 281 U.S. 74, 79–80 (1930). And the doctrine of sovereign immunity provides that additional constitutional claims can go unheard. *See* Black's Law Dictionary (8th ed. 2004) ("A government's immunity from being sued in its own courts without its consent").

[42] *See* Audrey Hudson, "Daschle Seeks to Exempt His State; Wants Logging to Prevent Fires," *The Washington Times* (July 24, 2002) at A1 ("'As we have seen in the last several weeks, the fire danger in the Black Hills is high and we need to get crews on the ground as soon as possible to reduce this risk and protect property and lives,' Mr. Daschle said in a statement late Monday night after a House-Senate conference committee agreed on the language . . . The provision says that 'due to extraordinary circumstances,' timber activities will be exempt from the National Forest Management Act and National Environmental Policy Act, is not subject to notice, comment or appeal requirements under the Appeals Reform Act, and is not subject to judicial review by any U.S. court."); Michelle Munn, "Plan to Curb Forest Fires Wins Support," *The Los Angeles Times* (August 2, 2002) at A16 ("Daschle's amendment authorizes a forest management program in Black Hills National Forest without resort to a typically lengthy judicial review and appeals process.").

206.[43] If Congress can deny all Federal courts the authority to hear a class of cases to protect trees, certainly it can do so to protect a state's marriage policy.[44]

Democratic Senator Robert Byrd also introduced an amendment, Amendment SU 70, to S. 450 during the 96th Congress. The amendment, which was adopted by a Senate controlled by Democrats with large bipartisan support,[45] provided that neither the lower Federal courts nor the Supreme Court would have jurisdiction to review any case arising out of state laws relating to voluntary prayers in public schools and public buildings.

Further, conservative commentator William F. Buckley has advocated that "[a] means of devolving popular authority, to be exercised by individual states, could be obtained by removing jurisdiction from the Supreme Court in matters having to do with marriage."[46]

And there are currently 224 bipartisan co-sponsors of H.R. 2028, the "Pledge Protection Act of 2003," which would provide that "No court established by Act of Congress shall have jurisdiction to hear or determine any claim that the recitation of the Pledge of Allegiance . . . violates the first article of amendment to the Constitution of the United States."

SUPREME COURT PRECEDENTS ARE CONSISTENT WITH CONGRESS'S AUTHORITY TO LIMIT FEDERAL COURT JURISDICTION

Supreme Court precedents upholding a variety of statutes limiting Federal court jurisdiction make clear that Congress has the authority to remove jurisdiction over legal issues from Federal courts including the Supreme Court.

In *Wiscart* v. *D'Auchy,*[47] Chief Justice Ellsworth, who has been a delegate to the Constitutional Convention, upheld a denial of Supreme Court jurisdiction, stating broadly that the Supreme Court's

> appellate jurisdiction is, likewise, qualified; inasmuch as it is given "with such exceptions, and under such regulations, as the Congress shall make." Here then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitu-

[43] *See* Pub. L. No. 107–206, § 706(j) ("Any action authorized by this section shall not be subject to judicial review by any court of the United States."). This provision was addressed by the Tenth Circuit Court of Appeals in *Biodiversity Associates* v. *Cables*, 357 F.3d 1152 (10th Cir. 2004), but only to determine whether that provision conflicted with a settlement agreement between the Clinton Administration and plaintiffs in the case under which it agreed not to allow any tree cutting in the Beaver Park Roadless Area. *Id.* at 1158, 1160 ("In the waning days of the Clinton Administration, in September of 2000, the Forest Service signed a settlement agreement with the plaintiff groups, under which it agreed not to allow any tree cutting in the Beaver Park Roadless Area, at least until the Service approved a new land and resource management plan remedying the defects of the 1997 plan . . . The question before us is simply whether the settlement agreement has continuing validity in the face of Congress's intervening act.").

[44] Congress has often acted to preclude judicial review in Federal courts in selected cases. For example, the Terrorism Risk Insurance Act (P.L. 107–297) precludes judicial review of "certifications" by the Secretary of the Treasury that terrorist events have occurred, and the Small Business Liability Relief and Brownfields Revitalization Act (P.L. 107–118) precludes judicial review of hazardous waste cleanup programs.

[45] *See* Congressional Quarterly, Congressional rollcall 1979, at 10–S ("R 25–12; D 26–28 ").

[46] William F. Buckley, "Alternatives on Marriage," *The Washington Times* (March 2, 2004).

[47] 3 U.S. (3 Dall.) 321 (1796).

> tional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?[48]

In *Turner* v. *Bank of North American,*[49] the Supreme Court upheld the provision of the Judiciary Act[50] which provided that no district or circuit court "shall have cognisance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." As counsel pointed out, Congress had passed the statute to prevent contracts between citizens of the same state from, through collusion, being made Federal issues under the Federal courts' diversity jurisdiction simply because one party assigned the benefits of a promissory note to a citizen of another state, or to an alien.[51] Chief Justice Ellsworth, during oral argument, asked the counsel asserting jurisdiction incredulously, "How far is it meant to carry the argument? Will it be affirmed, that in every case, to which the judicial power of the United States extends, the Federal courts may exercise a jurisdiction, without the intervention of the legislature, to distribute, and regulate, the power?"[52] Justice Chase agreed, stating:

> The notion has frequently been entertained, that the Federal courts derive their judicial power immediately from the constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the Federal courts, to every subject, in every form, which the constitution might warrant.[53]

In *Cary* v. *Curtis,*[54] the Supreme Court upheld the application of a statute that placed jurisdiction for all claims of illegally charged customs duties with the Secretary of the Treasury. The Court stated that, under the statute, "it is the Secretary of the Treasury alone in whom the rights of the government and of the claimant are to be tested."[55] In a broad decision, the Court upheld a Federal statute that removed jurisdiction over all such claims from both the

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[48] *Id.* at 328.
[49] 4 U.S. 8 (1799).
[50] 1 U.S. Stat. 79.
[51] 4 U.S. at 8 ("Congress knew, that the English courts have amplified their jurisdiction, through the medium of legal fictions; and it was readily foreseen, that by the means of a colorable assignment to an alien, or to the citizen of another state, every controversy arising upon negotiable paper might be drawn into the Federal courts.") (citing argument of counsel). *See also* 10 Annals of Congress, at 897–99 (1801) (discussing purpose of assignee provision).
[52] *Id.* at 10, n.a. (citing statement of Chief Justice Ellsworth).
[53] *Id.* at 9, n.a. (citing statement of Justice Case).
[54] 44 U.S. 236 (1845).
[55] *Id.* at 241 ("To permit the receipts at the customs to depend on constructions as numerous as are the agents employed, as various as might be the designs of those who are interested; or to require that those receipts shall await a settlement of every dispute or objection that might spring from so many conflicting views, would be greatly to disturb, if not to prevent, the uniformity prescribed by the Constitution, and by the same means to withhold from the government the means of fulfilling its important engagements . . . We have no doubts of the objects or the import of that act; we cannot doubt that it . . . has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid.").

state and Federal courts and dismissed the case for lack of jurisdiction:

> It is contended, however, that the language and the purposes of Congress, if really what we hold them to be declared in the statute of 1839, cannot be sustained, because they would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice . . . [I]n the doctrines so often ruled in this court that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. *To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely.* It follows, then, that the courts created by statute must look to the statute as the warrant for their authority, certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the Federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.[56]

In *Barry* v. *Mercein,*[57] the Supreme Court stated that "[b]y the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress, nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes."[58]

In *Sheldon* v. *Sill,*[59] the Supreme Court stated:

> It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result—either that each inferior court created by Congress must exercise all the judicial powers not

[56] *Id.* at 244–46 (emphasis added).
[57] 46 U.S. (5 How.) 103 (1847).
[58] *Id.* at 119.
[59] 29 U.S. 441 (1850).

> given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all . . . Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary.[60]

In *Mayor* v. *Cooper,*[61] the Supreme Court held that:

> How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The Constitution is silent upon those subjects. They are remitted without check or limitation to the wisdom of the legislature . . . As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it . . . It is the right and the duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them, *properly brought before it*, this court is the final arbiter.[62]

In *United States* v. *Klein,*[63] the Supreme Court struck down a statute that purported to deny the lower U.S. Court of Claims and the Supreme Court, on appeal, the authority to hear claims for property brought by those who were pardoned by President Lincoln following the Civil War. The Supreme Court held the statute unconstitutional for two reasons. First, because the statute made having received a pardon proof of disloyalty that effectively denied the right to Federal judicial review, it found that in forbidding the Court "to give the effect to evidence which, in its own judgment, such evidence should have" and directing the court "to give it an affect precisely contrary," Congress had "inadvertently passed the limit which separates the legislative from the judicial power."[64] Second, the statute unconstitutionally "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive."[65]

In the opinion, however, the Supreme Court made clear that "[i]t seems to us that this is not an exercise of the acknowledged power

[60] *Id.* at 448–49.
[61] 73 U.S. (6 Wall.) 247 (1868).
[62] *Id.* at 251–52.
[63] 80 U.S. 128 (1871).
[64] *Id.* at 147.
[65] *Id.*

of Congress to make exceptions and prescribe regulations to the appellate power."[66] Further, the Court stated that "*If [the challenged statute] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.* But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have."[67] In other words, the denial of Federal court jurisdiction would have been *upheld* if it had not effectively acted to limit the President's constitutional pardon power. H.R. 3313 would not conflict with any other constitutional authority granted by the Constitution.

In *The Francis Wright,*[68] the Supreme Court stated:

> [W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.[69]

In *Stevenson* v. *Fain,*[70] the Supreme Court stated that "The Supreme Court alone possesses [original] jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it, but the jurisdiction of the circuit courts depends upon some act of Congress."[71]

In *Kline* v. *Burke Construction Co.,*[72] the Supreme Court states that:

> Only the [original] jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution . . . The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part . . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.[73]

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[66] *Id.* at 146.
[67] *Id.* at 145 (emphasis added).
[68] 105 U.S. 381 (1881).
[69] *The Francis Wright,* 105 U.S. 381, 385–86 (1881).
[70] 195 U.S. 165 (1904).
[71] *Id.* at 167 (quotations and citations omitted).
[72] 260 U.S. 226 (1922).
[73] *Id.* at 234.

In *Lauf* v. *E.G. Shinner & Co.,*[74] the Supreme Court again upheld a statute that placed limits on the jurisdiction of the lower Federal courts, stating "the power of the court to grant the relief prayed depends upon the jurisdiction conferred upon it by the statutes of the United States . . . Section 7 [of the Act] declares that 'no court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined,' [with certain exceptions] . . . 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."

In *Lockerty* v. *Phillips,*[75] the Supreme Court similarly held, in upholding a statute limiting lower courts' jurisdiction over challenges to price controls, that

> [b]y this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other Federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior Federal court. All Federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. *Article III left Congress free to establish inferior Federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.* The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. In the light of the explicit language of the Constitution and our decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court.[76]

While some have argued that Federal court jurisdiction is necessary to ensure a Federal court exists to decide at least *constitutional* questions, as eminent Federal jurisdiction scholar Martin Redish has observed, "there is no logical way to limit the need for an article III court to police the states to cases involving assertions of constitutional rights. If the state courts are not to be allowed to undermine the establishment of national supremacy, surely these courts must also be policed on their interpretation and enforcement of any Federal law. The supremacy clause, it should be recalled, is

[74] 303 U.S. 323 (1938).
[75] 319 U.S. 182 (1943).
[76] *Id.* at 187–88 (quotations and citations omitted) (emphasis added).

not limited in its dictates to matters of constitutional law, much less of constitutional right."[77]

Indeed, the Supreme Court, in a decision this year, reaffirmed that "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[78] The Supreme Court has also stated that "domestic relations are preeminently matters of state law,"[79] and that "[f]amily relations are a traditional area of state concern."[80]

Further, H.R. 3313 is entirely consistent with *Marbury* v. *Madison. Marbury* v. *Madison*[81] established the principle of judicial review and stands for the proposition that the Supreme Court has the final say on the issues it decides provided either the issues it decides are within its original jurisdiction or Congress, by statute, has granted the Supreme Court the authority to hear the issue. If a case does not fall within the jurisdiction of the Federal courts because Congress has not granted the required jurisdiction, Federal courts simply cannot hear the case.

The author of *Marbury* v. *Madison* was Chief Justice John Marshall, and Chief Justice Marshall himself, after he decided *Marbury* v. *Madison,* dismissed cases when the Federal courts had not been granted jurisdiction by Congress to hear them under the Judiciary Act of 1789.[82]

STATE COURTS ARE NOT SECOND-CLASS COURTS, AND THEY ARE EQUALLY CAPABLE OF DECIDING FEDERAL CONSTITUTIONAL QUESTIONS

Federal legislation that precludes Federal court jurisdiction over certain constitutional claims to remedy perceived abuses by Federal judges, and to preserve for the states and their courts the authority to determine constitutional issues, rests comfortably within our constitutional system.[83]

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[77] Martin H. Redish, "Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager," 77 N.W.U.L.Rev. 143, 148 (1982).

[78] *Elk Grove Unified School District* v. *Newdow,* 124 S.Ct. 2301, 2309 (2004) (citing and quoting *In re Burrus,* 136 U.S. 586, 593–94 (1890)).

[79] *Mansell* v. *Mansell,* 490 U.S. 581, 587 (1989).

[80] *Moore* v. *Sims,* 442 U.S. 415, 435 (1979).

[81] 5 U.S. 137 (1803). In *Marbury* v. *Madison,* the Supreme Court found that under Article III of the Constitution, a party within the Supreme Court's original jurisdiction must be a State or an ambassador and that neither Marbury nor Madison was a state or an ambassador. Consequently, the Supreme Court held that the original jurisdiction of the Supreme Court is fixed by the Constitution and it dismissed the case because Congress had exceeded its constitutional authority when it granted the Supreme Court original jurisdiction to hear Marbury's case in the Judiciary Act of 1789. *Id.*

[82] *See Gordon* v. *Caldcleugh,* 7 U.S. 268 (1806) (dismissing case for lack of jurisdiction under the Judiciary Act of 1789) ("This court has no jurisdiction, under the 25th section of the judiciary act of 1789, but in a case where a final judgment or decree has been rendered in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question, the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, &c. or where is drawn in question, the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission. In the present case, such of the defendants as were aliens, filed a petition to remove the cause to the Federal circuit court, under the 12th section of the same act. The state court granted the prayer of the petition, and ordered the cause to be removed; the decision, therefore, was not against the privilege claimed under the statute; and, therefore, this court has no jurisdiction in the case. The writ of error must be dismissed.").

[83] As Martin Redish has observed, the Founders did not intend to guarantee a Federal judiciary to ensure uniformity of Federal policy, but rather they intended to allow Congress the *option* of creating and granting jurisdiction to Federal courts if Congress thought such was necessary to police actions by state courts:

The Supreme Court has clearly rejected claims that state courts are less competent to decide Federal constitutional issues than Federal courts.[84] Justice William Brennan wrote, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,*[85] that "virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts."[86] Justice Brennan was joined in that decision by Justices Marshall, Blackmun, and Stevens.

And the leading scholars have long noted the constitutional alternative of state court resolutions of Federal constitutional claims. As Martin Redish has observed, "The state courts have, since the nation's beginning, been deemed both fully capable of and obligated (under the supremacy clause) to enforce Federal law, including the Constitution . . . *Congress has complete authority to have constitutional rights enforced exclusively in the state courts* . . ."[87]

Article VI of the Constitution states that "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ." U.S. Constitution, Art. VI, Section 2. As Martin Redish has pointed out, "It is all but inconceivable that the framers who had vested total discretion in Congress over substantive lawmaking, with the possibility that a Congress 'biased' towards the states could choose to pass no substantive Federal law at all and instead defer completely to state control, would have fretted significantly over the possibility that Congress would take the lesser step of enacting substantive Federal law but leaving to the state courts the final authority to interpret it."[88]

As leading Harvard Law School Federal jurisdiction scholar Paul Bator has written, "If the Constitution means what it says, it means that Congress can make the state courts—or, indeed, the lower Federal courts—the ultimate authority for the decision of any category of case to which the Federal judicial power extends . . . Indeed, a powerful case can be made that such a plenary power may be essential to making the institution of judicial review tolerable in a democratic society."[89]

> [The Founders'] fear seems to have been that, absent policing by some branch of the Federal Government, state courts might undermine Federal supremacy. Ultimately, the framers chose the judicial branch to perform this policing function. But if the policy-making branches of the Federal Government—Congress and the executive—conclude in a particular instance that there is no need to worry about state court interference, there is, by definition, no possibility of interference with Federal supremacy; the Federal Government has chosen to deem acceptable whatever constructions of Federal law the state courts develop.

Martin H. Redish, "Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager," 77 N.W.U.L.Rev. 143, 146–47 (1982). *See also* Martin H. Redish, "Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination," 27 Villanova L. Rev. 900, 909 (1982) ("[I]f the policy-making branches of the Federal Government—Congress and the Executive—conclude that whatever interpretations of Federal law given by state courts are acceptable, there will be no need for Supreme Court policing of the state courts to assure compliance with Federal supremacy . . . What is important for purposes of federalism is that Congress have the *power* to check the states, not that such a check be *required* of Congress.").

[84] *See Stone* v. *Rice,* 428 U.S. 465, 492 (1976) ("[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like Federal courts, have a constitutional obligation to safeguard personal liberties and to uphold Federal law.").

[85] 458 U.S. 50 (1982).

[86] *Id.* at 64 n.15.

[87] Martin H. Redish, "Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager," 77 N.W.U.L.Rev. 143, 155, 157 (1982) (emphasis added).

[88] *Id.* at 148.

[89] *Constitutional Restraints Upon the Judiciary: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong. 51, 55 (1981) (statement of Paul M.

Continued

And as the Congressional Research Service has concluded, "[t]o the extent that state courts provide a forum for challenges to DOMA [the Federal Defense of Marriage Act], then concerns about removal of such issues from Federal courts are diminished."[90]

H.R. 3313 IS A PROPER EXERCISE OF CHECKS AND BALANCES

Far from violating the separation of powers, legislation that reserves to state courts jurisdiction to hear and decide certain classes of cases is an exercise of one of the very checks and balances provided for in the Constitution.

As Lord Acton stated, "Power tends to corrupt and absolute power corrupts absolutely." No branch of the Federal Government can be entrusted with absolute power—certainly not a handful of unelected Federal judges appointed for life. The Constitution allows the Supreme Court to exercise "judicial power," but it does not grant the Supreme Court unchecked power to define the limits of its own power. Integral to the American constitutional system is each branch of government's responsibility to use all its powers to prevent perceived instances of overreaching by the other branches.

Congress's exercise of its authority to remove classes of cases from Federal court jurisdiction does not transfer power from the Federal judiciary to Congress. Rather, it transfers power from the Federal judiciary to the state judiciary. Congress's exercise of its authority to remove classes of cases from Federal court jurisdiction also does not give Congress the power to decide the outcome of cases: that decisional authority would rest with the state courts.

H.R. 3313 DOES NOT FAVOR OR DISFAVOR ANY PARTICULAR RESULT OR ANY GROUP OF PEOPLE

H.R. 3313 does not favor or disfavor any particular result or any group of people. H.R. 3313 is motivated by a desire to preserve for the states the authority to decide whether the shield Congress enacted to protect them from having to accept same-sex marriage licenses issued out of state will hold—not by any ill will or animus.[91]

H.R. 3313 does not dictate results: it only places final authority over whether states must accept same-sex marriage licenses granted in other states in the hands of the states themselves. H.R. 3313 should be supported by any Member who supports the proposition

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Bator, Professor, Harvard Law School). *See also* Paul Bator, "The State Courts and Federal Constitutional Litigation," 22 Wm. & Mary L.Rev. 605, 627 (1981) ("We must never forget that under our constitutional structure it is the state . . . courts that constitute our ultimate guarantee that a usurping legislature and executive cannot strip us of our constitutional rights.").

[90] "Constitutional Issues Relating to H.R. 3313, the 'Marriage Protection Act'," Congressional Research Service Memorandum to Subcommittee on the Constitution, House Committee on the Judiciary, from Kenneth R. Thomas, Legislative Attorney, American Law Division (March 1, 2004) at 6.

[91] *See Romer* v. *Evans,* 517 U.S. 620, 634–36 (1995) (holding state constitutional amendment unconstitutional under Federal Equal Protection Clause because "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group" and "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."); *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1869) (dismissing case based on Federal statute repealing the act which originally authorized the appeal, stating "[w]e 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. What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.").

that lifetime-appointed Federal judges must not be allowed to rewrite marriage policy for the states.

HEARINGS

The Committee's Subcommittee on the Constitution held one day of hearings on "Limiting Federal Court Jurisdiction to Protect Marriage for the States" on June 24, 2004. Testimony was received from Phyllis Schlafly, President, Eagle Forum; Martin H. Redish, Professor, Northwestern University School of Law; Michael Gerhardt, Professor, William & Mary Law School; William E. Dannemeyer, former U.S. Representative, with additional material submitted by individuals and organizations.

COMMITTEE CONSIDERATION

On July 14, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 3313 with an amendment by a recorded vote of 21 to 13, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the Committee's consideration of H.R. 3313.

1. Ms. Baldwin offered an amendment to the amendment in the nature of a substitute to H.R. 3313 that would have allowed Federal courts to strike down on various constitutional grounds the provision of the Defense of Marriage Act that allows states to reject same-sex marriage licenses issued in other states. By a rollcall vote of 13 yeas to 20 nays, the amendment was defeated.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Ms. Hart		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn		X	
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	13	20	

2. Ms. Jackson Lee offered an amendment to the amendment in the nature of a substitute to H.R. 3313 that would have expanded the jurisdiction of the Federal courts. By a rollcall vote of 11 yeas to 19 nays and 1 pass, the amendment was defeated.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Ms. Hart		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn		X	
Mr. Conyers			
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			Pass
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	11	19	1 Pass

3. Motion to Report H.R. 3313 with an amendment in the nature of a substitute was agreed to by a rollcall vote of 21 yeas to 13 nays.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher	X		
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	21	13	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3313, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 16, 2004.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3313, the "Marriage Protection Act of 2004."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Walker, who can be reached at 226–2860.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3313—Marriage Protection Act of 2004.

H.R. 3313 would preclude all Federal courts from striking down the section of the Defense of Marriage Act that provides no State shall be required to recognize same-sex marriage licenses granted in another State unless the State allows such recognition. The bill also would preclude all Federal courts from reviewing the provisions of H.R. 3313. CBO estimates that implementing the bill would not have a significant effect on the Federal budget.

H.R. 3313 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The CBO staff contact for this estimate is Lanette J. Walker, who may be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3313 would preclude Federal court jurisdiction over 28 U.S.C. § 1738C and over the newly created 28 U.S.C. § 1632 created by H.R. 3313.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 9; article III, section 1, clause 1; and article III, section 2, clause 2.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes H.R. 3313 as reported by the Committee on the Judiciary.

Sec. 1. Short title. Section 1 provides that the legislation may be cited as the "Marriage Protection Act of 2004."

Sec. 2. Limitation on Jurisdiction. Section 2 creates a new 28 U.S.C. § 1632 that provides that no court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C of Title 28 of the United States Code, or the newly created 28 U.S.C. § 1632.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * * * *

PART IV—JURISDICTION AND VENUE

* * * * * * *

CHAPTER 99—GENERAL PROVISIONS

Sec.
1631. Transfer to cure want of jurisdiction.
1632. Limitation on jurisdiction.

* * * * * * *

§ 1632. Limitation on jurisdiction

No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C or this section.

* * * * * * *

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, JULY 14, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:30 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present. Pursuant to notice I now call up the bill H.R. 3313, the "Marriage Protection Act of 2003," for purposes of markup and move its favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 3313, follows:]

I

108TH CONGRESS
1ST SESSION

H. R. 3313

To amend title 28, United States Code, to limit Federal court jurisdiction over questions under the Defense of Marriage Act.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 16, 2003

Mr. HOSTETTLER (for himself, Mr. PENCE, Mr. SMITH of Michigan, Mr. GARRETT of New Jersey, Mr. GOODE, Mr. AKIN, Mr. GUTKNECHT, Mr. WELDON of Florida, Mr. JONES of North Carolina, Mr. BARTLETT of Maryland, Mr. FORBES, and Mr. PAUL) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to limit Federal court jurisdiction over questions under the Defense of Marriage Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Marriage Protection Act of 2003".

SEC. 2. LIMITATION ON JURISDICTION.

(a) IN GENERAL.—Chapter 99 of title 28, United States Code, is amended by adding at the end the following:

"§ 1632. Limitation on jurisdiction

"No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or determine any question pertaining to the interpretation of section 1738c of this title or of this section. Neither the Supreme Court nor any court created by Act of Congress shall have any appellate jurisdiction to hear or determine any question pertaining to the interpretation of section 7 of title 1.".

(b) AMENDMENT TO TABLE OF SECTIONS.—The table of sections at the beginning of chapter 99 of title 28, United States Code, is amended by adding at the end the following new item:

"1632. Limitation on jurisdiction.".

○

Chairman SENSENBRENNER. The Chair recognizes the author of the bill, the gentleman from Indiana, Mr. Hostettler, for 5 minutes to explain the bill.

Mr. HOSTETTLER. Thank you, Mr. Chairman.

Mr. Chairman, in 1996 both Chambers of the United States Congress overwhelmingly passed and the President signed into law the Defense of Marriage Act, otherwise known as DOMA. DOMA was in response to a decision by the Hawaii State Supreme Court which found that denial of marriage licenses to homosexual couples was a violation of Hawaii's Constitution.

DOMA employed the authority granted to Congress in Article IV, Section 1 of the United States Constitution, that explicit and exclusive congressional authority is spelled out thus, quote: Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof, end quote.

Since the passage of DOMA decisions in the United States Supreme Court and the Supreme Judicial Court of the State of Massachusetts have suggested that courts may be willing to call into question the constitutionality of the Federal DOMA. With that possibility looming, I introduced H.R. 3313, the Marriage Protection Act.

H.R. 3313 seeks to utilize the constitutional authority of Congress to limit the jurisdiction of the Federal Judiciary to hear cases which may arise as a result of the 1996 Defense of Marriage Act. The bill provides that, one, no Federal court will have jurisdiction to hear a case arising under DOMA's full faith and credit provision and, two, no Federal court will have appellate jurisdiction in a case arising under DOMA's definition of "marriage" and "spouse" for purposes of Federal benefits. In essence, the bill says that no Federal court will have the opportunity to suggest that DOMA's full faith and credit provision is, quote, unconstitutional, end quote.

Why may Congress do this? Simply because Article IV, Section 1 of the Constitution gives Congress explicit and exclusive authority to regulate full faith and credit relationships between the States. There is no need for the Federal courts to consider a question about Congress' authority when Congress' authority is so clearly expounded in the Constitution. But beyond that, Article I, Section 8 and Article III, Section 1 and 2 of the Constitution grant Congress explicit and exclusive authority to create the inferior Federal courts, regulate their jurisdiction and regulate the appellate jurisdiction of the Supreme Court.

With regard to the creation and regulation of, quote, tribunals inferior to the Supreme Court, end quote, known today as district courts and courts of appeals, the Constitution states in Article I Section 8, quote: The Congress shall have power to constitute tribunals inferior to the Supreme Court, end quote.

Further, Article I, Section 8 says, quote: The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution and the Government of the United States or any department or officer thereof, end quote.

Article III, Section 1 further stipulates that, quote, The judicial power of the United States shall be vested in such inferior courts as the Congress may from time to time ordain and establish, end quote. With regard to the regulation of the United States Supreme Court, the Constitution after first delineating the full range of cases the Federal Judiciary may consider and, second, delineating that very limited number of cases that the Supreme Court will have original jurisdiction, goes on to state in Article III Section 2, quote: In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and other such regulations as the Congress shall make, end quote.

And so, Mr. Chairman, this Committee is considering whether Congress should make a law that is necessary and proper for carrying into execution its constitutional power to regulate the inferior Federal courts' original and appellate jurisdiction and the Supreme Court's appellate jurisdiction concerning Congress' explicit and exclusive constitutional authority to regulate full faith and credit provisions between the States.

I ask should Congress do this and not can Congress do this, advisedly. It is obvious to anyone who actually reads the Constitution that Congress can do this. In other words, the question today is should Congress exercise its constitutional authority to stop the Federal courts from striking down the Federal Defense of Marriage Act.

The result of such a decision by the Federal courts would in effect invalidate the numerous State Defense of Marriage Acts. This would mean that the citizens of States such as Michigan, California, Virginia, North Carolina, Texas and Florida, who have their own statutes to define marriage as between one man and one woman would have to recognize the marriage licenses issued to homosexual couples by other States that require that practice. I believe the people of these States, as well as the people of the State of Indiana, should be able to defend and preserve the institution of marriage and that we today in this Committee should support them in their efforts.

That is why, Mr. Chairman, I ask today that my colleagues support H.R. 3313, the Marriage Protection Act, and yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman. I rise in some state of shock here this morning. I have heard of a lot of measures, more measures, amendments, bills, proposals, constitutional amendments than any Member on this Committee. And I would like to ask you, my friend, Chairman Sensenbrenner, what will you do with this bill proposed if it were to pass this Committee?

And I yield to the gentleman.

Chairman SENSENBRENNER. I would file a Committee report, and it would be up to the leadership to schedule it.

Mr. CONYERS. Okay. Now, I want to ask the author of this amendment, does he know of—has ever heard of or has there ever been any research brought to his attention that we would limit any application for appellate review to no review whatever? And I yield to the gentleman.

Mr. HOSTETTLER. The main body of research that I have done is to read the Constitution of the United States.

Mr. CONYERS. Well, I am glad you did that.

Mr. HOSTETTLER. Yield back.

Mr. CONYERS. Well, we have established then, my friend, two things, that, one, you could read and, two, that you have read the Constitution. But can you answer the question? Or you don't know what the question is. Okay. I am going to repeat it again. Now, look, tell me where you ever heard of no review of a matter being prevented, no review whatever in your life in American history?

I yield to the gentleman again.

Mr. HOSTETTLER. Actually, the question is false on its face in that there will be review, because in Article VI of the Constitution, the Constitution says, this Constitution and the laws of the United States shall be made pursuant 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, anything in the Constitution or laws of any State to the Constitution notwithstanding. And so there is review of this question on the State court level and there has been in the past many constitutional questions on the State court level.

Mr. WEINER. Would the gentleman yield to me for a question?

Mr. CONYERS. Yes.

Mr. WEINER. Just so I understand the sponsor, do you believe that *Marbury* v. *Madison* was wrongly decided?

Mr. HOSTETTLER. Do I believe that *Marbury* v. *Madison* was wrongly decided? Which part of *Marbury* v. *Madison*?

Mr. WEINER. The part of *Marbury* v. *Madison* that settled something that was nowhere in the Constitution is what if you have three branches Government who disagree about the interpretation of the law, who breaks the tie. And *Marbury* v. *Madison* ruled, frankly I am glad they did, that the Supreme Court and the courts of the land ultimately have the say. Do you believe that was wrongly decided?

Mr. HOSTETTLER. Will the gentleman yield?

Mr. WEINER. I am curious as to the question because it would help me understand what we are getting at here.

Chairman SENSENBRENNER. The time belongs to the gentleman from Michigan.

Mr. CONYERS. And I yield.

Mr. HOSTETTLER. Actually, there are several constitutional scholars; for example, Louis Fisher from the Congressional Research Service. I have a copy of his work on Congressional checks to the Judiciary that I can provide the gentleman.

Mr. WEINER. Would the gentleman from Michigan yield?

Mr. CONYERS. Of course.

Mr. WEINER. There is only one, one constitutional scholar whose view I am interested in now, and that is yours. Do you believe that *Marbury* v. *Madison* was wrongly decided? Just so I understand where you are coming from.

Mr. HOSTETTLER. I believe that part of the case was wrongly decided.

Mr. WEINER. Judicial review. Thank you. I yield back.

Mr. PENCE. Would the gentleman from Michigan yield?

Mr. NADLER. Would the gentleman yield?

Mr. CONYERS. Yes.

Mr. NADLER. I would ask the gentleman from Indiana one question. The gentleman says that if this bill were passed that the State courts could decide, could review peoples' claims.

Mr. HOSTETTLER. Yes.

Mr. NADLER. So in other words, we would have 50 different decisions on whether a given law was constitutional and in New Jersey it would be held constitutional and in Indiana it would be held unconstitutional under what this would do? Yes or no.

Mr. HOSTETTLER. If the gentleman will yield. This allows the States to determine——

Mr. NADLER. I asked you a different question. So the result of that would be, or would it not be that you would have a patchwork quilt and you would have 50 different decisions and in some States a Federal law would be unconstitutional and in other States it would be held constitutional because there would be no way to reconcile conflicting State court decisions? Yes or no.

Mr. HOSTETTLER. No.

Mr. NADLER. Well, why not?

Mr. HOSTETTLER. Because you are suggesting that all 50 States would——

Mr. NADLER. I am suggesting nothing of the sort.

Chairman SENSENBRENNER. The time of the gentleman from Michigan has expired.

Without objection, all Members' opening statements will appear in the record at this point.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

The only reason we are debating an unconstitutional and divisive proposal is because the President is in danger of losing his job and wants to detract attention from his Iraq failure and to bolster support among right-wing conservatives.

Just last week, the death toll of U.S.-led forces in Iraq reached 1,000. The 9/11 Commission found, contrary to President Bush's claims, that there was no relationship between Saddam Hussein and Al Qaeda. No weapons of mass destruction have been found in Iraq.

What did the President do about it? He followed the advice of Paul Weyrich, a conservative organizer, who said the President had based his entire campaign on Iraq, and the escalating violence there meant he needed to "change the subject" to win in November.

That is why we are here today talking about same sex marriage. The President and Republican leadership know that a constitutional amendment to ban same sex marriage has virtually no chance of passing in the House, and now they have pulled the old bait and switch. Instead of bringing up a constitutional amendment that would go down in flames, we are instead debating a bill that would strip federal court and Supreme Court review of the Defense of Marriage Act.

At first glance, its proponents seem to have forgotten that our laws need to be constitutional. We all know from the Constitution and *Marbury* v. *Madison* that it is the role of the federal courts and the Supreme Court to review federal law. Yet that is exactly what this bill prohibits, virtually asking to be overturned.

In some ways, this bill should not be a surprise because Republicans always try to remove federal courts from the process when courts might issue rulings contrary to right-wing beliefs. They did not like the Ten Commandments or Pledge of Allegiance decisions, so they introduced numerous bills to prevent federal courts from hearing cases on those two declarations. They also severely limited the ability of federal courts to issue writs of habeas corpus for state convictions.

But make no mistake about it, this bill is the height of hypocrisy. In 2003, they made it a federal offense for a doctor to comply with a woman's right to choose. In the 1980's, they clogged up federal courts with drug offenses that had been left to

the states. For at least a decade, they have been trying to move tort cases to the federal courts.

And no one can forget that it was the Republicans who ran up the steps to the Supreme Court in the winter of 2000 when they needed to secure a presidential election.

I urge my colleagues to vote "No" on this legislation.

Mr. NADLER. Mr. Chairman.

Chairman SENSENBRENNER. The Chair—are there amendments? The Chair——

Mr. NADLER. Mr. Chairman, I object. I want to read an opening statement.

Chairman SENSENBRENNER. Are there amendments? The Chair recognizes himself for purposes of offering an amendment in the nature of a substitute. The Clerk will report the amendment.

The CLERK. Amendment in the nature of a substitute to H.R. 3313 offered by Mr. Sensenbrenner. Strike all after the enacting clause and insert the following. Section 1, short title. This act may be cited as the "Marriage Protection Act of 2004."

Section 2, limitation of jurisdiction. (a) In general. Chapter 99 of title 28, United States Code, is amended by adding at the end the following: Subsection 1632, limitation on jurisdiction. No court created by act of Congress shall have any jurisdiction and the Supreme Court shall have no appellate jurisdiction to hear or decide any questions pertaining to the interpretation of or the validity under the Constitution of section 1738C, or this section.

(b) amendments to the table of sections. The table of sections at the beginning of chapter 99 of title 28, United States Code, is amended by adding at the end of the following new item. 1632 limitation on jurisdiction.

[The amendment in the nature of a substitute offered by Mr. Sensenbrenner follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3313 OFFERED BY MR. SENSENBRENNER

Strike all after the enacting clause and insert the following:

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the "Marriage Protection
3 Act of 2004".

4 **SEC. 2. LIMITATION ON JURISDICTION.**

5 (a) IN GENERAL.—Chapter 99 of title 28, United
6 States Code, is amended by adding at the end the fol-
7 lowing:

8 **"§ 1632. Limitation on jurisdiction**

9 "No court created by Act of Congress shall have any
10 jurisdiction, and the Supreme Court shall have no appel-
11 late jurisdiction, to hear or decide any question pertaining
12 to the interpretation of, or the validity under the Constitu-
13 tion of, section 1738C or this section.".

14 (b) AMENDMENTS TO THE TABLE OF SECTIONS.—
15 The table of sections at the beginning of chapter 99 of
16 title 28, United States Code, is amended by adding at the
17 end the following new item:

18 "1632. Limitation on jurisdiction.".

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes to explain the amendment. I offer this amendment in the nature of a substitute to focus this legislation in a way that will simply prevent Federal courts from striking down the provision of the Defense of Marriage Act that protects States from having to recognize same sex marriage licenses granted in other States.

When James Madison wrote the Constitution, I don't think his notion of federalism included the thought that a divided court in one State would set national policy. Legislation focused in this way eliminates the threat of inconsistent judgments that will affect marriage laws across State boundaries. It will also prevent Federal judges from taking away from the States their right, codified in DOMA to reject same sex marriage licenses issued elsewhere.

Any Member who wants to protect DOMA's provision preserving the States' prerogative to control marriage policy from invalidation by Federal judges should support this amendment in the nature of a substitute. The vast majority of Members of this Committee represent States that have passed laws that rely on the rights of States codified in DOMA to resist same sex marriage licenses issued out of State.

The threat posed to traditional marriage by a handful of Federal judges whose decision can have an impact across State boundaries has renewed concern over the abuse of power by Federal judges. A remedy to such abuses has long been considered to lie, among other places, in Congress' authority to limit Federal jurisdiction. The Constitution provides that the lower Federal courts are entirely creatures of Congress, as is the appellate jurisdiction of the Supreme Court, excluding only its very limited original jurisdiction over cases involving ambassadors and in cases in which States have legal claims against each other.

Limiting Federal court jurisdiction to avoid abuses is not a partisan issue. Senate minority leader Thomas Daschle of South Dakota supported legislation enacted during the last Congress that would deny all Federal courts jurisdiction over the procedures governing timber projects in order to expedite forest clearing. If limiting the jurisdiction of the Federal courts is good enough to protect trees, it also ought to be good enough to protect a State's marriage policy.

Furthermore, far from violating the separation of powers, as some have alleged, legislation that leaves State courts with jurisdiction to decide certain classes of cases would be an exercise of one of the very checks and balances provided for in the Constitution. No branch of the Federal Government can be entrusted with absolute power and certainly not a handful of tenured Federal judges who are appointed for life. The Constitution allows an exercise of judicial power, but it does not grant the Federal courts unchecked power to define the limits of its own power.

Integral to the American constitutional system is each branch of the Government's responsibility to use its powers to prevent overreaching by the other branches. This amendment in the nature of a substitute does just that, and I urge my colleagues to join me in supporting it.

I want to make a couple of other observations. First, marriage policy has traditionally been left to the States, and there are 50 different State family codes which include both marriage law and di-

vorce law. If the issue ends up being decided by judges, until the Supreme Court reaches a decision on a given issue, a judicial decision by the lower Federal courts is only binding within the district in which the district judge sits or the States in which an appellate judge has jurisdiction or an appellate court has jurisdiction over. So a lot of the decisions that have been made in the Federal courts on issues other than the marriage issue will have the type of crazy quilt application, and one that comes to mind is telecommunications policy and the application of the antitrust laws in the telecommunication policy.

Secondly, this amendment does not foreclose the right of anybody to petition the State courts who are bound by the Constitution to reach a determination. But then it would be a decision of the judicial power of the State to decide whether or not DOMA was constitutional as it applied to that State rather than having a Federal judge do it. So this simply defers to the States.

We have done if before on trees, and since the Judiciary Act of 1789, and I would urge support for this amendment in the nature of a substitute.

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Mr. Chairman, today we mark up legislation of clear unconstitutionality and even more dubious wisdom. Following four in a series of five hearings on the topic of same sex marriage, one would think that the possibility that somewhere a lesbian or gay couple might live out their years peacefully and happy were a greater threat to the future of the United States than al Qaeda, to which we have devoted less time in this Congress.

Today, however, the topic is a very serious one. The hysteria over the marriage question has brought us to the point of considering a bill that would strip the Federal courts of the jurisdiction to hear cases involving alleged violations of an individual's rights protected under the Constitution. These proposals are neither good law nor good policy. Past attempts to restrict court jurisdiction have followed many civil rights decisions, including the reapportionment cases.

Fortunately, cooler heads prevailed in Congress and the decisions that gave rise to these outlandish proposals are no longer controversial. Unless I am greatly mistaken no one in this room, not even Mr. Hostettler, would question the constitutional protection of one person, one vote.

No less a liberal icon than Barry Goldwater battled court stripping bills on school prayer, busing and abortion, which were the big issues in those days. He warned his colleagues that, quote, the frontal assault on the independence of the Federal courts is a dangerous blow to the foundations of the free society, close quote. It is still true today. I trust that decades from now these debates will find their way into the textbooks next to the segregationist backlash of the 1950's, the court packing plan of the 1930's and other attacks on our system of Government.

Our Committee has also received compelling testimony from a distinguished legal scholar called by the majority that this legislation is constitutionally suspect. Although Professor Redish has

taken the controversial position that Congress has almost unlimited power to modify court jurisdiction, he made clear that this power is not without limits. As he put it so well in his testimony, quote, To be sure, several other guarantees contained in the Constitution, due process, separation of powers and equal protection, impose limitations on the scope of congressional power. The due process clause of the fifth amendment requires that a neutral independent and competent judicial forum remain available in cases in which the liberty or property interests of an individual or entity are at stake. The constitutional directive of equal protection restricts congressional power to employ its power to restrict jurisdiction in an unconstitutionally discriminatory matter. And as the Supreme Court made clear in the Roemer case, when the motivation for legislation is to deprive a specific class of people, in this case, gays and lesbians, of their access to the courts, that is a violation of the equal protection clause.

Professor Redish also had some sound advice for Congress. Purely as a matter of policy I believe that Congress should begin with a very strong presumption against seeking to manipulate judicial decisions indirectly by selectively restricting Federal judicial authority. To exclude Federal judicial power to interpret or enforce substantive Federal law undermines the vitally important function performed by the Federal Judiciary in the American political system. The expertise and uniformity in interpretation of Federal law that is provided by the Federal Judiciary should generally not be undermined. Close quote.

If there is any word that describes this legislation it is discriminatory both in its purpose and its effect. We have had four hearings so far on the subject of same sex marriage. Any court reviewing this legislation will certainly look at what has been said in the legislative record. The record is an unabashed record of hostility to a particularly unpopular minority. This bill has only one purpose, to ensure that members of this group do not get their day in court to assert their rights.

Would we ever have suggested any other group in our society should be expelled from the Federal court system and left to wander every county courthouse in the country to try to vindicate their rights under the Federal Constitution? Are State courts an adequate forum to protect Federal constitutional rights? The majority does not think so when you are talking about the rights of big corporations in tort law, but when it comes to the rights of families and their children that is a different story.

Perhaps my colleagues have forgotten that between the Judiciary Act of 1789 and the present day we fought a civil war and added the 14th amendment to our Constitution. Our rights are federally guaranteed. That means that an independent Federal judicial forum must be provided to all citizens to get a fair hearing.

Mr. Chairman, it is our very system of Government and the constitutional checks and balances that are under attack by this bill. If the Congress by statute can prevent the Federal courts from applying the Constitution to any subject matter, then the protections of an independent Judiciary and the Bill of Rights will be no more than a puff of smoke. It will be unpopular minorities, whether religious minorities, political minorities, lesbians or gays or whoever, who will lose their rights.

With all the hysteria and carrying on about unelected judges, it is perhaps worthwhile to remember that those unelected judges are part of our system of Government and part of our system of checks and balances. It is they who the authors of the Constitution saw fit to designate with a key role to protect the rights of unpopular minorities. As Hamilton said in Federalist 78, quote——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. NADLER. I would ask unanimous consent for one additional minute.

Chairman SENSENBRENNER. Without objection.

Mr. NADLER. The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority such, for instance, as that it shall pass no bills of attainder, no ex post facto laws and the like. Limitations of this kind can be preserved and practiced no other way than through the mediums of the courts of justice, whose duty it must be to declare all acts contrary to the manifest standard of the Constitution void. Without this all reservations to particular rights or privileges would amount to nothing. Close quote.

Mr. Chairman, gay marriage doesn't threaten our future, but the evisceration of our Constitution and our Bill of Rights and the destruction of the ability of the courts to protect those rights and leaving the vindication and the protection of Federal constitutional rights up to 50 State courts which will render 50 different decisions does threaten our rights and our liberties under the Constitution.

We are playing with fire, Mr. Chairman, and that fire could destroy this Nation. I urge that we adopt—that we reject this dangerous nonsense. I thank you, Mr. Chairman. Yield back.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith.

Mr. SMITH. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, all Americans are entitled to a fair hearing before independent minded judges whose only allegiance is to the law. Too often we take for granted. But what should citizens do or their elected representatives when a few judges step out of bounds and try to change the rules of the game? Federal judges decide cases arising under the Constitution. However, over the last several years we have witnessed some judges wanting to determine social policy rather than interpret the Constitution. They seem to be legislators, not judges, promoters of a partisan agenda, not wise teachers relying on established law.

While judicial activism has existed since the founding of our Nation, it seems to have reached a crisis. Judges routinely overrule the will of the people and invent new rights and ignore traditional morality. Judges have redefined marriage, deemed the pledge of allegiance unconstitutional, outlawed religious practices and imposed their personal views on Americans.

Fortunately, there is a solution. The Constitution empowers Congress to say that some subjects are off limits to Federal courts. The founders of our Nation foresaw the dangers of an unbridled Judici-

ary and provided a way for Congress to put limits on the Judiciary that often appears to have none.

Thomas Jefferson lamented that, quote, the germ of dissolution of our Federal Government is in the Constitution of the Federal Judiciary, working like gravity by day and by night, gaining a little today and a little tomorrow and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped.

Responding to the argument that Federal judges are the final interpreters of the Constitution, Jefferson wrote, quote, you seem to consider the Federal judges as the ultimate arbiters of all constitutional questions. A very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy, end quote.

The constitutional authority authorizing Congress to restrain Federal courts has been used before and should be used again. Legislation being considered today preserves the right of State courts to consider the constitutionality of the full faith and credit portion of the Defense of Marriage Act, DOMA. It prevents Federal judges from ordering States to accept another State's domestic relations policy, an area of the law historically under the jurisdiction of the States, not the Federal Government.

While the bill does not dictate any conclusions about DOMA, the vast majority of States happen to agree with DOMA. Forty-four States have enacted laws that provide that marriage shall consist only of the union of a man and a woman. The 44 States include 86 percent of the U.S. population. We need to protect the right of the voters of these States to define marriage as they see it. This right is now threatened by activist judges who would overturn these State policies. When Federal judges step out of line, Congress has the responsibility to drop a red flag. On behalf of the American people, we should vote for this legislation because it rightfully restrains Federal judges who can in fact threaten our democracy.

Thank you, Mr. Chairman. I will yield back.

Mr. CONYERS. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Mr. Chairman, I would ask unanimous consent to speak out of order for 1 minute.

Chairman SENSENBRENNER. Without objection.

Mr. CONYERS. Today, ladies and gentlemen of the Committee, Carolyn Donnelly is going to be shortly leaving our staff on the Judiciary, and I wanted to pay a tribute to her 25-year career. Carolyn Donnelly. Would you raise your hand? Carolyn Donnelly. Thank you so much.

She has been a constant calm person with a sense of humor and good cheer that has marked her whole career. I and I don't think anyone have ever heard her raise her voice. She has always been on hand to help us. She was with some of us on the Government Operations Committee and is now completing her Federal career on the Committee on the Judiciary. We are real proud of her. She does a lot of volunteer work at her church, St. Patrick's Episcopal, and works in such programs as So Others Might Eat and the homeless programs, and so as you can see, Caroline, all of us on this Committee and the staff join in wishing you all the best as you leave the Hill.

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. CONYERS. I certainly will.

Chairman SENSENBRENNER. The Chair would like to echo the comment that has been made by the gentleman from Michigan. Caroline, you have done a very good job in serving all of the Members of the Committee, not just the minority party Members of the Committee, and we all wish you Godspeed and a happy and healthy retirement.

Mr. CONYERS. Mr. Chairman.

Ms. BALDWIN. Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from Wisconsin.

Ms. BALDWIN. Mr. Chairman, I move to strike the requisite number of words.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. BALDWIN. Mr. Chairman, today this Committee is poised to mark up legislation that if it were to become law could do grave damage. I strongly oppose H.R. 3313 and this amendment in the nature of a substitute and would urge the Members in the majority to reconsider this extreme approach to addressing the issue of same sex marriage and their concerns about so-called judicial activism. The consequences of enacting H.R. 3313 far exceed the stated objectives of the majority and would seriously undermine the faith of the American people in this Congress, in the courts, and in the principle of separation of powers and the notion of checks and balances.

When writing the Constitution the founders wisely decided that the best way to secure our freedom and liberties was to establish three coequal branches of Government, the Congress, the Executive and the Supreme Court, and these three branches of Government have different but overlapping authorities to ensure that each branch is subject to checks and balances. Not only will there be times that they will be in disagreement about a particular issue or law, the structure of the Constitution makes these conflicts inevitable.

As the Chairman knows well, the University of Wisconsin is dedicated to the proposition that it is through, and I quote, the continual and fearless shifting and winnowing by which alone truth can be found. In the context of our laws, this sifting and winnowing occurs at many points in the process. In Congress we hold hearings, markups, floor votes and amendments, conference committees, and we issue reports. The White House proposes legislation, engages in public debates, signs and vetoes legislation. The courts interpret, evaluate, settle disputes and invalidate laws based on our bedrock principles as enshrined in our Constitution.

We all know the expression about liking laws and liking sausages and not watching either one get made. It isn't always a pretty process. But it is through the process which includes the Court that we sift and winnow our laws to improve them and ensure that they are fair and just for all Americans. It is a terrible mistake to try to strip one branch of the Government from its involvement in evaluating particular laws. This is particularly true when considering the courts, whose constitutional and historic role is to defend our liberties.

Fortunately for our citizens, it is my belief that H.R. 3313 and this amendment in the nature of a substitute is unconstitutional,

and if it ever becomes law I believe it will be ultimately invalidated.

Mr. Chairman, during the Constitution Subcommittee's hearing on this issue on June 24, two witnesses were present, both law professors, one asked in by the majority, one asked to appear by the minority, and they actually addressed the question that the gentleman, the author of the underlying bill, raised in his opening testimony. They addressed the question "can Congress do this" and they addressed the question "should Congress do this". And there was disagreement between these two expert witnesses, these constitutional scholars. Both—they reached different conclusions about whether Congress could do this, although even the majority witness said that power was not without limitations and they could not preclude access to the courts by a group of American citizens. But the question of should Congress do that, they answered with unanimity. Even the majority witness, Professor Martin Redish, said, and I quote his testimony because it was quite compelling: I firmly believe that Congress should choose to exercise this power virtually never.

I think that we should take their counsel as we mark up this legislation, and I urge on my fellow Committee Members that this legislation is unnecessary, unconstitutional and unwise. It should be rejected.

I yield back.

Mr. CHABOT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Ohio, the Chairman of the Subcommittee on the Constitution.

Mr. CHABOT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. I don't intend to use the entire 5 minutes but I think this is a very important hearing, and I would just note that the Chairman of this Committee and I early on in this process set up a process by which we would have a series of hearings. We have held those hearings. We have invited legal experts from all over the country on both sides of the issue to come and testify. We have heard extensive testimony. Members of the Committee have had the opportunity on both sides to ask probing questions and get answers, answers back.

This is not something that we have just acted in a knee jerk fashion. It is not something we really sought. It is something that was thrust upon us principally due to the actions of a few rogue players around the country and a few, in my view, rogue judges who oftentimes on very narrow votes have chosen to go against the policy which previously was in effect within those particular States.

As I say, we held four hearings on this issue, and I would commend Mr. Hostettler for proposing this particular piece of legislation. I know he has given a tremendous amount of thought to it, as we all have, and the idea that this is something new, this so-called court stripping or reducing the jurisdiction of courts, the fact that that is unprecedented or it is in some way unconstitutional or contrary to things that have been done here recently is just not accurate. It has been done many times throughout time and, as the Chairman mentioned, most recently and perhaps most notably by the gentleman from South Dakota, Senator Daschle.

Now, that had to do with a bill relative to timber and trees and that sort of thing, but I think the Chairman is exactly right. If we are going to do it to protect trees, we certainly ought to do it to protect what has been the cornerstone of our society, and that is families in this country. And it is the families that are under attack and need, I believe, to be protected.

Now, I don't think we ought to change the marriage policy in this country. I think it should remain marriages between a man and a woman. But there are some that think it ought to be changed. The question that we are facing is if we are going to change that policy that has been the cornerstone of society and has been instrumental in how we raise kids in this country, should that be—who should make that decision? And I think most people think that this ought to be made by the will of the people. And how is the will of the people reflected in this country? It is reflected through their elected representatives.

At the local level, that is generally done in State legislatures. Nationally, it is done right here by the Congress of the United States. That is who ought to make that policy. It shouldn't be done on a 4 to 3 vote from Massachusetts or any other State. And the concern has been, and that is why some have proposed a constitutional amendment. That is something that is still being considered. That is not before us today but something that is being considered, a constitutional amendment, and the concern that some people have is that other States, the DOMA which we passed on a huge vote, bipartisan vote, 346 or something to 65, I believe, in the House, and 85 to I believe 14 in the Senate, one of those 14 happened to be Senator Kerry, who voted against that in the Senate. But that is over there. In both Houses it was overwhelming, and the concern is that that policy, which has worked for some time is now under attack and may well come from Massachusetts to my State of Ohio, or to Bill Jenkins here from Tennessee or to the Chairman up in Wisconsin or to other folks around the country, due to full faith and credit.

Now, Mr. Hostettler has crafted, I think, a very good solution here, at least in the short term. It may not hold long term. We may ultimately, even later this year a constitutional amendment may be something that we may be considering, but I think this is a good piece of legislation.

I would again commend the gentleman from Indiana for proposing this. We have done it before, and I could give you a whole range of examples but my time is about ready to run out. But again the most recent example was Senator Daschle. Senator Byrd proposed this on a whole range of issues some time ago. And so this is not unprecedented.

I would urge my colleagues to support this legislation. Yield back.

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas, Ms. Jackson Lee, seek recognition.

Ms. JACKSON LEE. To strike the requisite number of words.

Chairman SENSENBRENNER. The gentlewoman's recognized for 5 minutes.

Ms. JACKSON LEE. I thank the Chairman very much. To my colleagues and to the Chairman and Ranking Member, I think we have tried most often in this Committee room, though sometimes

we have not been successful, to respect the differing political and social, religious and human differences that we may bring to in place. We have often said that this Committee room is also the protector of the Constitution and the Nation as we know it. I don't know what to say about this legislation because I am somewhat taken aback by the quietness with which it has been defended and the lack of understanding that this literally undermines the Government as we know it.

I, in my skin, have not often been happy with the decisions of the Supreme Court or the Federal court system. In fact, I remember sitting in the United States Supreme Court and listening to the decision of the 2000 election. I couldn't have been more disappointed, more distraught, more taken aback, more frightened for this Nation, more concerned for my constituents, so much so that we showed up, a number of us, on January 6, 2001, again using a constitutionally provided provision or process under the Electoral College to challenge that election. Today, as I speak of it, I still feel a sense of panic and concern, frustration with the process and, yes, my country. But I will always hold to the fact that we have a system of Government, and there were times that in my skin, and my plight in this Nation, my second class citizenship, I could only look to the courts for relief.

What this amendment does, this legislation does, and I respect the right of anyone's religious position. I have just spoken to a number of ministers in my community and I know that they may have their positions on a number of issues. But Mr. Chairman, and Committee Members and Ranking Member, Article III specifically notes the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior.

Section 2 says the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States. How can we sit here and literally undermine the structure of Government that holds us together? It keeps us from being an Iraq, an Afghanistan, a Sudan, and any other despot place around the world.

I, too, have my position about the rights of individuals to be able to choose their partner and to engage in relationships. That is not the point. The point is that you have an amendment to the very nature of Government. That means that what we can spend our time in this Committee over the next couple of years is to frankly continue to amend by statute the powers of the Supreme Court and of the Article III courts.

I don't like the fact that affirmative action has not been fully and completely affirmed as I would like it by the Supreme Court, therefore I want them to have no jurisdiction. I am not comfortable by the continuous throwing out of civil rights cases in our Federal court system, therefore I should give them no jurisdiction over equal employment opportunity laws and any other laws dealing with civil rights and affirmative action and others.

I am not pleased with the immigration system in this country and the constant deportation and the lack of respect for those who have come to this country, albeit they may not have come in the

right way, but they seek only to come here to be able to be part of this wonderful democracy, therefore I should amend the Federal courts totally out of the immigration system in its totality.

I do not like the enemy combatant, which we don't, and therefore I should make sure that our courts have no rights and privileges as relates to terror cases.

I do not like the Court's interpretation on first amendment, and therefore I should not have that.

Mr. Chairman, I would simply say that this amendment is more than undermining. It is absolutely dangerous.

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

Ms. JACKSON LEE. And I would ask my colleagues to defeat it.

Chairman SENSENBRENNER. For what purpose does the gentleman from Alabama, Mr. Bachus, seek recognition?

Mr. BACHUS. Mr. Chairman, there has been much said

about——

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BACHUS. Thank you. There has been much said about the rights of the Supreme Court and the Federal courts to be the final interpreter of what the law is, what is constitutional and what is not, and I would like to go back and quote what Thomas Jefferson and Abraham Lincoln said about this thoughts. Here is what Thomas Jefferson said about Federal judges being the final interpreters of the Constitution. He was responding to someone that made that statement.

You seem to consider that Federal judges are the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps.

The Constitution has erected no such single tribunal knowing that to whatever hand is confided with the corruption of time and party its members become despots.

He said this: If Federal judges become the final arbiters, then indeed our Constitution is a complete act of suicide.

Here is what Abraham Lincoln had to say. Abraham Lincoln said this in his first inaugural address: The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of an eminent tribunal.

It is clear that both Jefferson and Abraham Lincoln had no such thought that Federal judges employed for life should be the final interpreters of the law. In fact, Thomas Jefferson actually said that the fact that they are appointed for life is one reason that they should not be the final interpreters of what the law is.

And I yield back the balance of my time.

Chairman SENSENBRENNER. What purpose does the gentleman from North Carolina seeks recognition?

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman, and Members. If I might digress before I make the comments about what is before us today just to acknowledge the presence of my daughter-in-law in the audience, whom I have met before, but she brought with her her parents and her brother, whom I have never met before today.

So this is a very, very special day for me because I am getting the opportunity to meet my daughter in-law's parents and family for the first time. I assure you that they did not come to hear the debate on the same sex marriage issue or on the court stripping bill that is before us. It is happenstance that they are here today, but it is kind of unfortunate that they would be here to hear me for the first time in this legislative setting and meet me for the first time in a legislative setting having to address a bill such as this.

I am distressed by what this bill proposes to do because it is perhaps the ultimate example of legislating by results or trying to achieve a result through legislation that has become characteristic of this Committee over the last several years. We don't seem to have much principle about our whole Federal system and how it is formulated and set up and how it was envisioned by our Founding Fathers. We don't seem to have much appreciation anymore for the notion of States rights. We don't seem to have any appreciation anymore for the separation of powers. We simply want the result that we would like to have from whatever level of Government, whatever court decides it. If it gives us the result that we are looking for, then we seem to be happy and we don't care about what consequences that may have for our whole system of federalism, our Judiciary, the separation of powers or any of that, and this seems to me to be the ultimate example of that.

Take away the power of the Supreme Court to decide what due process is, what equal protection is, what—well, who then decides that? Fifty different State judiciaries. Maybe we should just do away with the whole United States and divide ourselves back into 50 different States. There were some powers that were given to the Federal Government and to our Judiciary in the founding documents that this bill, I think, substantially undermines, and I think it is unfortunate that we are considering this today. It is yet another example that we don't really believe in the principles that the Constitution was founded upon. If somebody puts their finger up in the wind and decides that the political winds may be blowing one way or another, we are willing to do whatever is necessary to go with that political wind and I think that is unfortunate.

I am just happy that there were people of principle standing up for the Federal Judiciary when it was trying to do the right things during the civil rights movement.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. WATT. And I appreciate the opportunity to address this, and I will yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Pence.

Mr. PENCE. Move to strike the requisite number of words, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. PENCE. Mr. Chairman, I am delighted to be here today. I am a strong supporter of the Marriage Protection Act of 2003. Appreciate your leadership and the visionary leadership of my colleague, Mr. Hostettler, from Indiana. I love being on this Committee because I love the Constitution, I love debate, and I listen to my colleagues, who are men much smarter than me and much more articulate. But I get lost, Mr. Chairman, when I hear words like what we are doing today is undermining the structure of Government. Or that we are engaging in, and I am quoting now, an attack on our system of Government. And that we are threatening grave damage to the intentions of our founders.

Well, I am looking at Article III, Section 2, Clause 2 of the United States Constitution, as proof 1789, and it reads, and I quote: 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.

Now, I heard a quote from some expert that Congress should never use that authority, or almost never I think was the reference. And I accept the opinion. But I am quoting fact, Mr. Chairman. The Constitution of the United States, which apparently is the form of Government that we are talking here, that we—again the quote was undermining our structure of Government—says that Congress has in this power to set the jurisdiction of the court. In fact, Abraham Lincoln in the aftermath of I think the 1858 Dred Scott case, whereby a 5-4 decision the United States Supreme Court said that slavery was the supreme law of the land in the new territories, Abraham Lincoln stood in this city in his first inaugural address and he took on not specifically Mr. Weiner's assertion because neither he nor I were born then, Mr. Weiner's assertion that the Court had the exclusive right to decide matters upon which the Constitution was to be decided as to the whole people.

Mr. Weiner said that was the assertion of *Marbury* v. *Madison*. Abraham Lincoln stood in this city on the steps of the Capitol across the street and he disagreed with that. He looked at the immorality of a decision that said people of African descent were not entitled to rights under the Constitution of the United States and he said, quote: I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court. And he went on to say that such decisions in private matters are certainly appropriate, but as Mr. Bachus just quoted, Abraham Lincoln said in his first inaugural address, referring to the Dred Scott case, the decision by the U.S. Supreme Court to codify slavery in the new territories. Abraham Lincoln said the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is irrevocably fixed by decisions of the court, the people will have ceased to be their own rulers, having to that extent practically resigned their Government to the hands of an eminent tribunal. And then he went on to say apropos to our discussion today: Nor is there in this view any assault upon the courts or judges. That is my reading of history.

What Article III says specifically, Mr. Chairman, what our 16th President of the United States said when he courageously led our Nation away from the moral horror of slavery, I mean it seems to

me that although I would never attribute this to my—any of my distinguished colleagues, that there may well have been some people alive in 1859 and 1860, and I am sure I could find it in the historical record, who held the view the Supreme Court was the final decider on questions pertaining to the Constitution and President Lincoln ought to just shut up, and so ought the Congress ought to shut up on the question of whether or not people of African descent on this continent should have ever been afforded constitutional rights. And thank God he didn't, and thank God this Congress didn't.

The truth is, Mr. Chairman, that we are here to defend and uphold the Constitution. We are here to exercise——

Ms. JACKSON LEE. Will the gentleman yield?

Mr. PENCE. There is plenty of time later. We are here to exercise the authority given to this Congress under the Constitution——

Mr. NADLER. Will the gentleman yield for a question? Would the gentleman yield?

Mr. PENCE. I am about done. I will yield to Mr. Nadler.

Mr. NADLER. Thank you.

I would simply point out that the solution to the Dred Scott decision was the 13th and 14th amendments to the Constitution of the United States.

Chairman SENSENBRENNER. The gentleman from Indiana's time has expired.

Mr. PENCE. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Are there any second degree amendments to the amendment in the nature of a substitute?

The gentlewoman from Wisconsin, Ms. Baldwin.

Ms. BALDWIN. Mr. Chairman, I have an amendment to the amendment in the nature of a substitute at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 3313 offered by Ms. Baldwin.

Page one——

Ms. BALDWIN. Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection, so ordered. The gentlewoman is recognized for 5 minutes.

[The amendment to the amendment in the nature of a substitute offered by Ms. Baldwin follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3313 OFFERED BY MS. BALDWIN

Page 1, line 13, insert the following after the first period: "Nothing in this section shall abridge the jurisdiction of a court created by Act of Congress or the Supreme Court to hear or determine any question pertaining to the interpretation of the Due Process Clause of the Fifth Amendment to the Constitution, the Due Process Clause of the Fourteenth Amendment to the Constitution, or the Equal Protection Clause of section 1 of the Fourteenth Amendment to the Constitution.".

Ms. BALDWIN. Mr. Chairman, my amendment would narrow this bill before us so the Supreme Court and inferior Federal courts would retain jurisdiction for challenges to the Defense of Marriage Act based on fundamental constitutional rights. The amendment would allow the Federal court to consider challenges to the Defense of Marriage Act, otherwise know as DOMA, involving due process and equal protection clauses embodied in the 5th and 14th amendments.

Mr. Chairman, I believe that this legislation, the underlying legislation, is unnecessary, unconstitutional, and unwise. I can do nothing through amendment to make it necessary or to make it wise, but I can attempt through amendment to repair some of its constitutional defects in order to defend the rights of American citizens. This amendment will help to achieve that.

During the Constitution Subcommittee hearing on June 24, Professor Michael Gerhardt from the William & Mary Law School testified that H.R. 3313 would run afoul of the equal protection portion of the due process clause of the fifth amendment because the bill would fail the rational basis test, particularly in light of the court's decision in the *Roemer* v. *Evans* case, decided in 1996, in which they invalidated Colorado's anti-gay referendum. In *Roemer*,

the court states that "a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the Government is itself a denial of equal protection."

Mr. Gerhardt also testified that the bill fails the fifth amendment due process guarantee of procedural fairness by denying a Federal forum to litigants. He testified that "excluding all Federal jurisdiction with respect to some Federal law forces litigants into State courts which are often thought to be hostile or unsympathetic to Federal interests."

Professor Martin H. Redish of Northwestern University, a majority witness, also acknowledges the limitations on Congress' authority to limit court jurisdiction. He stated that "Congress quite clearly may not revoke or confine Federal jurisdiction in a discriminatory manner."

The equal protection clause necessarily limits our power to sideline Federal courts. Congress cannot remove the Federal courts without ensuring that another neutral forum be available for an American to seek redress. Mr. Chairman, my amendment will remedy some of the serious failures with this legislation. If the majority believes in due process and if the majority believes in equal protection, which I hope and believe the majority does, you should agree to this amendment.

Please do not turn your backs on these two fundamental principles, and please remember it is our Federal courts that have been the venue and catalyst for helping our country to better realize Thomas Jefferson's words that all men, and I add, all women, are created equal.

Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. Mr. Chabot.

Mr. CHABOT. Mr. Chairman, I rise in opposition to this amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CHABOT. Mr. Chairman, this guts the bill and is totally unacceptable. This gutting amendment should be rejected because it would allow Federal courts themselves to strike down provisions aimed at limiting their own jurisdiction. It makes no sense at all. You are taking away a particular area of jurisdiction from the Federal courts and bringing them right back in. It is confusing and unnecessary and does not make any sense.

Lord Acton once stated that "power tends to corrupt, and absolute power corrupts absolutely." no branch of the Government can be entrusted with absolute power; certainly not a handful of tenured Federal judges appointed for life. Those same judges should not be allowed to judge the extent of their own authority.

Congress' exercise of its authority to remove classes of cases from Federal court jurisdiction does not transfer power from the Federal judiciary to Congress; rather, it transfers power from the Federal judiciary to the State judiciary.

Congress' exercise of its authority to remove classes of cases from Federal court jurisdiction also does not give Congress the power to decide the outcome of those cases. That decisional authority would rest with the State courts. There seems to be, again, kind of a continuing misunderstanding that there would be no review. There will be a review. The review would be at the State level. The State

courts are very well equipped to handle all kinds of decisions, including this particular type of issue. Again, this guts the bill. It is totally unnecessary and I strongly encourage my colleagues to oppose it.

Chairman SENSENBRENNER. Mr. Schiff.

Mr. SCHIFF. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. Mr. Chairman, this is now at least the fifth hearing we have had on the subject of gay marriage. I said during the fourth hearing, admittedly somewhat facetiously, that I did not think that was enough, and that you can never have too many hearings on gay marriage.

But, in fact, you can have too many hearings on one issue, particularly when it is to the exclusion of all other issues: when it excludes our ability to have a hearing on whether a Medicare actuary was threatened with being fired for disclosing to Congress the cost of the Medicare bill; whether a CIA agent was outed because her husband critiqued the Administration's use of a claim about seeking uranium from Niger; or even issues more particular to this Committee, whether the Administration should have the power to detain Americans as enemy combatants without giving them access to counsel or judicial review. We have not had time for those hearings.

The irony of this fifth hearing is that we are abdicating our responsibility to place any check on the executive branch of Government in favor of an assault on the judicial branch of Government.

Another reason why we can have too many hearings on a subject is evidently we are not listening to the witnesses we have called in these hearing. The DOMA panel testified unanimously, each of the four witnesses, they all felt DOMA was constitutional and would be upheld. If we listen to the testimony of the witnesses called in the Subcommittee, you would have to accept that this is probably unnecessary and unwise since the very law that the Committee is concerned about, its own witnesses have said unanimously I believe, is constitutional and likely to be upheld.

But instead, we now move to strip the court of jurisdiction over an issue which the experts believe will be upheld because of a chance that it will not be upheld in the Federal court. So what are we going to do? We are going to give that jurisdiction to State courts.

Then I go to one of the other panels we had where Mrs. Schlafly testified in favor of taking this away from the Federal courts and giving it to the State courts, to which I asked her, and I ask my colleagues on this panel, do we really want to take this issue away from the United States Supreme Court and give it to the Massachusetts Supreme Court? Or are we going to say we will give this jurisdiction only to certain State courts of our determination; and other State courts, we will not let them decide at all.

Indeed, the two experts who testified, as opposed to the two advocates on the court-stripping panel, both said that we ought to be very, very circumspect about ever exercising this power to remove the jurisdiction of the Federal courts merely because we anticipate we might not like the result of their exercise of that jurisdiction.

In fact, just looking at some of the bills introduced, we have great reason for the caution expressed by those experts. We have one bill, one bill which would remove Federal court jurisdiction over any policies, laws, or regulations concerning the free exercise or the establishment of religion, or the right of privacy or the right to marry, and should any Federal judge take up any issue involving that, the free exercise or establishment of religion, he is subject to impeachment under this bill.

We have another proposal by another of our colleagues to remove jurisdiction of the courts over the Ten Commandments, another over the Pledge of Allegiance, yet another bill to remove jurisdiction of the Federal courts over any issue affecting the acknowledgement of God as the sovereign source of law, liberty, and Government.

Again, the penalty for a judge who inquires or exercises jurisdiction there is impeachment, removal from office. Indeed, I asked one of the other witnesses on the court-stripping panel, our former colleague, Mr. Dannemeyer, why don't we just simply remove jurisdiction of the Federal courts over the entire first amendment and be done with it?

Does anybody on this Committee believe we can undermine the courts without belittling the Congress itself?

Does anyone believe we can force the court to look at the transient wishes of the Congress rather than the Constitution and not have it come back to undermine this very institution we serve in?

If it is the first amendment we remove now, when will it be the second amendment we remove from the jurisdiction of the courts?

Mr. CONYERS. Could the gentleman yield?

Mr. SCHIFF. Yes.

Mr. CONYERS. Did Mr. Dannemeyer want to remove the jurisdiction of the first amendment when you asked him that question?

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Two of the most important rights enshrined in our Constitution are the rights to due process and to equal protection under the law. Those rights have been critical to protecting minorities against discrimination. Those rights have been critical to preserving every person's right to be heard and for decisions to be made in a consistent, nonarbitrary manner.

Unfortunately, this bill—as drafted—would disallow anyone from protecting those rights in court, if they believe those rights have been violated by the Defense of Marriage Act. For this reason, and other reasons, this statute is itself unconstitutional. The Congress cannot pass a statute which essentially invalidates constitutional rights by rendering them unenforceable. A right without any legal recourse is no right at all.

The Fourteenth Amendment to the United States Constitution says that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Which part of these essential freedoms does the Majority disagree with?

Which part should be unenforceable by any United States Court?

When we were sworn into office, we all took an oath to "protect and defend the Constitution of the United States against all enemies, foreign and domestic." Make no mistake about it: if you vote against this amendment, you are voting against one of the most vital and critical provisions in our Constitution.

Mr. SCHIFF. He was not prepared to go quite that far, and I asked him whether we should merely enumerate within the first amendment the series of issues that should be removed from the court's jurisdiction, and I think he was amenable to that. But in the end I think we get to what John Marshall warned of when he said that "the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hotstettler.

Mr. HOSTETTLER. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Mr. Chairman, I rise in opposition to the amendment and wish to refocus the discussion here on the constitutional provisions that we are actually talking about, and that is the constitutional provision in Article 4, section 1, that allows Congress to regulate the full faith and credit provisions between the States. It does not allow the courts to do it. It does not allow the President to do it. It says that Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be approved, and the effect thereof. Congress and Congress only. And we did that in the Defense of Marriage Act.

If you believe that the Constitution allows Congress to do that and that Congress has done that, then the second question is do you find constitutional authority to regulate the Federal courts? This so-called independent court, that I would suggest to my colleagues that I don't see the modifier of independence in any discussion of the courts in the Constitution. In fact, at virtually every turn, the Congress is given the authority to check the courts. Also in Article 1, section 8, in Article 3, section 1 and 2. And then with regard to full faith and credit, we can likewise do it.

If we can refocus our attention on what the Constitution actually says, we will find that in fact we can do this. If the gentlewoman would like to deal with the due process clause of the 14th amendment, and the equal protection clause of the 14th amendment, then the 14th amendment itself guarantees that Congress can do that, in that the 14th amendment says in section 5 that Congress shall have power to enforce by appropriate legislation the provisions of this article. She has the power to do that in a bill that she can introduce, but the simple fact of the matter is we are talking about explicit and exclusive authority of the Congress. There is no need to hand over authority to the judiciary to judge on matters where the Constitution grants explicit and exclusive authority to the Congress.

Mr. Chairman, I yield back the balance of my time. I ask my colleagues to defeat the amendment.

Chairman SENSENBRENNER. Mr. Weiner.

Mr. WEINER. Mr. Chairman, first I think this whole debate must be very dispiriting to anybody who supported DOMA. If you read the debate on the Defense of Marriage Act, there was a rather spirited discussion about whether or not DOMA would withstand constitutional muster. Some of the people who argued most fiercely at the time that yes it would, it would, it would, are now obviously

retreating from that position; because if you believe it is in the Constitution, there is no reason to court strip or court shop or court disengage at all.

In fact, the Chairman in some of his remarks leading up to this hearing, I believe, has taken the intellectually consistent position, although it may change with this vote, that hey, we were concerned about one court in one State dictating to another; therefore, we passed a law stating congressional supremacy in the issue, saying you do not have to acknowledge and recognize that law. That was DOMA. DOMA is the law of the land. Why the panic? You obviously believe that DOMA was so badly flawed that many of the opponents of the law at the time were right, that it is constitutionally flawed.

Finally, I think we are having this debate here in the Judiciary Committee 1 year late for the 200th anniversary of *Marbury* v. *Madison*. This is an excellent Constitutional Law 101 discussion about a fundamental blind spot, perhaps, in the Constitution of the United States, the document we revere. Nowhere did it say, anywhere does it say that courts have the right to strike down an act of Congress. It does not say that anywhere. You are exactly right. Well, in 1803 in what I think was a brilliantly reasoned case, which frankly I think some of the meshuggahs on the Supreme Court do not contest, even they do not say, even those folks who are so self-loathing about the courts that even they do not say that *Marbury* v. *Madison* was wrongly decided. There is an acceptance in this country that we are going to allow the courts to resolve these conflicts. They do not do it often. As a matter of fact, I think after *Marbury* v. *Madison* it went 50 years without them doing it again, 50 years without them striking down another congressional act as unconstitutional.

Finally, let me just clarify something else. We say this is done all of the time. It is not done all of the time. There are instances in the law where people say administrative proceedings and administrative tribunals cannot act on this with that provision. That was the Daschle case and the Byrd case. But nowhere does it say there isn't judicial review. Nowhere. You find me a case that said there is no access to the courts for someone who wants to challenge the interpretation of this law. That is not what happens.

Sure, I don't have a problem with it going the other way as well, saying some cases like in the McCain-Feingold bill or the Shays-Meehan bill, we say go straight to the Supreme Court. I do not have a problem with that. But the fundamental premise of what we do around here is that someone is going to mediate these disputes.

Mr. CONYERS. Would the gentleman yield for a question?

Mr. WEINER. I certainly will.

Mr. CONYERS. Can you explain to me what a meshuggah is, please?

Chairman SENSENBRENNER. And would you please spell that so the court reporter gets it right the first time?

Mr. WEINER. Mr. Chairman, I have been reminded under the rules of the House, English is the official language of our proceedings, so I will withdraw the use of that word.

Chairman SENSENBRENNER. Without objection, the word is stricken.

Mr. WEINER. Let me just conclude by saying this is an interesting discussion for someone like me, one of the few Members of this Committee who is not an attorney general. It is very interesting. I get to say things like *Marbury* v. *Madison*, which is not something I usually get to do, but this is a little surreal. We are all beating our chest, and the gentleman from Indiana saying we are in charge. No. We pass laws and then we give it to the Supreme Court. Even when they screw things up like they did in *Gore* v. *Bush*, we still stick to it. We say things have to go on. There has to be some arbiter of these decisions, and every American, every American, whether you believe what they do or not, has a right to the courts. That is a fundamental premise of our system of Government. And to say well, we are not going to do it in this or that case ignores the well-reasoned case of *Marbury* v. *Madison*.

At the end of day, if you remember, it was a victory for Republicans. It was a victory for Republicans because they actually ruled in favor of the Republican position. So I would urge my colleagues to keep in mind that this is not a new concept.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. Feeney.

Mr. FEENEY. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. FEENEY. Mr. Chairman, people paying close attention to this debate are getting lost in some of the sophisms that are going on. It is a pretty simple bill that we are passing, and the amendment seeks essentially to gut the bill. The proponents of the amendment and the people who oppose our determination to try to defend marriage from the Massachusetts Supreme Court basically suggest something that I find bizarre, and that is that which the Constitution gives to the Congress, Article 3, section 1, Congress cannot later modify or subtract from or eliminate.

I find that sort of an absurd premise to base their argument on. I will tell you that from the very first act involving the judiciary, Congress engaged in limiting some of the court's jurisdiction. I will tell you that in Federalist 80, Alexander Hamilton, as he tried to convince Americans to support and ratify the Constitution, said at times Federal court jurisdiction would become out of line and he suggested that would not be a problem because "the national legislature will have ample authority to make such exceptions and prescribe such regulations as will be calculated to obviate or remove these in conveniences."

Later, in Federalist 81, Hamilton wrote that legislature could make such exceptions and regulations as the national legislature may prescribe. These are very important. These are the type of things that Senator Daschle engaged in in protesting forests and wildlife in his area.

What we are trying to do here today is very simple. We are trying to protect the people of 49 States from four judges' redefinition of marriage on the Massachusetts Supreme Court. We are trying to ensure they cannot impose some new definition of marriage on the other 49 States.

Article 4 of our Constitution guarantees all of us a republican, small "r," form of government, meaning you as citizens get to vote

for the people that will make your laws. None of us voted for the four characters that redefined marriage in Massachusetts.

Now, if you want to live under philosopher kings making your laws for you, if you believe oligarchy is a great form of government, that is a different position. Plato, for example, in The Republic suggested that is a great way to be governed; but it is not our form of Government, and thank God it is not.

I will say that if the people of Massachusetts want to lived under a judicial oligarchy, as Lincoln said, if they have decided to cease to become their own rulers, there is probably not much we can do to save the people of Massachusetts. But at least with respect to protecting the definition of marriage, Mr. Hotstettler's good bill will give us the right in 49 other States to preserve the democratic principle that our State legislatures and not the Massachusetts justices get to define what marriage means.

Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. The Chair will note it is anticipated there will be three or four votes on the floor about 1 p.m. Should we not finish the bill before 1, we will be coming back after the votes and after a period for lunch. Members should set their schedules accordingly.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, as I understand the opposition to this amendment, the bill will be ineffective. We will gut the bill if we allow courts to enforce the 5th and 14th amendments to the Constitution.

I yield to anyone who disagrees with that assessment.

Mr. CHABOT. Would the gentleman repeat his question? No one was listening, I am afraid.

Mr. SCOTT. As I understand the opposition to the amendment, the bill will be ineffective, we will gut the bill if we allow courts to enforce the 5th and 14th amendments to the Constitution.

Mr. CHABOT. Would the gentleman yield?

Mr. SCOTT. I yield.

Mr. CHABOT. I don't think that is what we are saying. We are saying that without this amendment the States can already have judicial review. It is the Federal courts who would not be able to have judicial review.

Mr. SCOTT. Let me state my statement again. As I understand the opposition to the amendment now, the bill will be ineffective, we will gut the bill if we allow Federal courts to enforce the 5th and the 14th amendments to the Constitution.

Mr. CHABOT. Would the gentleman yield?

Mr. SCOTT. I yield.

Mr. CHABOT. What we are doing, we are giving the States the ability to review. We are taking the jurisdiction away from the Federal courts which has been done innumerable times prior to this occasion.

Mr. SCOTT. Let me restate it then. Am I right in saying we will gut the bill if we allow the Federal courts to enforce the 5th and 14th amendments to the Constitution?

Mr. CHABOT. Will the gentleman yield?

Mr. SCOTT. I yield.

Mr. CHABOT. In this case, yes.

Mr. SCOTT. Thank you.

Mr. Chairman, I yield back the balance of my time.

Mr. NADLER. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from New York.

Mr. NADLER. Mr. Chairman, I have a number of comments. First, it is very clear this amendment does gut the bill. It is intended to gut the bill. It should gut the bill. The bill ought to be gutted.

But the point is, it guts the bill because it says that the bill cannot be enforced by depriving the Federal courts of the ability to enforce the 5th and 14th amendments. That is what it does. And the bill in fact deprives the Federal courts of the ability to enforce the United States Constitution with respect to the subject matter at hand. That is one reason why it is an obnoxious bill.

We have been told, and Mr. Chabot says it repeatedly, that the State courts will be able to uphold the Constitution of the United States. Well, yeah, they would be, but that would clearly mean that some State courts might rule that DOMA violates the 5th or 14th amendments. Some other State courts might rule it doesn't. There would be a patchwork quilt across the country. The Constitution would mean different things in different States.

Mr. CHABOT. Would the gentleman yield?

Mr. NADLER. Yes.

Mr. CHABOT. The effect would only be felt within that particular State, so that is up to that State.

Mr. NADLER. Mr. Chairman, reclaiming my time, you are not disagreeing with what I said.

The Constitution would be different in different States. In New York, the courts might say DOMA is constitutional. In Colorado, the courts—and maybe I have it backwards—in Colorado the courts might say DOMA is not constitutional, according to the Federal Constitution. It was—and I do not remember which distinguished justice of the Supreme Court, whether it was Marshall or Frankfurter or Holmes—it was one of the greats, who said a number of decades ago that if the power of the court to declare a law passed by Congress unconstitutional were withdrawn, the country would survive.

If the power of the courts to declare a law passed by the States unconstitutional were withdrawn, the country would not survive, because the fact is that you cannot have a unified country if the Constitution of the United States is interpreted differently in the different States. That is why we have the supremacy clause in the Constitution. That is why the Constitution is declared by the supremacy clause to be superior to any State laws or any State constitution so we have one country.

What this would do by stripping the Federal courts of the ability to interpret the Constitution in certain respects and leaving it to the State courts means you would have 50 different countries in effect, 50 different constitutions, at least in this area. Now, that is ridiculous.

It also is clear that this bill is unconstitutional because it would violate—and when Mr. Feeney talks about the core function of the Supreme Court, or the court system, is that we should have one Constitution, not 50 constitutions—this would violate that. And whether it is Federalist 78 or Federalist No. 80 which says specifically, and Federalist No. 80 says the core functions of the judiciary, including ensuring the supremacy and uniformity of Federal law

and that congressional action to undermine these functions would be impermissible.

The Marriage Protection Act wholly violates the separation of powers principle explained in Federalist Paper No. 80. Under the Marriage Protection Act, this bill, all challenges to the cross-State recognition of DOMA would be finally determined by the 50 State supreme courts. No gay or lesbian couple would be ever able to appeal to the United States Supreme Court, and no State would be able to either remove a challenge to DOMA to Federal court or to appeal to the United States Supreme Court. The Marriage Protection Act would cause the very legal chaos the U.S. Supreme Court averts by its core function of being the final authority on the constitutionality of Federal statutes. The Congress cannot deny the Supreme Court this core function.

Finally, let me say that the case of the legislation sponsored by Senator Daschle that was cited as a precedent is not a precedent. The court of appeals in upholding that statute ruled in the case of *Biodiversity* v. *Cables* that the challenge legislation's jurisdictional bar did not apply to preclude court of appeals' review as to the legislation's validity under the Constitution. So it is a wholly different case, and it is not a posit to this.

I maintain again this law is bad law. It is unconstitutional law, it would divide this country into 50 different countries, and the gentlewoman's amendment would gut the bill and ought, therefore, to be adopted.

Mr. NADLER. I ask unanimous consent to put this case into the record.

Chairman SENSENBRENNER. Without objection, so ordered.

[The material referred to follows:]

Biodiversity Associates v. Cables
357 F.3d 1152
C.A.10 (Colo.),2004.
Feb. 4, 2004. (Approx. 19 pages)

United States Court of Appeals,

Tenth Circuit.

BIODIVERSITY ASSOCIATES and Brian Brademeyer, Plaintiffs-Appellants,

Sierra Club and The Wilderness Society, Plaintiffs,

v.

Rick D. CABLES, in his official capacity as Regional Forester of the Rocky Mountain Region of the U.S. Forest Service; Dale N. Bosworth, in his official capacity as Chief of the U.S. Forest Service; John C. Twiss, in his official capacity as Supervisor of the Black Hills National Forest; U.S. Forest Service, Defendants-Appellees,

Larry Gabriel, in his official capacity as Secretary of the South Dakota Department of Agriculture; Black Hills Regional Multiple Use Coalition; Black Hills Forest Resource Association; Meade County, Lawrence County, and Pennington County, all political subdivisions the State of South Dakota, Defendants-Intervenors-Appellees.

No. 03-1002.

Feb. 4, 2004.

McCONNELL, Circuit Judge.
For many years, Congress has been unable to come to agreement on nationwide legislation to address the dangers of insect infestation and fire in the national forests. In 2002, however, in a rider to a supplemental appropriations act for the war on terrorism, Congress passed legislation applicable to selected sections of the Black Hills National Forest in South Dakota and nowhere else, permitting logging and other clearance measures as a means of averting forest fires. The legislation specifies forest management techniques for these lands in minute detail, overrides

otherwise applicable environmental laws and attendant administrative review procedures, and explicitly supersedes a settlement agreement between the Forest Service and various environmental groups regarding management of these lands.

The question presented is whether the extraordinary specificity of this legislation, coupled with its displacement of a settlement agreement, amounts to congressional violation of the Constitution's separation of powers, by invading the province of the executive branch, the judicial branch, or both. We hold that it does not. Article IV, § 3, cl. 2 expressly grants Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." With respect to this power--like most of its enumerated powers--Congress is permitted to be as specific as it deems appropriate. Moreover, settlement agreements between private litigants and the executive branch cannot divest Congress of its constitutionally vested authority to legislate.

BACKGROUND

The first law involved in this case is the law of unintended consequences. Fire suppression efforts conducted over more than a century in large parts of the West have had the unintended effect of transforming forests from savannah-like grasslands studded with well-spaced large, old, fire-resistant trees, into thicker, denser forests. [FN1] Prior to the arrival of Europeans, these forests experienced frequent, but relatively mild, forest fires caused primarily by lightning and Native American activity. [FN2] These fires would clear the forest *1157 floor of undergrowth and saplings while leaving the larger trees unscathed. The denser forests produced by fire suppression accumulate more combustible fuel and are more vulnerable to infestations, such as mountain pine beetles, and to fires far more intense and devastating than those of the pre-settlement era. [FN3] Forestry experts are divided as to the response to these conditions. Some advocate a hands-off approach, allowing fire (outside areas of human habitation) to reconstitute the forests in their natural state; some advocate controlled burns; and some advocate thinning and fuel removal. [FN4] The role of commercial logging as part of the last approach has been particularly controversial.

FN1. *See* Robert B. Keiter, *Keeping Faith with Nature: Ecosystems, Democracy, and America's Public Lands* 136, 140-41, 155 (2003); Marlin A. Johnson, *Changed Southwestern Forests: Resource Effects and Management*

Remedies, at <http://www.cpluhna.nau.edu/Research/changed_southwestern_forests.htm> (last visited Dec. 23, 2003); W. Wallace Covington et al., *Restoring Ecosystem Health in Ponderosa Pine Forests of the Southwest,* 95 *Journal of Forestry,* April 1997, 23, 23, 27 tbl.1, *corrected adaptation availableat* <http://www.cpluhna.nau.edu/Research/pinerestoration.htm> (last visited Dec. 23, 2003); *see generally* Robert E. Keane et al., *Cascading Effects of Fire Exclusion in Rocky Mountain Ecosystems: A Literature Review* (U.S. Forest Serv. Gen. Technical Report RMRS-91, 2002).

FN2. Researchers have found that pre-European human inhabitants of North America used fire and other techniques to alter the "natural" character of the forests. *See* Keiter, *supra* note 1, at 136 & 376-77 n. 15; Stephen J. Pyne, *A Cultural History of Wildland and Rural Fire* 46-50, 66-83 (1982); Homer Aschmann, *Aboriginal Use of Fire,* in *Proceedings of the Symposium on the Environmental Consequences of Fire and Fuel Management in Mediterranean Ecosystems* 132, 133, 135, 137-38 (Harold A. Mooney & C. Eugene Conrad technical coordinators, U.S. Forest Serv. Gen. Technical Report WO-3, 1977); George E. Gruell, *Indian Fires in the Interior West: A Widespread Influence,* in *Proceedings of the Symposium and Workshop on Wilderness Fire* 68 (James E. Lotan et al. technical coordinators, U.S. Forest Serv. Gen. Technical Report INT-182, 1985); Henry T. Lewis, *Why*

Indians Burned: Specifics Versus General Reasons, in *id.* 75.

Some speculate that before the arrival of the ancestors of Native Americans on this continent, forests were denser, and that it was the Native Americans' deployment of fire that created the savannah-like forests that European explorers encountered and that are now deemed "natural." *See, e.g.,* Pyne, *supra,* at 79 ("[T]he general consequence of the Indian occupation of the New World was to replace forested land with grassland or savannah, or, where the forest persisted, to open it up and free it from underbrush."); Nancy Langston, *Forest Dreams, Forest Nightmares: The Paradox of Old Growth in the Inland West* 46-48 (1995) (agreeing that Native American fires helped to open up the forest, but denying that they were primarily responsible for creating the grasslands). *But see, e.g.,* Thomas W. Swetnam & Christopher H. Baisan, *Historical Fire Regime Patterns in the Southwestern United States since AD 1700,* in *Proceedings of the Second La Mesa Fire Symposium* 11, 29 (C.D. Allen ed., U.S. Forest Serv. Gen. Technical Report RM-286, 1996) (arguing that because fuels and climatic conditions controlled the extent of forest fires more than ignition sources did, Native American activity in the Southwest did not significantly alter preexisting fire patterns).

FN3. *See* Keane et al., *supra* note 1, at 14-15; Keiter, *supra* note 1,

at 141; Langston, *supra* note 2, at 296-97.

FN4. Keiter, *supra* note 1, at 141 & 378 n. 27. *Compare* Michael Axline, *Forest Health and the Politics of Expediency,* 26 Envtl. L. 613, 626-39 (1996) (arguing that there is no

forest health emergency because fire and insect infestation are natural parts of forest ecology, and dismissing tree-thinning measures as motivated by logging interests), *with* James K. Agee, *Alternatives for Implementing Fire Policy,* in *Proceedings: Symposium on Fire in Wilderness and Park Management* 107, 108-111 (James K. Brown et al. technical coordinators, U.S. Forest Serv. Gen. Technical Report INT-320, 1995) (warning that given the current unnatural forest densities, it would be foolish to rely on natural fires without prescribed burns to reproduce natural forest ecosystems), *and with* Covington et al., *supra* note 1, at 24-25 (noting that because prescribed burns are difficult to control and unpredictable in their results, they must be supplemented by tree thinning and deadwood removal); Johnson, *supra* note 1 (recommending a mixed strategy using natural fires, prescribed burns, and tree thinning). *See also* Langston, *supra* note 2, at 260-63 (expressing doubt about the possibility of successfully engineering a return to the old forests by any method).

From 1983 to 1997, the Beaver Park Roadless Area, a relatively pristine portion of the Black Hills National Forest, was free of logging activity, apparently because the land management plan then in place did not allow it. In 1997, however, the Forest Service approved a new Black Hills National Forest plan revision (the "1997 Revised Plan"), which allowed logging in a significant portion of Beaver Park's 5,109 acres. It subsequently began preparations for a timber sale in an area called the "Veteran/Boulder Project Area," which included most of the Beaver Park land newly authorized for logging. Especially in a part of the area known as Forbes Gulch, a major purpose of the logging was to counter an infestation of mountain pine beetles. The Forest Service proceeded to clear various administrative hurdles in preparation for the Veteran/Boulder timber sale, issuing *1158 a final environmental impact statement on the proposed sale and records of decision approving timber harvest both inside and outside the Beaver Park Roadless Area. Several environmental groups, including the Sierra Club, the Wilderness Society, and Appellant Biodiversity Conservation Alliance (BCA), [FN5] objected strenuously to the timber sale. The Beaver Park Roadless Area was one of the last areas in the Black Hills National Forest still eligible for designation as a wilderness, and logging activity would likely disqualify it from being designated as such. [FN6] The environmental groups were also concerned about the effects that the Veteran/Boulder timber sale would have on the viability of the northern goshawk population in the Forest. Accordingly, they brought administrative challenges to both the particular project and the recently revised plan under which it was approved.

FN5. At the time of these events, BCA was known as Biodiversity Associates. For the sake of simplicity, we use its current name.

FN6. The Wilderness Act requires that a wilderness area have "at least five thousand acres of land or ... sufficient size as to make practicable its preservation and use in an unimpaired condition." 16 U.S.C. § 1131(c)(3). Since recently logged areas are not

eligible for wilderness protection, the proposed logging would decrease the eligible acreage of the Beaver Park Roadless Area below the 5,000-acre threshold, potentially compromising its eligibility for wilderness designation for the indefinite future.

The groups met with mixed success in their administrative challenges. Their challenge to the Veteran/Boulder sale was initially denied in its entirety, though the sale was stayed pending review of the Revised Plan itself. Then, on October 12, 1999, the Chief of the Forest Service upheld the 1997 Revised Plan in most respects, but found that there was inadequate support in the record for the conclusion that the Revised Plan's proposed changes would not threaten the viability of several species, including the northern goshawk. He therefore ordered further research into that question. In the meanwhile, the Forest Service did not stop all pending projects, but instead provided interim directions that would apply until the identified defects in the Revised Plan were remedied. As a result, when the stay on the sale expired, the Forest Service went forward and put the timber out for bid.

The Sierra Club, the Wilderness Society, and BCA brought suit challenging the sale in federal district court, claiming that the Forest Service could not rely on an "illegal" plan to justify project-level decisions under that plan. Specifically, they argued that the final environmental impact statement's conclusion that the Veteran/Boulder sale would not affect the viability of the northern goshawk was based on the very findings in the 1997 Revised Plan that had been disapprov

In the waning days of the Clinton Administration, in September of 2000, the Forest Service signed a settlement agreement with the plaintiff groups, under which it agreed not to allow any tree cutting in the Beaver Park Roadless Area, at least until the Service approved a new land and resource management plan remedying the defects of the 1997 plan. The settlement was approved by the United States District Court for the District of Colorado, which had jurisdiction over the lawsuit because the relevant Forest Service offices were in Colorado.

The process of approving a new plan took much longer than anticipated. The record does not reveal whether the mountain pine beetles of western South Dakota were aware of the settlement agreement or participated in the plan revision process, but it is clear that they did not wait *1159 for authorization from Washington before undertaking an expanded program of forest resource exploitation. Just two years after the initial Veteran/Boulder environmental impact statement, the mountain pine beetle infestation in this section of the Black Hills had reached epidemic proportions. According to Forest Service estimates, the pine beetles killed 114,000 trees in 2002, as compared to only 15,000 in 1999. This convinced forest managers that immediate harvesting of deadwood and infested trees, which the settlement agreement prohibited, was necessary to guard against further spread of the infestation and potentially disastrous forest fires.

Given that approval of a corrected resource management plan was still a long way off, the Forest Service and the local South Dakota interests that shared its concerns had a choice: they could either attempt to obtain consent to the tree cutting from the original parties to the agreement, or with the help of South Dakota's congressional delegation, they could attempt to overturn the settlement agreement's prohibition by legislation. The Forest Service began by trying the consensual approach. Perhaps spurred by the threat of intervention from Congress, the signatories to the settlement met with the Forest Service to discuss changing the agreement in light of the mountain pine beetle problem. The Forest Service reached agreement with the Sierra Club and the Wilderness Society, but BCA and Brian Brademeyer, then chair of the Black Hills Sierra

Club, refused to agree to proposed modifications in the settlement. [FN7] Stymied, South Dakota interests turned to Congress for a legislative solution.

FN7. Mr. Brademeyer had represented the Sierra Club in the settlement modification negotiations, but resigned after higher-ups in the Sierra Club agreed with the Forest Service to allow certain tree-cutting activities in the Black Hills National Forest, which he considered to be a "suspension of law." Brademeyer Decl. ¶ 13, App. 299-300.

For some years, Congress had been considering national legislation that would streamline the process of obtaining environmental approval of logging and other clearance projects in fire- and disease-threatened national forests; but these efforts were caught up in the debate over the role of commercial logging in forest restoration. By limiting legislative action to a narrow geographical area, however, and with the acquiescence of some influential environmental groups and the active support of the state's congressional delegation, Congress was able to reach agreement on a bill that would permit logging and other measures in the Beaver Park Roadless Area. In a rider to an unrelated appropriations bill, Congress enacted into law essentially the terms of the modified agreement negotiated between the Forest Service and the Sierra Club and the Wilderness Society. *See* Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Acts on the United States, Pub.L. No. 107-206, § 706, 116 Stat. 820, 864 (2002) (the "706 Rider" or "Rider"). The Rider, which was signed into law on August 2, 2002, required the Forest Service to take a variety of actions that violated the settlement agreement, *see, e.g., id.* § 706(d)(5), 116 Stat. at 867, and prohibited judicial review of those actions, *id.* § 706(j), 116 Stat. at 868. It also specifically referred to the settlement agreement, and stated that the agreement should continue in effect to the extent it was not preempted by the Rider. *See id.,* 116 Stat. at 869.
After the Rider was passed, BCA and Mr. Brademeyer (hereinafter referred to, jointly, as "BCA") went to the federal district court in Colorado to obtain an order *1160 requiring continued enforcement of the settlement agreement, claiming that the 706 Rider unconstitutionally trenched on both the executive and judicial branches. The district court denied the motion, and BCA appealed.

DISCUSSION

I

[1] As a preliminary matter, we must determine the scope of this Court's jurisdiction over this case. Although we would normally have jurisdiction under 28 U.S.C. § 1291, the 706 Rider limits that jurisdiction:
Due to the extraordinary circumstances present here, actions authorized by this section shall proceed immediately and to completion notwithstanding any other provision of law including, but not limited to, NEPA and the National Forest Management Act (16 U.S.C. 1601 et seq.). Such actions shall not be subject to the notice, comment, and appeal requirements of the Appeals Reform Act, (16 U.S.C. 1612 (note), Pub. Law No. 102-381 sec. 322). *Any action authorized by this section shall not be subject to judicial review by any court of the United States.*
Rider § 706(j), 116 Stat. at 868 (emphasis added). At oral argument, BCA contended that the

italicized language does not preclude us from considering the constitutionality of the Rider itself. The government disagrees, arguing that we have jurisdiction at most to determine whether the denial of jurisdiction, not the entire Rider, is constitutional.

[2] In determining the extent of our jurisdiction, we must start with the precise language of the Rider, keeping in mind that such limitations of jurisdiction are to be construed narrowly to avoid constitutional problems. *See Johnson v. Robison*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). What is prohibited here is judicial review of "[a]ny action authorized by" the Rider. Rider § 706(j), 116 Stat. at 868. BCA, however, does not seem to be seeking judicial review of any specific actions already taken or soon to be taken by the Forest Service. Rather, it has moved for enforcement of the settlement agreement in the face of the new Congressional legislation. Admittedly, the basis for the lawsuit, and the alleged injury that gives BCA standing, is the prospect of Forest Service action pursuant to the Rider and in violation of the settlement agreement. Yet at this point, no past or prospective actions of the Forest Service are directly at issue. The question before us is simply whether the settlement agreement has continuing validity in the face of Congress's intervening act.

[3] The situation here is thus different from one in which the court is asked to hold a party who has violated an injunction in contempt. In such a case, the "actions" taken by a party to the injunction are directly at issue. BCA's motion is more analogous to a suit for declaratory judgment holding the Rider itself to be unconstitutional. Because BCA seeks judicial review of the congressional act mandating that the settlement agreement be violated, rather than judicial review of the Forest Service's acts authorized by the Rider, the jurisdictional bar does not apply. *See Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C.Cir.2001). We therefore must reach the question of whether the Rider is constitutional. Because this question is purely legal, our review is de novo. *See United States v. Pompey*, 264 F.3d 1176, 1179 (10th Cir.2001).

II

BCA's chief argument is that the Rider trenches on the Executive by giving the Forest Service marching orders so detailed *1161 that they go beyond merely "passing new legislation" to interpreting the law, which is "the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986). However, they never clearly explain what, in their view, separates permissible legislation from impermissible interpretation. The main flaw they find in the Rider is its extreme particularity, making it seem as if their theory is that extreme particularity by itself infringes the Executive's power to enforce and execute the law. At times, though, they make a more limited claim: that while specificity is not *per se* unconstitutional, at least in this case it is "indicative" of the fact that Congress has unconstitutionally "direct[ed] how law is to be implemented," rather than (constitutionally) changing the applicable law. Appellants' Reply Br. 5. This more limited claim suggests that it is particularity in combination with some other feature that raises the constitutional problem. We consider each theory in turn.

A

[4] BCA bases its argument on a handful of cases in which the Supreme Court has held that the legislative branch cannot play a role in the interpretation and execution of the law. *See, e.g.*,

Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 271-72, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991); *Bowsher*, 478 U.S. at 725-26, 106 S.Ct. 3181; *INS v. Chadha*, 462 U.S. 919, 951-52 (1983); *Springer v. Philippine Islands*, 277 U.S. 189, 201-02, 48 S.Ct. 480, 72 L.Ed. 845 (1928). There is no basis, however, for BCA's assertion that the sheer specificity of the 706 Rider takes it beyond the realm of Congress's legislative powers. Certainly the cases cited above do not support this position. In each of those cases, Congress sought a role for itself in the execution of the laws, beyond enactment of legislation, through mechanisms such as a one-house legislative veto or the vesting of law-executing powers in officers appointed by, or accountable to, Congress. In *Bowsher*, the Court held that the Comptroller General, who serves at the pleasure of Congress, could not be the officer who determined what spending cuts would be made in order to reduce the deficit under the Gramm-Rudman-Hollings Act of 1985. 478 U.S. at 717-18, 736, 106 S.Ct. 3181. *Springer* held that it violated separation of powers for members of the legislative branch to be directors of government-owned businesses. 277 U.S. at 202-03, 48 S.Ct. 480. Similarly, *Metropolitan Washington Airports* struck down an arrangement whereby a board of review composed of members of Congress had authority to veto key acts of the Metropolitan Washington Airport Authority. 501 U.S. at 275-77, 111 S.Ct. 2298. *Chadha* struck down a law that delegated authority to the Attorney General to suspend certain deportations, but allowed either house of Congress acting alone to veto the Attorney General's decisions. 462 U.S. at 923, 944-59, 103 S.Ct. 2764. None of these cases, or any others of which we are aware, suggest that Congress is required to speak with some minimum degree of generality, so as to leave play for the Executive to exercise discretion in interpreting the law. Rather, the Constitution expressly leaves it up to Congress to determine how specific it may deem it "necessary and proper" for the laws to be. U.S. Const. art. I, § 8, cl. 18. The cases cited above have simply forbidden Congress, or its members or servants, from exerting legal authority without observing the formalities for the passage of legislation under the Constitution: "bicameral passage followed by presentment to the President." *Bowsher*, 478 U.S. at 726, 106 S.Ct. 3181 (quoting *Chadha*, 462 U.S. at 954-55, 103 S.Ct. 2764). This is a structural and institutional means of guaranteeing *1162 that Congress stays within the bounds of legislating, and is far superior to asking courts to police the shades of gray between the poles of general and specific.

[5] To be sure, the Constitution imposes certain specific constraints on the power of Congress to legislate with overmuch particularity. The Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3, and the "uniform Duties, Imposts, and Excises" Clause, *id.*, § 8, cl. 1, are examples. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468-73, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); *United States v. Ptasynski*, 462 U.S. 74, 80-85, 103 S.Ct. 2239, 76 L.Ed.2d 427 (1983). Due process and equal protection principles similarly prevent Congress from acting with respect to specific persons or groups in some contexts, and specificity may be relevant to determining whether Congress has trenched on the Executive's ability to carry out its specifically enumerated executive powers. *Nixon*, 433 U.S. at 443, 97 S.Ct. 2777. But when Congress is exercising its own powers with respect to matters of public right, the executive role of "tak[ing] Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, is entirely derivative of the laws passed by Congress, and Congress may be as specific in its instructions to the Executive as it wishes. Indeed, as the Supreme Court has noted, Congress may even pass legislation governing "a legitimate class of one." *Nixon*, 433 U.S. at 472, 97 S.Ct. 2777.

In the instant case, none of the Constitution's explicit restrictions on specificity apply. The

Property Clause states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The Supreme Court has "repeatedly observed that the power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976) (internal brackets and quotation marks omitted); *see also Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir.2002). It would be difficult if not impossible to control the use of federal lands without reference to specific actions affecting specific tracts of land, and we see no reason why Congress should be forced to avoid such directives. *See Save Our Mall*, 269 F.3d at 1097 (noting that particularity is especially unproblematic when addressing unique public amenities). The Supreme Court's remark in *Metropolitan Washington Airports* seems relevant here:

Because National and Dulles are the property of the Federal Government and their operations directly affect interstate commerce, there is no doubt concerning the ultimate power of Congress to enact legislation defining the policies that govern those operations. *Congress itself can formulate the details,* or it can enact general standards and assign to the Executive Branch the responsibility for making necessary managerial decisions in conformance with those standards. 501 U.S. at 271-72, 111 S.Ct. 2298 (emphasis added).

[6] [7] Thus, BCA is mistaken when it argues that Congress has arrogated power to itself at the expense of the executive branch because it "specifically ordered the Executive Branch to carry out a duty which had been expressly delegated to the Department of Agriculture, the management of the Black Hills National Forest." Appellants' Br. 23. To give specific orders *by duly enacted legislation* in an area where Congress has previously delegated managerial authority is not an unconstitutional encroachment on the prerogatives of the Executive; it is merely to reclaim the formerly delegated authority. Such delegations, *1163 which are accomplished by statute, are always revocable in like manner; they cannot extend the domain reserved by the Constitution to the Executive alone. *See Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1435 n. 24 (9th Cir.1989).

B

[8] We now turn to consider the view that although the 706 Rider's specificity is unobjectionable in the abstract, it is still unconstitutional because it attempts to mandate specific results *without* changing the underlying environmental laws. BCA relies for this view chiefly on *Robertson v. Seattle Audubon Society*, where the Supreme Court upheld a similar provision because it "compelled changes in law, not findings or results under old law." 503 U.S. 429, 438, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992); *see also Apache Survival Coalition v. United States*, 21 F.3d 895, 904 (9th Cir.1994); *Stop H-3 Ass'n*, 870 F.2d at 1434 (upholding a statute authorizing construction of a highway despite an environmental regulation because it "does not interpret [the relevant regulation's] requirements but rather exempts H-3 from them"); *Armuchee Alliance v. King*, 922 F.Supp. 1541, 1550 (N.D.Ga.1996).

Far from supporting BCA's position, however, *Seattle Audubon* rejects an argument very much like its own. The case concerned logging litigation to which Congress responded by passing the Northwest Timber Compromise of 1990, applicable only to timber sales entered before September 30, 1990, in thirteen national forests in the Pacific Northwest. The key section of that legislation stated that "Congress determines and directs that management of areas according to [new rules set forth in the Northwest Timber Compromise] ... meet[s] the statutory requirements that are the basis for [the litigation]." 503 U.S. at 434-35, 112 S.Ct. 1407. The Ninth Circuit,

below, had held that this did not "establish new law, but direct[ed] the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court," thus encroaching on the judicial branch under *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871). *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1316 (9th Cir.1990) (*Seattle Audubon I*). In reversing, the Supreme Court criticized the Ninth Circuit's focus on the form of the enactment; instead, it looked to the legal effect of the *Seattle Audubon* provision:

We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law. Before subsection (b)(6)(A) was enacted, the original claims would fail only if the challenged harvesting violated none of five old provisions. Under subsection (b)(6)(A), by contrast, those same claims would fail if the harvesting violated neither of two new provisions. Its operation, we think, modified the old provisions.

Seattle Audubon, 503 U.S. at 438, 112 S.Ct. 1407.

This case follows *a fortiori* from *Seattle Audubon*. Just as in *Seattle Audubon*, the 706 Rider has the practical effect of changing the scope of the government's legal duties. Before the Rider, the Forest Service was prohibited by law from cutting trees without meeting various requirements of various environmental laws; after the Rider, it is required to cut trees in the Black Hills "notwithstanding" those laws. Rider § 706(j), 116 Stat. at 868. But the 706 Rider lacks the problematic language--"the Congress determines and directs that management of areas according to [new rules set forth in the Northwest Timber Compromise] ... meet[s] the statutory requirements that are the basis for [the litigation]"--which the Ninth Circuit construed as interpreting rather than *1164 amending the law. *Seattle Audubon I*, 914 F.2d at 1316. By contrast, the 706 Rider orders that certain actions be taken "notwithstanding" the requirements of certain prior-enacted laws, thus effectively replacing the old standards, in this one case, with new ones. Similar statutes have been upheld as constitutionally valid amendments of the underlying law. *See Save Our Mall*, 269 F.3d at 1097; *Apache Survival Coalition*, 21 F.3d at 904; *Stop H-3 Ass'n*, 870 F.2d at 1434. Thus, we need not decide whether directing specific actions without changing the law would be an unconstitutional attempt by Congress to usurp the Executive's role in interpreting the law.[FN8] In accordance with the counsel in *Bowsher*, Congress has influenced the execution of the law here only "indirectly--by passing new legislation." 478 U.S. at 734, 106 S.Ct. 3181 (citing *Chadha*, 462 U.S. at 958, 103 S.Ct. 2764).

FN8. We underscore that by relying on the fact that the 706 Rider changed applicable law, we do not mean to suggest, any more than did *Seattle Audubon*, that if the Rider had not changed the law it would necessarily have run afoul of *United States v. Klein*. By interpreting the provision at issue in *Seattle Audubon* as a change in the law, the Supreme Court expressly avoided addressing any such constitutional question. 503 U.S. at 441, 112 S.Ct. 1407. Thus, if a provision cannot be read as a change in the law, the most that follows from this case or *Seattle Audubon* is that the constitutional question of whether there is a *Klein* violation must be faced--not that it must be answered in the affirmative.

Next, BCA claims that the 706 Rider encroaches on the Judiciary, in three ways: (1) by disturbing final dispositions of cases in violation of *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995); (2) by prescribing rules of decision to the Judiciary in pending cases, in violation of *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871); and (3) by vesting review of judicial decisions in the executive branch, in violation of the rule in *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 1 L.Ed. 436 (1792). We reject all three claims.

A

BCA's first contention, that the 706 Rider impermissibly sets aside a final judicial disposition, depends on a crucial but questionable premise: that the settlement agreement is actually a judicial disposition rather than a mere private agreement between the parties. Although the district court did incorporate the settlement agreement by reference in its order dismissing the suit, it nevertheless preferred the latter characterization in addressing BCA's current request for injunctive relief:

This case doesn't even rise to the level where the Court executed a consent decree. This is a case where the parties sat down among themselves and settled the case. The more proper analogy here is to an executory settlement contract. It is true that the Court approved the settlement agreement, but that is different from a consent decree.

....

... [A]s far as I'm concerned, the Court's approval of the settlement agreement is entitled to very, very little weight, because it was negotiated among the parties.

Tr. of Mot. Hr'g dated Dec. 26, 2002, at 12, App. 405. Nevertheless, because the settlement agreement was a judicial disposition in form if not in substance, we assume for purposes of this appeal that it is entitled to the same constitutional protection that it would have if the court had decided its terms.

*1165 1

[9] [10] Within the scope of its enumerated powers, Congress has authority to enact laws to govern matters of public right, such as the management of the public lands, and authority to change those laws. Even when the Judiciary has issued a legal judgment enforcing a congressional act--for example, by a writ of injunction--it is no violation of the judicial power for Congress to change the terms of the underlying substantive law. The purpose of an injunction is to define and enforce legal obligations, not to freeze them into place. Thus, when Congress changes the laws, it is those amended laws-- not the terms of past injunctions--that must be given prospective legal effect. *See, e.g.*, *Miller v. French*, 530 U.S. 327, 347-50, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000); *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969); *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 648-650, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961); *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 201-07, 42 S.Ct. 72, 66 L.Ed. 189 (1921).

The Supreme Court applied this principle to dispose of a contention very similar to BCA's as long ago as 1855, in the venerable case of *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1855). In that case, Pennsylvania had previously brought suit to enjoin the construction of a bridge over the Ohio River, which would obstruct access to Pennsylvania's ports. The Supreme Court eventually granted an injunction requiring the bridge to

be removed or raised. It reasoned that because Congress had "regulated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same," the Virginia-authorized bridge impeding travel on the Ohio River was "in conflict with the acts of congress, which were the paramount law." 59 U.S. (18 How.) at 430 (summarizing the earlier opinion).

Thereafter, Congress passed a new law authorizing the construction of the bridge and stating that the bridge and one other were "lawful structures in their present positions and elevations." *Wheeling Bridge*, 59 U.S. (18 How.) at 429. Pennsylvania sued again, claiming that the intervening enactment was an unconstitutional attempt to overturn a final decision of the Judiciary. The Supreme Court disagreed:

[I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court.... But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with the law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree.

Id. at 431-32. Central to the Court's analysis was the fact that the right to unobstructed waterways was a "public right ... under the regulation of congress." *1166 *Id.* at 431. In other words, the plaintiff had no vested property right in an unobstructed waterway. The core violation was against Congress's right to control the waterways, and Pennsylvania's right to an unobstructed waterway was only the derivative right to enjoy whatever degree of navigation Congress saw fit to allow. So long as the will of Congress was to leave the river unimpeded, any impediment was a violation of the public right thus defined. But once Congress changed its mind, the contours of that right changed, and there was no more ground for injunctive relief. If a landowner grants her neighbor a revocable license to use a private road across her property, the neighbor could conceivably obtain an injunction against any third party who prevents him from using that road. However, that does not affect the right of the landowner to revoke the license at any time. Should the license be revoked, the neighbor's right to use the private road ceases, and enforcing the injunction is no longer appropriate.

2

Wheeling Bridge has remained a fixed star in the Supreme Court's separation-of-powers jurisprudence, and numerous subsequent cases have relied on it. *See, e.g.*, *The Clinton Bridge*, 10 Wall. 454, 77 U.S. 454, 463, 19 L.Ed. 969 (1870) (concluding, on the basis of *Wheeling Bridge*, that in public rights cases, Congress could not only modify injunctive relief already granted, but also could "g[i]ve the rule of decision" in pending cases); *Hodges v. Snyder*, 261 U.S. 600, 603, 43 S.Ct. 435, 67 L.Ed. 819 (1923) (noting that the normal rule against disturbing final judgments "does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and

should not be thereafter enforced"); *Sys. Fed'n No. 91*, 364 U.S. at 648-650, 81 S.Ct. 368 (holding that it is an abuse of discretion for a district court not to modify an injunction to reflect changes in underlying law); *Miller v. French*, 530 U.S. at 347-48, 120 S.Ct. 2246.
Even *Plaut v. Spendthrift Farm, Inc.*, the principal case on which BCA relies, is careful not to disturb the holding of *Wheeling Bridge*. There the Supreme Court had previously imputed a uniform nationwide statute of limitations on actions brought under § 10(b) of the Securities Echange Act of 1934, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), and held that the newly established statute of limitations applied to all pending cases in the federal courts. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). Six months later, Congress passed a law changing the statute of limitations for those cases commenced before *Lampf* to what it would have been had the Supreme Court not imposed a uniform nationwide limitations period, and reinstating all actions dismissed as time-barred if they would have been timely under the limitations period of their local jurisdiction. *See* Federal Deposit Insurance Corporation Act of 1991, Pub.L. No. 102-242, sec. 476, § 27A, 105 Stat. 2236 (codified at 15 U.S.C. § 78aa-1 (1988 Supp. V)). The Supreme Court held that this action violated the separation of powers by requiring federal courts to reopen final judgments. *Plaut*, 514 U.S. at 240, 115 S.Ct. 1447. It reasoned that once the judicial branch has given its final word on a case, to allow Congress to reopen the case by legislation would destroy the power of the Judiciary to render final judgments. *Id.* at 219, 115 S.Ct. 1447. Instead, Congress would be in effect a court of last resort to which one could appeal any "final" decision of the Judiciary.
*1167 In rejecting such an outcome, the Court in *Plaut* did no more than follow the dicta of *Wheeling Bridge* itself:
But it is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the *private rights of the parties.* When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.
....
Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the Plaintiff *for damages,* the right to these would have passed beyond the reach of the power of congress.
Wheeling Bridge, 59 U.S. (18 How.) at 431 (emphasis added), *quoted in Plaut*, 514 U.S. at 226, 115 S.Ct. 1447. As *Plaut* itself insists, it does not call the holding of *Wheeling Bridge* into question at all. 514 U.S. at 232, 115 S.Ct. 1447. The disturbed court decision in *Plaut* definitively resolved a private claim to a certain amount of money, leaving the defendants with an unconditional right to the sum in question; the judgments in this case and in *Wheeling Bridge* merely prohibited future interference with the enjoyment of a public right that remained revocable at Congress's pleasure.
The Supreme Court has since reaffirmed the continued vitality of *Wheeling Bridge* in *Miller v. French*. In that case, the Prison Litigation Reform Act had set new limits on the power of courts to give injunctive relief to prisoners, requiring (among other things) that any injunctive relief granted be both narrowly drawn to correct the violation of federal rights and also the least intrusive means of correcting the violation. 18 U.S.C. § 3626(a)(1)(A). The provision at issue in *Miller* directed that an action to modify or terminate injunctive relief pursuant to the PLRA

would act as an automatic stay of any existing injunctive relief if a court did not find that the injunctive relief remained appropriate under the new standards within 30 days. *Id.* § 3626(b)(2). In upholding the PLRA's automatic stay, the Supreme Court found *Wheeling Bridge* controlling, distinguishing *Plaut* because in that case Congress had disturbed final judgments in actions for money damages. *Miller*, 530 U.S. at 344-45, 120 S.Ct. 2246. The Court held that when courts grant prospective injunctive relief, they remain obligated to modify that relief to the extent that "subsequent changes in the law" render it illegal. *Id.* at 347, 120 S.Ct. 2246.

3

[11] This case falls squarely within the principle of *Wheeling Bridge*. BCA's members' rights with respect to the national forests is a "public right ... under the regulation of congress," *Wheeling Bridge*, 59 U.S. (18 How.) at 431, in exactly the same way that the right to unimpeded navigation of the Ohio River was. Both rights are entirely contingent on Congress's continuing will that the federal lands or interstate waterways be managed in a particular way. The settlement agreement in the Veteran/Boulder matter in no way touched on vested private rights. To be sure, the private interests of BCA's members are sufficiently affected to give rise to standing, but the interest they represented in their lawsuit was nothing other than the interest of the public in seeing that Congress's environmental directives are observed by the Forest Service.

BCA's attempts to distinguish *Miller* and *Wheeling Bridge* are unavailing. It *1168 argues, first, that in those cases, Congress simply changed the law, leaving it for the courts to decide whether to modify their injunctions, whereas here Congress is directly requiring the courts to modify the settlement agreement. We see no such distinction. In those cases, as here, Congress enacted rules in direct conflict with existing legal obligations. In those cases, as here, courts later had to decide whether those previous legal obligations remained enforceable in light of Congress's act.

Second, BCA argues that the 706 Rider specifically refers to a particular settlement agreement it means to supercede, whereas the PLRA provision in *Miller* "did not speak directly to any pre-existing judicial ruling or issuance of relief." Appellants' Br. 27. The same was true in *Wheeling Bridge*. There, legislation was targeted at two named bridges, one of which was the subject of the injunction in the case. *See* 59 U.S. (18 How.) at 429. It is true that in *Seattle Audubon*, the Court declined to address the question of whether such targeting raised a constitutional problem. 503 U.S. at 441, 112 S.Ct. 1407. However, its silence ended four years later in *Plaut*. There, a concurrence found a constitutional violation precisely because the reopening of dismissed cases "applie[d] only to a few individual instances." 514 U.S. at 243, 115 S.Ct. 1447 (Breyer, J., concurring). A majority of the Court rejected that position, describing it as "wrong in law." *Id.* at 238, 115 S.Ct. 1447. The majority concluded that the infringement of the judicial power consisted "*not* of the Legislature's acting in a particularized and thus (according to the concurrence) nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action. It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized." *Id.* at 239, 115 S.Ct. 1447 (emphasis in original; footnote omitted); *see also* *id.* at 239 n. 9, 115 S.Ct. 1447 ("While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of operation.").

To avoid constant interbranch friction, the lines separating the branches should be clear. As the Supreme Court noted in *Plaut*, and as BCA's arguments illustrate, it only "prolongs doubt and multiplies confrontation" to make the constitutional analysis hinge on the murky distinction

between generalized lawmaking and particularized application of the law. 514 U.S. at 240, 115 S.Ct. 1447.

4

It is true that the injunction BCA seeks to enforce differs from the one in *Wheeling Bridge* in that it is the product of a settlement agreement rather than a product of a judicial declaration of right. Thus, Appellants' claimed right to keep Beaver Park unmolested might be said to rest directly on the terms of their contractual agreement, and only indirectly on public rights provided by the environmental laws. We must therefore consider whether the settlement agreement has interposed a new set of contractual rights that adequately support keeping the injunction in place, making changes to the scope of the underlying public right irrelevant.

A negative answer to that question has been clear since at least 1961, when the Supreme Court decided *System Federation No. 91 v. Wright*, 364 U.S. 642, 648-650, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961). In that case, several nonunion railway employees brought a class action against the railroad and various unions for discrimination against them and other nonunion workers. The district court eventually entered a consent decree enjoining the defendants "from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on *1169 account of the refusal of said employees to join or retain their membership in any of defendant labor organizations, or any labor organization." *Sys. Fed'n.* 364 U.S. at 644, 81 S.Ct. 368. At the time, labor law did not allow collective bargaining agreements to require union shops. *Id.* at 645-46, 81 S.Ct. 368.

Later, when the applicable law had changed to allow such contracts, the unions sought modification of the decree to make it clear that it would not prevent them from bargaining for a union shop. *Id.* The district court refused to modify the injunction; since nothing in the amended law made it illegal for parties to agree *not* to have a union shop, the court concluded that the parties were stuck with their agreement. *Id.*

[12] [13] [14] The Sixth Circuit affirmed, but the Supreme Court reversed, holding that the district court's refusal to modify the decree was an abuse of discretion. *Id.* at 646, 650-53, 81 S.Ct. 368. The Court reasoned that, under *Wheeling Bridge*, the district court would have had to modify the decree if it had been the result of litigation instead of consent. *Id.* at 650-51, 81 S.Ct. 368. It then concluded that the same principles applied to consent decrees:

The result is all one whether the decree has been entered after litigation or by consent.... In either event, a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. We reject the argument ... that a decree entered upon consent is to be treated as a contract and not as a judicial act....

Id. at 650-51, 81 S.Ct. 368 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114-15, 52 S.Ct. 460, 76 L.Ed. 999 (1932) (Cardozo, J.)) (some ellipses in original). The Court's reasons are also applicable here:

The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. Frequently of course the terms arrived at by the parties are accepted without change by the adopting court. But just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms

in conflict with statutory objectives. In short, it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. The court must be free to continue to further the objectives of that Act when its provisions are amended. The parties have no power to require of the court continuing enforcement of rights the statute no longer gives.

Id. at 651, 81 S.Ct. 368. Put briefly, a settlement agreement or consent decree designed to enforce statutory directives is not merely a private contract. It implicates the courts, and it is the statute--and "only incidentally the parties"--to which the courts owe their allegiance. The primary function of a settlement agreement or consent decree, like that of a litigated judgment, is to enforce the congressional will as reflected in the statute. The court should modify or refuse to enforce a settlement agreement or proposed decree unless it is "in furtherance of statutory objectives." The agreement or consent decree is contractual only to the extent that it represents an agreement by the parties regarding the most efficient means of effectuating their rights under the statute. It does not freeze the provisions of the statute into place. If the statute changes, *1170 the parties' rights change, and enforcement of their agreement must also change. Any other conclusion would allow the parties, by exchange of consideration, to bind not only themselves but Congress and the courts as well.

This principle applies even more clearly here than it did in *System Federation* itself. There, the original injunction was not inconsistent with the new law; it merely ruled out an option that Congress had since made permissible but not mandatory. If that injunction had to change, then *a fortiori* the injunction at issue here, which *is* inconsistent with the 706 Rider, must give way.

B

[15] Having disposed of the claim that the 706 Rider disturbs the district court's *final judgment* in violation of *Plaut*, we turn to BCA's somewhat inconsistent claim that the Rider violates *United States v. Klein* because it dictates "rules of decision" to the district court in a *pending* case. *Klein* involved one episode in a series of conflicts between the Reconstruction Congress and the balking President Andrew Johnson. Various presidential proclamations had offered a "full pardon, with restoration of all rights of property," to certain broad classes, conditioned on taking an oath of loyalty. *Klein*, 80 U.S. (13 Wall.) at 139-40. In the Abandoned and Captured Property Act, 12 Stat. 820 (Mar. 12, 1863), however, Congress provided that the owner of seized property could sue in the Court of Claims to recover its proceeds only on proof that the owner "had never given aid or comfort to the rebellion." *Id.* at 138-39. In *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43, 19 L.Ed. 788 (1869) (mem.), the Supreme Court held that a presidential pardon renders the pardoned "as innocent as if he had never committed the offense," and concluded that proof of pardon was equivalent to proof that the claimant had not aided the rebellion. Congress responded to *Padelford* by passing an appropriations proviso directing the Court of Claims to take the fact of a pardon, with some narrow exceptions, as conclusive proof that the claimant *had* "given aid or comfort to the rebellion," and as grounds for dismissing the claimant's suit. *Klein*, 80 U.S. (13 Wall.) at 142-43. The proviso also removed the Supreme Court's authority to hear appeals of such suits. *Id.* at 144-45. In *Klein*, the administrator of the estate of V.F. Wilson, who had taken the oath and qualified for the pardon, sued to recover the proceeds of Wilson's seized property. *Id.* at 136, 143. The Supreme Court found the proviso to be unconstitutional, both because it attempted to impair the effect of a presidential pardon and because it "prescribe[d] rules of decision to the Judicial Department of the government in cases

pending before it." *Id.* at 146.
Klein is a notoriously difficult decision to interpret. Read broadly, the "rules of decision" language of *Klein* would seem to contradict the well-established principle that courts must decide cases according to statutes enacted by Congress. *See United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109, 2 L.Ed. 49 (1801); *Miller*, 530 U.S. at 344, 346-47, 120 S.Ct. 2246.
In any event, the 706 Rider is very different from the unusual legislation found unconstitutional in *Klein*. Central to the Court's analysis in *Klein* was its conclusion that the government's seizure of the private property at issue did not divest its owner of his property rights. *See Klein*, 80 U.S. (13 Wall.) at 136-39. Thus, the basis of the *Klein* suit (at least in the eyes of the *Klein* court) was a private right to property vindicated by a presidential pardon, which Congress was therefore powerless to extinguish. *See id.* at 148. Since Congress could not manipulate these *1171 private rights, *Klein* merely refused to allow Congress to accomplish indirectly (by manipulating the judiciary's interpretation of those private rights) what it could not accomplish directly.
[16] Thus understood, *Klein* is precisely in accord with *Wheeling Bridge*, as *Klein* itself observes. *See* 80 U.S. (13 Wall.) at 146-47. When Congress does not control the substance of a right, there are limits to its ability to influence the judiciary's determination of that right, either by directing the judiciary to decide a particular way, or by setting aside judicial determinations after the fact. But when rights are the creatures of Congress, as they were in *Wheeling Bridge*, Congress is free to modify them at will, even though its action may dictate results in pending cases and terminate prospective relief in concluded ones. Thus, *Klein's* prohibition on prescribing rules of decision in pending cases has no application to public rights cases like this one.
The Supreme Court explicitly made this point in *The Clinton Bridge*, a case decided only one year before *Klein*. That case addressed facts almost identical to those in *Wheeling Bridge*. The only difference was that Congress passed legislation authorizing the bridge in question while the suit over its legality was still pending, not after the injunction issued. *See* 77 U.S. (10 Wall.) at 462-63. The Court noted that, in so doing, Congress "gave the rule of decision for the court" in the pending case. *Id.* at 463. While it found that to be unobjectionable under *Wheeling Bridge*, it warned that "very different considerations would have arisen" if Congress had attempted to dictate the rule of decision in a case concerning a "private right of action." *id. Klein* must be read as the fulfillment of that narrow warning, not the enunciation of any broader principle. [FN9]

FN9. The same analysis disposes of BCA's contention that the 706 Rider disturbed the result in another then-pending case, *Sierra Club-Black Hills Group v. United States Forest Serv.*, No. 94-D-2273 (D.Colo. Feb. 20, 2003). Subsections (h) and (i) of the Rider directed the Forest Service to take specific actions in the Norbeck Wildlife Preserve, the area under dispute in the *Sierra Club* litigation.

Furthermore, the Supreme Court has made it clear that *Klein* does not apply to cases like this one: "Whatever the precise scope of *Klein*, ... its prohibition does not take hold when Congress amends applicable law." *Plaut*, 514 U.S. at 218, 115 S.Ct. 1447, *quoted in Miller*, 530 U.S. at 349, 120 S.Ct. 2246 (internal quotation marks and brackets omitted). Because, as we explained in Part II of this opinion, the 706 Rider did "amend[ ] applicable law," the *Klein* principle does not apply here.

C

[17] Last, BCA claims that the 706 Rider violates the rule in *Hayburn's Case. Hayburn's Case* has come to stand "for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut,* 514 U.S. at 218, 115 S.Ct. 1447. BCA admits that the 706 Rider does not literally authorize Forest Service officials to review judicial determinations. Nevertheless, it maintains that the 706 Rider orders the Executive to ignore and violate judicial orders, and that this is close enough to make out a claim under *Hayburn's Case.* We disagree. As discussed above, it is well-established that new law can modify old injunctive decrees. Whenever that happens, the new law at least implicitly orders the Executive to ignore the old decrees.

BCA maintains that in such circumstances, Congress's act cannot constitutionally modify an injunction directly. Instead, it claims, any modification must be the made by the court itself (though the *1172 court may be obliged to do it), and until the court does so, the injunction remains in force. Thus, because the 706 Rider directs the Forest Service to proceed with its tree-cutting activities regardless of whether the court modifies the settlement agreement, it unconstitutionally directs the Executive to ignore an injunction in force. But this is not the lesson of our cases. *Wheeling Bridge* held, not merely that Congress's legislation made modification of the injunction necessary, but that it rendered the injunction unenforceable. 59 U.S. (18 How.) at 432; *Miller,* 530 U.S. at 346, 120 S.Ct. 2246. Similarly, the provision upheld in *Miller v. French* went beyond ordering judges to stay prospective relief after 30 days; instead, it stated that a motion to terminate injunctive relief "shall operate as a stay" of that relief beginning 30 days after the motion--thus staying the injunctive relief without any action by the court. *Miller,* 530 U.S. at 331, 120 S.Ct. 2246. When Congress is acting within the boundaries set by *Wheeling Bridge* and *Miller,* the parties to a modified injunction need not wait upon the court to ratify the congressional change. Thus, we see no violation of *Hayburn's Case* or any other constitutional principle here.

IV

[18] Viewed realistically, the 706 Rider intrudes on neither executive nor judicial authority. The Rider comports with the current view of executive branch officials regarding management of the national forest. And while the Rider overrides a settlement agreement entered by the district court, that agreement was in fact a private agreement between the parties, in which the Judiciary had little or no independent involvement. To overturn the Rider would thus serve not to vindicate the constitutionally entrusted prerogatives of those two branches, but rather to keep in place a private group's own preferences about forest preservation policy in the face of contrary judgments by the Executive and Congress. True principles of separation of powers prevent settlement agreements negotiated by private parties and officials of the executive branch from encroaching either on the constitutionally vested authority of Congress or on the statutorily vested authority of those officials' successors in office. BCA's claim amounts to the argument that an agreement forged by a private group with a former administration, without serious judicial involvement, can strip both Congress and the Executive of their discretionary powers. The Constitution neither compels nor permits such a result.

[19] [20] The executive branch does not have authority to contract away the enumerated constitutional powers of Congress or its own successors, and certainly neither does a private

group. [FN10] Accordingly, the *1173 governance of the Black Hills National Forest must be conducted according to the new rules set by Congress, as Article IV of the Constitution provides.

FN10. Even when the Government unmistakably contracts not to exercise its sovereign powers in otherwise permissible ways, that promise cannot be enforced by injunction, as BCA seeks to do here. At most, such a contract

may give rise in certain circumstances to a suit for damages. *See United States v. Winstar Corp.*, 518 U.S. 839, 910, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (plurality opinion); *id.* at 923, 116 S.Ct. 2432 (Scalia, J., concurring); *Perry v. United States*, 294 U.S. 330, 351-53, 55 S.Ct. 432, 79 L.Ed. 912 (1935); *Lynch v. United States*, 292 U.S. 571, 580, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); *The Sinking Fund Cases*, 99 U.S. 700, 718-19, 25 L.Ed. 496 (1878). As the plurality stated in *Winstar*, "[t]he Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act." 518 U.S. at 881-82, 116 S.Ct. 2432 (quoting *Amino Bros. v. United States*, 178 Ct.Cl. 515, 372 F.2d 485, 491 (1967)). Appellants have made no claim for damages in this case, nor could they.

For the foregoing reasons, the district court's denial of BCA's motion is AFFIRMED.
C.A.10 (Colo.),2004.
Biodiversity Associates v. Cables
357 F.3d 1152

Mr. BACHUS. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. Mr. Bachus is recognized for 5 minutes.

Mr. BACHUS. Mr. Chairman, I am really surprised at my colleagues, in two regards. First, some of them have suggested this is all a waste of time, that this is a trivial or unimportant matter. I would say to all Members, how we define a marriage, whether we continue to define it as all States do and as the Federal Government has, as a marriage between a man and a woman, or whether we allow the courts to disregard that and to invalidate these laws and say that a marriage is not restricted to a man and a woman, it can be two men or two women, first of all, I would say to all of the Members that hopefully we at least ought to be able to agree that is a very important matter. That is fundamental to who we are as a people, to our beliefs, and to who we are as a country.

Second of all, and I think equally absurd, is that somehow to argue that this body, which the Constitution clearly establishes as the lawmaking body under the Constitution, that this body should not make law on this, that we should allow the courts to make law or invalidate laws by legislators, by the properly elected legislature. It is in fact clearly under the Constitution. It is clearly, and any argument to the contrary is, I think, without any merit that this body has no right to make law in this regard or to protect laws which are on the books.

Mr. Chairman, I yield the balance of my time to the gentleman from Indiana, Mr. Hostettler.

Mr. HOSTETTLER. Mr. Chairman, there has been much discussion about a concern of patchwork of marriage laws. Today we have essentially a micro patchwork of marriage laws in that the State of Massachusetts is allowing homosexual couples to marry, which is inconsistent with a vast majority of the States' policies. If Members are opposed to a patchwork of marriage laws, you must have one or two stances on this issue.

First, you must support the gentlewoman from Colorado's amendment to the Constitution to eradicate the notion of a patchwork of marriage laws; or you must introduce your own amendment which says all States must allow homosexual marriage, similar to the status of what is going on in Massachusetts.

If you oppose a patchwork of marriage laws, as we have patchworks of insurance laws, of all types of laws, property laws, zoning laws and ordinances, if you oppose a patchwork of laws for marriage, then you must be in favor of a uniform approach to marriage. I don't think very many of my colleagues on the other side of the aisle are at this point supporting the gentlewoman from Colorado's approach to amending the Constitution on marriage, so I must assume that in the wings is waiting a constitutional amendment to amend the Constitution requiring that all 50 States and territories of the United States and the District of Columbia must require that each State grant a marriage license to homosexual couples.

Ms. WATERS. Will the gentleman yield?

Mr. HOSTETTLER. It is the gentleman from Alabama's time.

Mr. BACHUS. I have yielded to the gentleman from Indiana.

Chairman SENSENBRENNER. The time still belongs to you.

Mr. BACHUS. Mr. Chairman, I will close by saying that I think it ought to be up to the people of the United States, through their elected representatives, to make these important decisions. And I think it is incumbent upon every Member of this Congress to take a stand on how you feel, representing the people you represent, and not to run from this and leave it to an unelected judiciary to make these important decisions. This is an important decision to our country, to our Nation, and to our future, and it ought not be decided by elected judges. It ought to be decided by the people who sent us up here to represent them. The people ought to make this decision, not unelected judges.

Mr. WEXLER. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WEXLER. Mr. Chairman, nobody on this side of the aisle is running from the issue; just the opposite. If I understand the gentleman from Alabama's argument, it essentially goes like this. The issue in definition of marriage is so important, therefore, we ought to engage in a debate and a serious discussion. He takes exception with those that say it isn't or does not rise to the level of national importance so as to discard or move aside the other elements of national debate, but this issue is so important, so fundamental, that we must strike the jurisdiction of the Federal courts from ever entertaining it.

It is that important that we need to single out the issue of definition of marriage and the Federal courts should not entertain it. If we were engaging in a discussion of the general jurisdiction of the Federal courts of the United States, that might be a legitimate argument, but I give my colleague and friend from Florida, Mr. Feeney, credit when he spoke about what is the purpose of this bill.

Americans in good conscience have a differing level of opinion as to what defines marriage and a different level of comfort with different situations. But what an overwhelming number of Americans entirely are uncomfortable with is when their own Government singles out a law-abiding group of people for special treatment which is discriminatory in the process of our Government.

Whether one is comfortable or not comfortable with gay marriage is one thing. Whether one believes marriage ought to be unique to a man and woman or ought to be able to be entertained and entered into by same-sex individuals and couples, that is one thing. But to go a step further and say that because someone chooses to enter into a same-sex marriage, then they have in effect given up their rights to go to the Federal courts and ask for the same constitutional protection as any other American. We are not trying to preordain a result. What we say is the Federal courts ought to have their opportunity to weigh in on this issue like they have in every other important issue that affects our society.

With all due respect to the general definitions of we are seeking to protect marriage, I just want to go on record as one individual, one American, who is married to a woman who does not in any way feel jeopardized by the fact that men or women in Massachusetts or California or anywhere else in the country choose to engage in a monogamous relationship that is protected by law, and I wish those men and women well. I hope they have a long relationship, that they engage in a meaningful, loving relationship, and it does

not in any way jeopardize my relationship with the woman I chose to marry.

If we can get off this sanctimonious box of saying that those of us who are heterosexual and marry a man or woman opposite to our sex are somehow jeopardized by two loving people, whether they be men or women, and that our whole structure of life is coming crumbling down, I would respectfully argue that is not the issue. The issue is are we going to allow law-abiding Americans their day in court and let the courts decide based on a Constitution provision of 200-plus years.

Mr. Chairman, I yield to the gentleman from Massachusetts.

Mr. DELAHUNT. Mr. Chairman, I thank the gentleman for yielding.

In response to my dear friend from Alabama, no one is running away from the issue. What I would have hoped is the majority, the proponents of this legislation, would have put out before us for consideration an amendment to the Constitution, much as what has occurred in the other body, and let us have the vote.

But I do think that going in this direction, what we do is reconfigure the relationship between the three independent branches of Government. Let us be honest. What we are doing here is we are divesting from the United States Supreme Court the right of appellate review. I don't know, maybe someone can tell me from either side of the aisle.

Chairman SENSENBRENNER. The gentleman from Florida's time has expired.

Mr. CARTER. Mr. Chairman.

Chairman SENSENBRENNER. Judge Carter from Texas is recognized for 5 minutes.

Mr. CARTER. Mr. Chairman, I have been listening to this debate and I have been reading the Constitution. I am really reserved as to what the other side is saying. I have tried to uphold the Constitution for the entire time I served on the bench.

The question we have as Members of Congress is do we have to meet the duties and responsibility that are set out in the Constitution for Members of Congress?

When our Founding Fathers, when they faced a court prior to their independence, that court was a court that represented the crown. The crown was the king. The tyrannical king was what they were overthrowing when they declared their independence from Great Britain, so they clearly would have viewed a court system to be speaking for the crown at the time that they declared their independence.

We substituted in our Constitution, in Article 3, the crown for the United States Constitution by declaring the judicial power of the United States shall be vested in one Supreme Court, et cetera. Our Constitution then stepped into the position that the crown had made. Now we have to look at does the court system by its independence, declared by unelected judges, are they at some point reaching a tyranny against this country. Who is supposed to look into that and see whether it is that in the opinion of the majority of the Congress? It is the Congress. It says right here, with such exceptions and rules and regulations as the Congress shall make. It says in Article 4 that the Congress may by general law prescribe the manner and acts and records and so forth.

This is a duty imposed upon the Congress of the United States.

Now, the fact that the Congress has never raised this duty to the level of a constitutional crisis, does that mean you are not supposed to do that? I happen to agree with the minority, this probably does raise the constitutional crisis. I do think that constitutional crisis will be resolved by the Supreme Court of the United States no matter what we write into this law. But I think by the fact that we are given the declaration "shall" and in drafting—from anybody's interpretation of drafting legislation, "shall" means you have got to do it. At some point in time when the majority of this Congress feels like an issue ought to be raised, even if it is a constitutional crisis, we have a duty if we believe in this Constitution to raise that issue. And if not, then I would like someone on the other side of the aisle to tell me who should uphold the provisions of Article 3 of the Constitution which says the Congress shall.

Mr. WEINER. Would the gentleman yield?

Mr. CARTER. I yield.

Mr. WEINER. Mr. Chairman, it is funny that the gentleman says that, because today a bill that is sponsored by Mr. Bachus is on the floor commemorating the life of John Marshall. He asked that exact same question and answered it in a case that you are familiar with.

Mr. CARTER. I know I am familiar with it.

Mr. WEINER. I guarantee from time to time you have been glad it was argued, which is *Marbury* v. *Madison*. That is exactly where that question is answered.

Mr. Chairman, I ask unanimous consent that the decision of *Marbury* v. *Madison* be placed in the record at this point.

Mr. SMITH. [Presiding] That unanimous consent request is granted.

[The material referred to follows:]

Marbury v. Madison
5 U.S. 137
U.S.Dist.Col.,1803.
Feb. 1803. (Approx. 24 pages)

Supreme Court of the United States

William MARBURY

v.

James MADISON, Secretary of State of the United States.

Feb. 1803.

MARSHALL.

*138 The supreme court of the U. States has not power to issue a mandamus to a secretary of state of the U. States, it being an exercise of *original* jurisdiction not warranted by the constitution. Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution. An act of congress repugnant to the constitution cannot become a law. The courts of the U. States are bound to take notice of the constitution. A commission is not necessary to the appointment of an officer by the executive--Semb. A commission is only *evidence* of an appointment.

Delivery is not necessary to the validity of letters patent. The President cannot authorize a secretary of state to omit the performance *139 of those duties which are enjoined by law.

A justice of peace in the district of Columbia is not removable at the will of the President. When a commission for an officer not holding his office at the will of the President, is by him signed and transmitted to the secretary of state to be sealed and recorded, it is irrevocable; the appointment is complete. A mandamus is the proper remedy to compel a secretary of state to deliver a commission to which the party is entitled.

*137 At the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, esq. late attorney general of the United States, *138 severally moved the court for a rule to James Madison, secretary of state of the United States, to shew cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said

commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to shew cause on the 4th day of this term. This rule having been duly served,

Mr. Lee, in support of the rule, observed that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office not held at the will of the president. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate praying them to suffer their secretary to give extracts from their executive journals respecting *139 the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have therefore been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31 January, 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state and not bound to disclose any facts relating to the business or transactions in the office.

Mr. Lee observed, that to shew the propriety of examining these witnesses, he would make a few remarks on the nature of the office of secretary of state. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the President. In the first his duty is to the United States or its citizens; in the other his duty is to the President; in the one he is an independent, and an accountable officer; in the other he is dependent upon the President, is his agent, and accountable to him alone. In the former capacity he is compellable by mandamus to do his duty; in the latter he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July, 1789, vol. 1. p. 359, entitled "an act for establishing an executive department, to be denominated the department of foreign affairs." The first section ascertains the duties of the secretary so far as he is considered as a mere executive agent. It is in these words, "Be it enacted, &c. that there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall perform and execute such duties as shall from time to time be enjoined on, or intrusted to him by the President of the United States, agreeable to the constitution, relative to correspondencies, commissions *140 or instructions to or with public ministers or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall

from time to time order or instruct."
The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken which is simply, "well and faithfully to execute the trust committed to him;" and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given and the duties imposed by this act, no mandamus will lie. The secretary is responsible only to the President. The other act of congress respecting this department was passed at the same session on the 15th September 1789, vol. 1, p. 41, c. 14, and is entitled "An act to provide for the safe keeping of the acts, records, and seal of the United States, and for other purposes." The first section changes the name of the department and of the secretary, calling the one the department and the other the secretary of state. The second section assigns new duties to the secretary, in the performance of which it is evident, from their nature, he cannot be lawfully controlled by the president, and for the non-performance of which he is not more responsible to the president than to any other citizen of the United States. It provides that he shall receive from the president all bills, orders, resolutions and votes of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they *141 shall have been signed by the President. The fifth section provides for a seal of office, and that all copies of records and papers in his office, authenticated under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, &c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The President has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office the President cannot take from his custody the seal of the United States, nor prevent him from recording, and affixing the seal to civil commissions of such officers as hold not their offices at the will of the President, after he has signed them and delivered them to the secretary for that purpose. By other laws he is to make out and record in his office patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the President; and if he neglects or refuses to perform them, he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States. The President is no party to this case. The secretary is called upon to perform a duty over which the President has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are entrusted, and he alone is answerable for their due performance. The secretary of state, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are undoubtedly facts, which may come to their knowledge by means of their

connection with the secretary of state, respecting which *142 they cannot be bound to answer. Such are the facts concerning foreign correspondencies, and confidential communications between the head of the department and the President. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose I claim title to land under a patent from the United States. I demand a copy of it from the secretary of state. He refuses. Surely he may be compelled by mandamus to give it. But in order to obtain a mandamus, I must shew that the patent is recorded in his office. My case would be hard indeed if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit. It becomes necessary for me to have the use of that act in a court of law. I apply for a copy. I am refused. Shall I not be permitted, on a motion for a mandamus, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded? Surely it cannot be contended that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

The court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

Mr. Wagner being examined upon interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them justices of the peace. That Mr. Marbury and Mr. Ramsay called on the secretary of state respecting their commissions. That the secretary referred them to him; he took them into another room and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question "who gave him that information;" and the court decided that he was not bound to answer it, because it was not pertinent to this cause. He further testified that some of the commissions of the justices, but he believed not all, were recorded. He did not know whether the commissions of the applicants were *143 recorded, as he had not had recourse to the book for more than twelve months past.

Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace signed by Mr. Adams; but believed, and was almost certain, that Mr. Marbury's and col. Hooe's commissions were made out, and that Mr. Ramsay's was not; that he made out the list of names by which the clerk who filled up the commissions was guided; he believed that the name of Mr. Ramsay was pretermitted by mistake, but to the best of his knowledge it contained the names of the other two; he believed none of the commissions for justices of the peace signed by Mr. Adams, were recorded. After the commissions for justices of the peace were made out, he carried them to Mr. Adams for his signature. After being signed he carried them back to the secretary's office, where the seal of the United States was affixed to them. That commissions are not usually delivered out of the office before they are recorded; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the secretary of state.

Mr. Lincoln, attorney general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was

acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.

*144 1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and

2d. He ought not to be compelled to answer any thing which might tend to criminate himself.

Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objection of Mr. Wagner and Mr. Brent. He stated that the duties of a secretary of state were two-fold. In discharging one part of those duties he acted as a public ministerial officer of the United States, totally independent of the President, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to answer as a marshal, a collector, or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as a public ministerial officer, but in the capacity of an agent of the President, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln was not bound to disclose any thing which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every secretary of state should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

The court said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it *145 is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.

The court granted it and postponed further consideration of the cause till the next day.

At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last which he did not think himself obliged to answer fully. The question was, what had been done with the commissions. He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.

The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the present cause, what had been done with them by others.

To the other questions he answered that he had seen commissions of justices of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect whether any of them constituted Mr. Marbury, col. Hooe, or col. Ramsay, justices of the peace; there were when he went into the office several commissions for justices of peace of the district made out; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions; and the individuals whose names were contained in this general commission were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that any one had been sent.

*146 Mr. Lee then read the affidavit of James Marshall, who had been also summoned as a witness. It stated that on the 4th of March 1801, having been informed by some person from Alexandria that there was reason to apprehend riotous proceedings in that town on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace; that as many as 12, as he believed, commissions of justices for that county were delivered to him for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for colonel Hooe, and one for William Harper.

Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule to three questions;

1st. Whether the supreme court can award the writ of mandamus in any case.

2d. Whether it will lie to a secretary of state in any case whatever.

3d. Whether in the present case the court may award a mandamus to James Madison, secretary of state.

The argument upon the 1st question is derived not only from the principles and practice of that country, from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States.

This is the *supreme* court, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and a ministerial officer. From this principle alone the court of king's bench in England derives the power of issuing the writs of mandamus and prohibition. 3. Inst. 70, 71. *147 Shall it be said that the court of king's bench has this power in consequence of its being the supreme court of judicature, and shall we deny it to this court which the constitution makes the *supreme* court? It is a beneficial, and a necessary power; and it can never be applied where there is another *adequate, specific, legal remedy.*

The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction) with such exceptions, and under such regulations as congress shall make. The term "appellate jurisdiction" is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals.

Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. com. 109. There are some injuries which can only be redressed by a writ of mandamus, and others by a writ of prohibition. There must then be a

jurisdiction some where competent to issue that kind of process. Where are we to look for it but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110, says that a writ of mandamus is "a command issuing in the king's name from the court of king's bench, and directed to any *person,* corporation or inferior court, requiring them to do some particular thing therein specified, *which appertains to their office and duty,* and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, *and has no other specific means of compelling its performance."*

In the Federalist, vol. 2, p. 239, it is said, that the word "appellate" is not to be taken in its technical sense, as used in reference to appeals in the course of the *civil* law, but in its broadest sense, in which it denotes nothing more than the power of one tribunal to review the proceedings *148 of another, either as to law or fact, or both. The writ of mandamus is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a mandamus to be one. But the power does not depend upon implication alone. It has been recognized by legislative provision as well as in judicial decisions in this court.

Congress, by a law passed at the very first session after the adoption of the constitution, vol. 1, p. 58, sec. 13, have expressly given the supreme court the power of issuing writs of mandamus. The words are, "The supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or *persons holding office,* under the authority of the United States." Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dal. Rep. 298.

This court has entertained jurisdiction on a mandamus in one case, and on a prohibition in another. In the case of the United States v. judge Lawrence, 3. Dal. Rep. 42, a mandamus was moved for by the attorney general at the instance of the French minister, to compel judge Lawrence to issue a warrant against captain Barre, commander of the French ship of war Le Perdrix, grounded on an article of the consular convention with France. In this case the power of the court to issue writs of mandamus, was taken for granted in the arguments of counsel on both sides, and seems to have been so considered by the court. The mandamus was refused, because the case in which it was required, was not a proper one to support the motion. In the case of the United States v. judge Peters a writ of prohibition was granted, 3. Dal. Rep. 121, 129. This was the celebrated case of the French *149 corvette the Cassius, which afterwards became a subject of diplomatic controversy between the two nations. On the 5th Feb. 1794, a motion was made to the supreme court in behalf of one John Chandler, a citizen of Connecticut, for a mandamus to the *secretary at war,* commanding him to place Chandler on the invalid pension list. After argument, the court refused the mandamus, because the two acts of congress respecting invalids, did not support the case on which the applicant grounded his motion. The case of the United States v. Hopkins, at February term, 1794, was a motion for a mandamus to Hopkins, loan officer for the district of Virginia, to command him to admit a person to subscribe to the United States loan. Upon argument the mandamus was refused because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue

a mandamus ever denied. Hence it appears there has been a legislative construction of the constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2d. The second point is, can a mandamus go to a secretary of state in any case? It certainly cannot in *all* cases; nor to the President in *any* case. It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a mandamus to a secretary of state is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the President, he is not liable to a mandamus; but as a recorder of the laws of the United States; as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions, &c. he is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control, but that of the laws. It is true he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, *150 should be above the compulsion of law in the exercise of those duties. As a ministerial officer he is compellable to do his duty, and if he refuses, is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of mandamus. If a mandamus can be awarded by this court in any case, it may issue to a secretary of state; for the act of congress expressly gives the power to award it, "in cases warranted by the principles and usages of law, *to any person holding offices under the authority of the United States."*

Many cases may be supposed, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress, vol. 1, p. 43, copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose the secretary refuses to give a copy, ought he not to be compelled? Suppose I am entitled to a patent for lands purchased of the United States; it is made out and signed by the President who gives a warrant to the secretary to affix the great seal to the patent; he refuses to do it; shall I not have a mandamus to compel him? Suppose the seal is affixed, but the secretary refuses to record it; shall he not be compelled? Suppose it recorded, and he refuses to deliver it; shall I have no remedy?

In this respect there is no difference between a patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge Patterson inquired of Mr. Lee whether he understood it to be the duty of the secretary to deliver a commission, unless ordered so to do by the President.

Mr. Lee replied, that after the President has signed a commission for an office not held at his will, and it comes to the secretary to be sealed, the President has done with it, and nothing remains, but that the secretary perform those ministerial acts which the law imposes upon him. It immediately becomes his duty to seal, record, and deliver *151 it on demand. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.

3d. The third point is, whether in the present case a writ of mandamus ought to be awarded to

James Madison, secretary of state.
The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of Congress passed the 27th of Feb. 1801, entitled "An act concerning the district of Columbia," ch. 86, sec. 11 and 14; page 271, 273. They are authorized to hold courts and have cognizance of personal demands of the value of 20 dollars. The act of May 3d, 1802, ch. 52, sec. 4, considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the President. The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed. The President has then done with it; it becomes irrevocable. An appointment of a judge once completed, is made forever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law they are as if done.
These justices exercise part of the judicial power of the United States. They ought therefore to be independent. Mr. Lee begged leave again to refer to the Federalist, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district that the justices should be independent; almost all the authority immediately exercised over them is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the will of a secretary of state. *152 This cause may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments or the dignity of the office, are no objects with the applicants. They conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The citizens of this district have their fears excited by every stretch of power by a person so high in office as the secretary of stat
It only remains now to consider whether a mandamus to compel the delivery of a commission by a public ministerial officer, is one of "the cases warranted by the principles and usages of law."
It is the general principle of law that a mandamus lies, if there be no other *adequate, specific, legal* remedy; 3 *Burrow,* 1067, *King v. Barker, and al.* This seems to be the result of a view of all the cases on the subject.
The case of Rex.v. Borough of Midhurst, 1. Wils. 283, was a mandamus to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of Rex v. Dr. Hay, 1. W.Bl.Rep. 640, a mandamus issued to admit one to administer an estate.
A mandamus gives no right, but only puts the party in a way to try his right. Sid. 286.
It lies to compel a ministerial act which concerns the public. 1. Wilson, 283, 1. Bl.Rep. 640--although there be a more tedious remedy, Str. 1082, 4 Bur. 2188, 2 Bur. 1045; So if there be a legal right, and a remedy in equity, 3. Term Rep. 652. A mandamus lies to obtain admission into a trading company. Rex v. Turkey Company, 2 Bur. 1000. Carthew 448. 5 Mod. 402; So it lies to put the corporate seal to an instrument. 4. Term.Rep. 699; to commissioners of the excise to grant a permit, 2 Term.Rep. 381; to admit to an office, 3 Term.Rep. 575; to deliver papers which concern the public, 2 Sid. 31. A mandamus will sometimes lie in a *153 doubtful case, 1 Levinz 123, to be further considered on the return, 2 Levinz, 14. 1 Sidersin, 169.

It lies to be admitted a member of a church, 3. Bur. 1265, 1043.
The process is as ancient as the time of Ed.2d. 1 Levinz 23.
The first writ of mandamus is not peremptory, it only commands the officer to do the thing or shew cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding, if not, a peremptory mandamus is then awarded.
It is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man.
On a subsequent day, and before the court had given an opinion, Mr. Lee read the affidavit of Hazen Kimball, who had been a clerk in the office of the Secretary of State, and had been to a distant part of the United States, but whose return was not known to the applicant till after the argument of the case.
It stated that on the third of March, 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe a justice of the peace for the county of Alexandria, in the district of Columbia.
Afterwards, on the 24th of February the following opinion of the court was delivered by the chief justice.
Opinion of the court.
At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why a mandamus *154 should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.
No cause has been shewn, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded.
These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.
In the order in which the court has viewed this subject, the following questions have been considered and decided.
1st. Has the applicant a right to the commission he demands?
2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remed
3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?
The first object of inquiry is,
1st. Has the applicant a right to the commission he demands?
His right originates in an act of congress passed in February 1801, concerning the district of Columbi
After dividing the district into two counties, the 11th section of this law, enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.
*155 It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the

commission has never reached the person for whom it was made out.
In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.
The 2d section of the 2d article of the constitution, declares, that, "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."
The third section declares, that "he shall commission all the officers of the United States."
An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."
These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:
1st. The nomination. This is the sole act of the President, and is completely voluntary.
2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.
*156 3d. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States."
The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.
Although that clause of the constitution which requires the President to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer, who has been appointed, remains the same as if in practice the President had commissioned officers appointed by an authority other than his own.
It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.
These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

*157 This is an appointment made by the President, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to shew an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment; though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the President, must be completely evidenced, when it is shewn that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transac

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed, converting the department *158 of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the President:" "Provided that the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the President therefore."

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal, is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is

affixed the appointment is made, and *159 the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which, delivery is essential.

This idea is founded on the supposition that the commission is not merely *evidence* of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle, claimed for its support, is established.

The appointment being, under the constitution, to be made by the President *personally,* the delivery of the deed of appointment, if necessary to its completion, must be made by the President also. It is not necessary that the livery should be made personally to the grantee of the office: It never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission *after* it shall have been signed by the President. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences *160 of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the President, and the seal of the United States, are those solemnities. This objection therefore does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission, is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to mis

It may have some tendency to elucidate this point, to enquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the secretary of state, would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to

prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but, not that the original had been transmitted. If indeed it should appear that *161 the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees, to be paid by a person requiring a copy, are ascertained by law. Can a keeper of a public record, erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one, nor the other, is capable of rendering the appointment a non-entity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct. A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who *162 has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but

violative of a vested legal right.
This brings us to the second inquiry; which is,
2dly. If he has a right, and that right has been violated, do the laws of this country afford him a remed
*163 The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.
In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.
"In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."
And afterwards, p. 109, of the same vol. he says, "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."
The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.
If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.
It behoves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself, is, whether this can be arranged *164 with that class of cases which come under the description of *damnum absque injuria* --a loss without an injury.
This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.
Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.
That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.
By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its

mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country? Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. *165 No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3. p. 255, says, " but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (vol.3d. p. 299) the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the secretary of state, the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the President is invested with certain important political powers, in the *166 exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more

perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us enquire how it applies to the case under the consideration of the court. *167 The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the President; the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defense had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is then the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice *168 of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for, and,

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be, "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the

court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord Mansfield, in 3d Burrows 1266, in the case of the *King v. Baker, et al.* states with much precision and explicitness the cases in which this writ may be used.

"Whenever," says that very able judge, "there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit) and a person is kept out of possession, or dispossessed of such right, and *169 has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government." In the same case he says, "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty and which the court has previously determined, or at least supposes, to be consonant to right and justice." Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered *170 by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a

duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is *171 again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is the head of a good department is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken up in this country.

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February, 1793, making it the duty of the secretary of war, in conjunction with the attorney general, to take such measures, as might be necessary to obtain an adjudication of the supreme court of the United *172 States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judge There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant, was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was, not that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case--the decision necessarily to be made if the report of the commissioners did not confer

on the applicant a legal right.
The judgment in that case, is understood to have decided the merits of all claims of that description; and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.
The doctrine, therefore, now advanced, is by no means a novel one.
It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.
It is to deliver a commission; on which subject the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable, at the will of the executive; and being so *173 appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.
It was at first doubted whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in *detinue* is for the thing itself, *or* its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.
This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,
Whether it can issue from this court.
The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."
The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.
The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present *174 case; because the right claimed is given by a law of the United States.
In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."
It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited;

provided those cases belong to the judicial power of the United States.
If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all. It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.
*175 If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.
When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.
To enable this court then to issue a mandamus, it must be shewn to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.
It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.
It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to *176 appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.
The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exe
The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited *177 and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

*178 So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which

they both apply.
Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.
This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure.
That it thus reduces to nothing what we have deemed the greatest improvement on political institutions--a written constitution--would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.
The judicial power of the United States is extended to all cases arising under the constitution. *179 Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?
This is too extravagant to be maintained.
In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?
There are many other parts of the constitution which serve to illustrate this subject.
It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.
The constitution declares that "no bill of attainder or *ex post facto* law shall be passed."
If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?
"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."
Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out of* court, sufficient for conviction, must the constitutional principle yield to the legislative act?
From these, and many other selections which might be made, it is apparent, that the framers of the constitution *180 contemplated that instrument, as a rule for the government of *courts,* as well as of the legislature.
Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?
The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative

opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to *the constitution,* and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts,* as well as other departments, are bound by that instrument.

The rule must be discharged.

U.S.Dist.Col.,1803.

Marbury v. Madison

5 U.S. 137, 1 Cranch 137, 1803 WL 893 (U.S.Dist.Col.), 2 L.Ed. 60

Mr. WEINER. I have a copy here.

Mr. CARTER. Reclaiming my time, no, it does not speak to *Marbury* v. *Madison*. This question is where is the check and balance in this Constitution if it is not in the writing of the Constitution that the Congress has over the court? There it is, right there in black and white. We have a check and balance over the court. *Marbury* v. *Madison*, there is nobody trying to limit the jurisdiction of the court.

Mr. WEINER. If the gentleman would yield, that is exactly what the case was. It was a case about whether or not the writ of mandamus, whether the court could order Congress, could order another branch, the executive branch, to issue this writ; and the executive said what you just said: No, no, the Constitution says that only the Congress can do that. And John Marshall, in an extraordinarily reasoned decision, said oh, no, we are not all equal. In the case of interpreting acts of the executive and the legislature, it is the judicial branch that has the final say. That is exactly the precedent.

Mr. CARTER. We are not talking about interpreting the acts of the legislative branch. We are talking about interpreting the acts of the judicial.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from California, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

I came to this hearing today with no real intention of engaging in discussion on this legislation because I feel so strongly that it is simply political in nature and that it is designed to strengthen a more conservative element of this country with an eye towards the elections in November.

However, I am really surprised at some of the debate which is taking place. We have been challenged on this side of the aisle that if we do not like this legislation, that somehow we have to be for a constitutional amendment that would force the State to do what we would want it to do, and that is absolutely not true.

I think on this side of the aisle we are simply for equal protection under the law. You talk about the rule of law. The rule of law in this country is that none of us will be excluded from access to the courts. None of us. It does not matter whether you are gay or lesbian or black or disabled, you have the right to petition your courts at every level.

I do not quite understand the argument that likens the Supreme Court to the crown, and then goes on to say that in some way these unelected judges are synonymous to the Supreme Court, and when we take them on, we are taking on the crown or that which substituted for the crown, the Supreme Court. We simply want the right for folks to be able to get to the Supreme Court. We are very fair in what we are talking about. What we are saying is yes, you have a patchwork of laws at the State level, and let those who will, take this debate all of the way to the highest level of the courts in this country.

Why would anybody block the ability to take the debate and the argument to the highest level so that decisions can be made?

Let me just say after we get through with the so-called dispassionate arguments on this issue, arguing the law, disagreeing on jurisdiction, all of that, this is one of the most divisive, political

acts that could be committed by an elected official. We are dividing communities, we are pitting families against each other. We are causing even people who work in this building and elected officials to try and hide their preferences based on accusations and threats of outing. How can you do this?

I want to tell the Members of this body that we see this division at the highest level. Isn't it absolutely telling that the Vice President of the United States and his wife are now in public view disagreeing on this issue. You know why? They are torn. They are torn because they have a child who is openly lesbian, and one parent has made the decision that they will do the political thing and do whatever they are told to do by the President of the United States, and another member of that family is saying I stand with where my husband said he stood when he said he believed that it should remain with the States.

And so despite the fact that I think we can argue all day long about equal protection, unelected jurists, whether or not the Supreme Court should be blocked from ever hearing cases on this issue, the fact of the matter is this is simply a political move. This is simply an issue which has been framed a few months from an election. I would hope that we would discontinue, close this down, and go on with the business of this Government with so many important issues which need to be attended to.

Mr. Chairman, I yield to the gentleman from Massachusetts.

Mr. DELAHUNT. Mr. Chairman, I thank the gentlewoman for yielding.

We have heard about unelected judges and the rights of people to make these decisions, which some believe is so fundamental.

Let me issue a challenge. There is nothing more open in terms of listening to the people's views on a constitutional amendment. We all know the process that would be required. What I would suggest is that those who feel that unelected judges should not be involved—and in most States there are unelected judges—I think it would be a better course to bring before this Committee a constitutional amendment, which I would oppose.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Mr. KING. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman from Iowa, Mr. King.

Mr. KING. Mr. Chairman, I would like to speak to a broader issue as to what is at stake here. When we discuss the constitutional aspects, one of the questions is where is the check? If Congress is not the check on the overreach of power by the judiciary, where is it? I will say, Congress is the check.

One thing is that the courts will hear this case. They will hear this case eventually, and we are asking them to go back and reread the Constitution and finally make a decision after a couple of centuries on where the check is on the tyranny of the courts.

But what is at stake here is marriage itself, our families, our way of life. And all of human history points to a man and a woman joined together in matrimony, raising children, passing their values along, father and mother, to the next generation; their religious values, their community's values, their sense of community and nationhood and history. That has been proven throughout the mil-

lennia to be the undisputed method by which a civilization survives.

Here we have another argument in front of us that says we can use the courts to contravene the will of the people to impose another kind of a relationship here by the virtue of four judges to three in Massachusetts imposing that upon the rest of the Nation. If that happens, and if you argue that we should not draw the line at marriage as we know it, then where would you draw the line? If we do not draw this line here and limit the jurisdictions of the courts and slow down this contravention of the will of the people, where do we draw the line?

Do we draw the line, as Mr. Frank testified in a hearing, he would draw it at two people. We have heard that in testimony earlier today. How would you draw it at two people? If you cannot draw it at a man and woman, how do you draw the line at two people and not three. If you cannot draw the line at three people, how do you draw the line with any other relationship that is out there? Eventually if this precedent is allowed to stand which has been established in Massachusetts, then eventually every human relationship will become a constitutional right by the same logic. If those human relationships become constitutional rights, it breaks down the entire structure of family and relationship.

And, we are a in values-neutral society. I am not worried about the high-school kids today, I am worried about the ones that are just born and those yet to be born that will grow into a society that they do not know the traditions that we have. They will be told, you don't know what you might be and what your preferences might be, so you ought to experiment with a number and settle on one or two or three, or rotate throughout a lifetime. They will be told that one relationship is as good as any other. They will have a menu of life far different than the one that we are talking about here, and that menu of life will encourage them to try to sample along that list. When that happens, you will see relationships form for reasons other than personal love. For example, there will be relationships formed because they want to access someone's 401(k) plan or somebody's health care plan or retirement plan or inheritance. So we do not have either a limitation on what group relationship could be married to another group relationship.

What would be the constitutional prohibition? How could we ever limit a group marriage and one of those people being into another group marriage? It ends up in a never-ending, interconnecting link of relationships which breaks down this entire structure, this structure of family which has been proven through at least 6,000 years to be the model that perpetuates our situation.

The argument has to be a lot stronger from the other side. Marriage is not a right. It is not a constitutional right. It is not a civil right. We give a marriage license. A license is by definition permission to do something which is otherwise not legal. It is a privilege to get married, d we support that because of all of the good things that I have described and many more beyond. It does not discriminate against anybody else. We want people to have the privacy of their lives, we just do not want that imposed upon all of the States, and we absolutely do not want to see Massachusetts law imposed upon the entire United States of America.

The Hostettler bill slows that process down. We do need a constitutional amendment. We must save marriage. It is the most critical issue of our time.

Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Mr. Chairman, I like my colleague, Ms. Waters, had not planned to engage in debate this morning but I feel a need to say a couple of things.

First, as Ms. Waters has noted, have debated this on two levels. The first is really the substance, and I think it is clear there is just one reason why this measure is before us today, and that is to divide America for political gain, and I think it is quite unfortunate that is the goal which is being pursued.

Also, I have been a Member of the Judiciary Committee for 9½ years, and I think we have hit an all-time low in terms of debate on the legal issues before us. I mean, the proponents of this bill have said so many preposterous things, I find it almost embarrassing to listen to it. So I have a request. I would like every Member of the Committee who actually went to law school to provide me with the name of their constitutional law professor, and I would like to send their comments to their professor and ask their former professors to engage with them in a renewal of the course, because it really is quite alarming and frightening to me that this kind of discussion could occur in this year about our fundamental, basic constitutional law.

This bill is unconstitutional. If it passes, which it probably will not, it will be tossed by the court. But the discussion about this is enormously alarming and I think should frighten Americans everywhere.

Mr. Chairman, I yield the balance of my time to Mr. Delahunt from Massachusetts.

Mr. DELAHUNT. Mr. Chairman, I thank the gentlewoman.

I have to allay some of the concerns I heard from my dear friend on the other side of the aisle, Mr. King, about Massachusetts dictating their policy regarding marriage to the other States of the Union. That simply is inaccurate. It is not the case. Let me refer to you or let me quote to you certain excerpts from a brief recently filed by the chief law enforcement officer of the Commonwealth of Massachusetts, the attorney general, as well as excerpts from the Goodrich opinion which obviously is a focal point, if you will. So for those of you who are concerned about Massachusetts impacting policy in the definition of marriage in your States, I would respectfully request you to listen very carefully to the excerpts that I will quote.

"the argument made that legalization of same-sex marriage in Massachusetts will be used by persons in other States as a tool to obtain recognition of a marriage in their State that is otherwise unlawful is precluded by provisions of," and it enumerates various sections of the Massachusetts general laws. The language used throughout the Goodrich majority decision recognizes that other States are entitled to reach their own conclusions about same-sex marriage and that nothing in Goodrich is intended to force the issue in or on other States. The Goodrich court carefully and repeatedly limited the reach of its decision to Massachusetts residents or citizens. Our concern is with the Massachusetts Constitu-

tion as a charter of governance for every person properly within its reach.

So please do not misunderstand the implications of this decision. Understand that there is a specific Massachusetts statute expressly according respect to other States' marriage laws. This is not the case. The Goodrich decision, the Massachusetts decision, will not implicate the policy of other States.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Let me make a suggestion. There are some Members who have obligations over the lunch hour. Most of this debate does not relate to the Baldwin amendment specifically. Because Members are here, I think it would be good comity to allow a vote on the Baldwin amendment now, the next amendment can be offered, and then the debate can continue.

Those in favor of the Baldwin amendment to the amendment in the nature of a substitute will say aye.

Opposed, no.

The noes appear to have it.

Ms. BALDWIN. Mr. Chairman, I request a rollcall.

Chairman SENSENBRENNER. A rollcall is requested and will be ordered.

Those in favor of the Baldwin amendment to the amendment in the nature of a substitute will, as your names are called, answer aye. Those opposed, no.

The Clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK. Mr. Coble.

Mr. COBLE. No.

The CLERK. Mr. Coble votes no.

Mr. Smith.

Mr. SMITH. No.

The CLERK. Mr. Smith votes no.

Mr. Gallegly.

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly votes no.

Mr. Goodlatte.

[No response.]

The CLERK.Mr. Chabot.

Mr. CHABOT. No.

The CLERK. Mr. Chabot votes no.

Mr. Jenkins.

Mr. JENKINS. No.

The CLERK. Mr. Jenkins votes no.

Mr. Cannon.

Mr. CANNON. No.

The CLERK. Mr. Cannon votes no.

Mr. Bachus.

Mr. BACHUS. No.

The CLERK. Mr. Bachus votes no.

Mr. Hostettler.

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler votes no.

Mr. Green.

Mr. GREEN. No.
The CLERK. Mr. Green votes no.
Mr. Keller.
Mr. KELLER. No.
The CLERK. Mr. Keller votes no.
Ms. Hart.
Ms. HART. No.
The CLERK. Ms. Hart votes no.
Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake votes no.
Mr. Pence.
Mr. PENCE. No.
The CLERK. Mr. Pence votes no.
Mr. Forbes.
Mr. FORBES. No.
The CLERK. Mr. Forbes votes no.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King votes no.
Mr. Carter.
Mr. CARTER. No.
The CLERK. Mr. Carter votes no.
Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney votes no.
Mrs. Blackburn.
Mrs. BLACKBURN. No.
The CLERK. Mrs. Blackburn votes no.
Mr. Conyers.
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers votes aye.
Mr. Berman.
Mr. BERMAN. Aye.
The CLERK. Mr. Berman votes aye.
Mr. Boucher.
[No response.]
Mr. Nadler.
Mr. NADLER. Aye.
The CLERK. Mr. Nadler votes aye.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott votes aye.
Mr. Watt.
Mr. WATT. Aye.
The CLERK. Mr. Watt votes aye.
Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren votes aye.
Ms. Jackson Lee.
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee votes aye.
Ms. Waters.
Ms. WATERS. Aye.
The CLERK. Ms. Waters votes aye,

Mr. Meehan.
[No response.]
The CLERK. Mr. Delahunt.
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt votes aye.
Mr. Wexler.
[No response.]
Ms. Baldwin.
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin votes aye.
Mr. Weiner.
Mr. WEINER. Aye.
The CLERK. Mr. Weiner votes aye.
Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff votes aye.
Ms. Sanchez.
Ms. SANCHEZ. Aye.
The CLERK. Ms. Sanchez votes aye.
Mr. Sensenbrenner.
Chairman SENSENBRENNER. No.
The CLERK. Mr. Sensenbrenner votes no.
Chairman SENSENBRENNER. Are there Members in the Chamber who wish to cast or change their vote?
The gentleman from Virginia, Mr. Goodlatte.
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte votes no.
Chairman SENSENBRENNER. If there are no further Members in the Chamber who wish to cast or change their vote, the Clerk will report.
The CLERK. Mr. Chairman, there are 13 ayes and 20 noes.
Chairman SENSENBRENNER. And the amendment is not agreed to.
[12:30 p.m.]
Chairman SENSENBRENNER. Let me talk a little bit about scheduling. After this announcement the Chair will ask if there are any more amendments. I imagine there will be another amendment or two. We will continue debating those amendments until the votes are called on the floor. If we get talked out before the votes are called on the floor, the Committee will recess at that point. I don't think that is a possibility, but I am just saying so to put it on the record. When we have the votes on the floor, and it is anticipated that there will be four votes on the floor, the Committee will recess. We will come back promptly 30 minutes after the conclusion of the last vote on the floor. Everybody clear on that? The conclusion of the last vote on the floor. So there will be no further votes between now and the time the bell rings to summon us over to the floor. Come on back probably 30 minutes after the conclusion of the last vote on the floor, and we will then resume consideration and stay in session until we complete this bill today. So, again, no votes until after the recess for the votes and the lunch hour.
Are there further amendments?
Ms. JACKSON LEE. I have an amendment at the desk.
Chairman SENSENBRENNER. Okay. The gentlewoman——
Ms. JACKSON LEE. This is a handwritten one.

Chairman SENSENBRENNER. The clerk will report the handwritten one.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 3313 offered by Ms. Jackson Lee. Strike all after the enacting clause and insert the following: Section 1. Short title. This act may be cited as the Marriage Protection Act of 2004. Section 2. Limitation of jurisdiction. A——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentlewoman from Texas will be recognized for 5 minutes.

[The amendment to the substitute offered by Ms. Jackson Lee follows:]

H.L.C.

AMENDMENT ~~IN THE NATURE OF A~~ To the SUBSTITUTE

TO H.R. 3313

OFFERED BY ~~MR. [illegible]~~ JACKSON LEE

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Marriage Protection
3 Act of 2004".

4 SEC. 2. LIMITATION ON JURISDICTION.

5 (a) IN GENERAL.—Chapter 99 of title 28, United
6 States Code, is amended by adding at the end the fol-
7 lowing:

8 "§ 1632. ~~[illegible]~~ Jurisdiction

9 "~~[illegible]~~ Courts created by an Act of Congress shall have ~~any~~ all
10 jurisdiction necessary, and the Supreme Court shall have ~~[illegible]~~ all appel-
11 late jurisdiction necessary to hear or decide any question pertaining
12 to the interpretation of, or the validity under the Constitu-
13 tion of, all cases in Law and Equity, arising ~~[illegible]~~ under this Constitution, the Laws of the United States and Treaties.

14 (b) AMENDMENTS TO THE TABLE OF SECTIONS.—
15 The table of sections at the beginning of chapter 99 of
16 title 28, United States Code, is amended by adding at the
17 end the following new item:

"1632. ~~Limitation on~~ Jurisdiction.".

Ms. JACKSON LEE. I thank the Chairman.

Mr. Chairman, this—as I have listened to the debate, and particularly the debate on the gentlelady's very thoughtful amendment that almost passed previously, I want to again refer my colleagues—so many of them have been utilizing the Constitution and the *Marbury* v. *Madison* and a number of other citations and suggesting a variety of opinions based around their own interpretation. I would like to just simply draw my colleagues' attention to the language in 1632, and it reads as follows: Courts created by an act of Congress shall have all jurisdiction necessary and the Supreme Court shall have all appellate jurisdiction necessary to hear or de-

cide any question pertaining to the interpretation of or the validity under the Constitution of all cases in law and equity arising under this Constitution, the laws of the United States and treaties.

I cite partially from Article III, and I do that because I cannot believe that Members of this Committee would sit and attempt to undermine the very framework in which we guide ourselves in the three branches of Government. I have heard language from my distinguished friend suggesting we draw a line, drawing a line. What I would offer to say to my colleagues is this amendment tracks the Constitution and gives authority to the appellate courts by restating the provisions in the Constitution, and simply says that we stand by that document and the rightful role of the Federal courts.

Drawing a line means setting precedent in this body, which means for every legislative initiative, every act in the State, we will take it upon ourselves to draw the line. Mr. Chairman, I believe that would wreak havoc on any suggestion that there is a democracy in this country.

I have also heard a variety of expressions of allowing loving relationships and others who would challenge whether or not the idea of relationships between individuals not of differing sexes or differing sex would then educate or suggest to embryonic status, or those that are embryos and born, in the first 3 or 4 hours of their life that they would then choose to be one or the other. I am not a scientist, sociologist, nor do I think there are many in this room, psychologists, that can give me a definitive position on a different lifestyle, and thereby I have no information as to what and who would make changes in their life on the basis of this particular statutory law that we are deciding. I don't think anyone in this body does. And so, therefore, to bring in our social and religious perspective to this room, I don't disrespect your religious or political perspective, but you are utilizing that to undermine the infrastructure of Government, the three branches of Government and the constitutional underpinnings or the constitutional language of the Article III courts.

What I see in this particular statute that has been offered by my good friend from Indiana is the drawing of the line on every single social issue, every single political issue, every single contractual issue that comes before us. That means we will write legislation because we disagree with the court's interpretation on every matter that occurs in States, in law and in equity.

I believe that is wrong, and so this particular amendment speaks to that question by simply suggesting that the appellate courts—that Article III courts retain their rights under Section 2 of Article III, and also to refer my colleagues to this language, that these courts would then have the authority to address matters, controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign states, citizens or subjects.

I frankly do not understand why we would offer to utilize this particular amendment to begin to unravel a system that we have utilized and has worked. I conclude my remarks by saying this: As I opened in the general debate, that there was a Supreme Court

decision that took place in 2000. I listened keenly and carefully, but at that time that that decision was rendered——

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

I rise in support of this amendment, which would preserve Supreme Court review of the Defense of Marriage Act.

In their zeal to score political points in an election year, the President and conservative Republicans have raised the issue of same sex marriage. They seem not to care that this issue is more likely to divide the nation than unite it.

Because they know they cannot pass a constitutional amendment to ban same sex marriage, they are trying to prevent court review of their other discriminatory law, the 1996 Defense of Marriage Act.

This shows the Republicans are afraid that a law they passed eight years ago is unconstitutional. What is the Republican remedy? It is not to repeal the unconstitutional law but to block court review of it. That is typical—if people won't like your dirty laundry, don't let it get aired.

I think my colleagues on the other side of the aisle would support this because, in the Winter of 2000, they strongly believed in the abilities of the Supreme Court.

This amendment also would cure a constitutional problem with the underlying bill. The Constitution and *Marbury* v. *Madison* state clearly that it is the province of the courts to interpret and review federal laws. The Constitution does not say Congress can prevent the Supreme Court from reviewing discriminatory and bigoted laws.

I urge my colleagues to vote "Yes" on this amendment.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. JACKSON LEE.—no one referred to the Supreme Court as the crown. I simply ask my colleagues to support this amendment and restore us back to the three branches of Government and the Constitution.

I yield back.

Chairman SENSENBRENNER. The Chair recognizes himself in opposition to the amendment.

The way this amendment is drafted is that it goes much further than dealing with the Defense of Marriage Act or issues relating to marriage, but it gives unlimited jurisdiction to the Federal courts under all laws of the United States, the Constitution and treaties whether this relates to DOMA or anything relating to marriage, whether it is same-sex marriage or opposite-sex marriage. It involves everything.

Let me just give a partial list of major legislation that limited court jurisdiction that was passed in the last Congress. We have talked extensively about Senator Daschle's language protecting the Black Hills Forest from the National Environmental Protection Act and other environmental laws. The Terrorism Risk Insurance Act that was passed after 9/11 prevented judicial review from a certification of or a determination that something was an act of terrorism, which triggered the coverage under this law. The Small Business Liability Relief and Brownfields Revitalization Act, the Department of Justice Authorization Act, the Andean Trade Promotion and Drug Eradication Act, the American Service Members Protection Act, the Public Health Security and Bioterrorism Response Act, the Aviation Security Act, to expedite the construction of the World War II memorial in the District of Columbia, and the Small Business Investment Company Act—Amendments Act of 2001. Now, that is these laws, and this was just in the last Con-

gress, but have the restrictions or limitations on judicial review been overridden by the gentlewoman's amendment?

Ms. JACKSON LEE. Would the gentleman yield?

Chairman SENSENBRENNER. I will yield in a second.

So this amendment is drafted in a far broader manner where the Congress, in many areas that has nothing do with same-sex marriage or the Defense of Marriage Act, has made a determination to try to expedite action by limiting judicial review or making an action not subject to judicial review whatsoever. For this reason this amendment should be rejected, and I now yield to the gentlewoman from Texas.

Ms. JACKSON LEE. I thank the distinguished gentleman for recounting a number of legislative acts that support my position in the three branches of Government. We do have checks and balances. I would offer to the distinguished Chairman that none of the laws that he has recited prevents a constitutional review by the courts of constitutional questions that would arise under those legislative initiatives. All my amendment does is restate the fact that the courts under Article III have their rights, appellate and otherwise, to review questions that come before them. It is not broad to the extent that that is the bottom line.

Chairman SENSENBRENNER. Reclaiming my time. This is not the way the gentlewoman has drafted her amendment. The grant of unlimited jurisdiction on all issues relates to all cases of law and equity arising under this Constitution, the laws of the United States and treaties. So, again, it is a much broader amendment that goes far beyond the topic of same-sex marriage, and I believe it ought to be rejected.

Mr. NADLER. Mr. Chairman——

Chairman SENSENBRENNER. The gentleman from New York.

Mr. NADLER. Mr. Chairman, let me say that I support the amendment. Having said that, the balance of my comments will be devoted to the bill in chief, and I simply want to observe that despite all the sentiment drawing on both sides of the aisle, if you really read this bill and consider it carefully, the effect it will have will be zero. This bill will do nothing whatsoever on this controversy.

And the reason I say that is the following: Imagine how this will come—how this bill would operate in practice. Imagine how this whole situation could come up in court. Some gay couple gets married in Massachusetts and moves, let's say, to New York. Some controversy arises. One of them dies intestate, and a controversy arises over the intestacy, and a New York surrogates' court decides either that the marriage was valid in New York because New York does not have a public policy objection and recognizes the Massachusetts marriage, or the New York surrogates' court decides that the marriage is not valid because New York has a public policy objection and will not recognize the Massachusetts marriage. Those are the two options.

In the first case, if the New York court recognizes the marriage and says, we do not have a public policy objection, there is no Federal case whatsoever, and this whole thing is irrelevant. In the other possibility, where the New York court says that New York's public policy objects to gay marriage, and therefore New York will not recognize the Massachusetts marriage, the losing party would

then go to Federal court and claim that New York's public policy objection, which normally States have a right to have a public policy objection under full faith and credit enforcement, but in this case the Federal claim would be that New York's public policy objection cannot be recognized because it violates the equal protection clause of the Federal Constitution. So the question before the Federal court would be whether or not New York's refusal to recognize the Massachusetts marriage because of its public policy exception violates the Federal equal protection clause or not. That decision is up to the Federal court. This bill has nothing to do with that.

Now, someone might try to interpose DOMA and say, well, DOMA says that the State doesn't have to recognize what Massachusetts did, to which the reply would be, well, we think they do because of the equal protection clause, with or without DOMA. So DOMA is irrelevant because either the equal protection clause overturns the public policy exception the State has applied, or it doesn't. DOMA doesn't add to that and doesn't detract from that. So this bill, by saying that the Federal courts cannot adjudicate the constitutionality or meaning of DOMA, is irrelevant because DOMA itself is irrelevant to that question.

Mr. HOSTETTLER. Would the gentleman yield?

Mr. NADLER. Yes, I will.

Mr. HOSTETTLER. I don't believe the DOMA is irrelevant because DOMA, likewise, exercises an explicit and exclusive constitutional prerogative with regard to full faith and——

Mr. NADLER. Reclaiming my time. Being that—even given that fact, either the public policy exception of the State is valid, in which case DOMA is unnecessary, because we recognize the public policy exception of the State, or the Federal courts would hold the public policy objection invalid as in violation of equal protection. If the courts would hold that, DOMA can't fix that because you can't overturn a constitutional problem with a statute, even if the statute by itself is valid, because—so even if Congress had power to enact DOMA, which I don't question, even if the Congress had power to enact DOMA, which you say it did, and I agree, the fact is if the public policy exception violates the equal protection clause, then DOMA as applied in that context would also violate the equal protection clause. But in any event, it wouldn't be applied.

So the point is this legislation, saying that you cannot—that the Federal courts cannot adjudicate the validity of DOMA, doesn't deal with the question that it purports to deal with, because the question would not be DOMA, the question would be whether the State's public policy exception violates the equal protection clause or not, and that—the fact you cannot strip the courts of the ability to adjudicate, nor does this bill purport to do that.

Chairman SENSENBRENNER. The gentleman's time has expired. The question is on the——

Mr. HOSTETTLER. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Indiana.

Mr. HOSTETTLER. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. The gentleman kept referring to a, quote, public policy exception, end quote, which is, my understanding, a construct of the Federal judiciary. And what you are asking us to con-

sider is that this public policy exception, quote, public policy exception, end quote, that has been constructed by the court is going to be adjudicated by the court vis-a-vis the equal protection clause that the court has created the doctrine concerning. And so what you are saying is that, in effect, there is no full faith and credit provision that could ever be enacted by Congress.

Mr. NADLER. Would the gentleman yield?

Mr. HOSTETTLER. Just 1 minute and then I will yield.

There is no full faith and credit provision that the Congress could ever enact and the President sign into law that the court could not overturn, because you have two constructs that are created by the court to judge a constitutional prerogative of the Congress.

I yield to the gentleman.

Mr. NADLER. No, I think you have it backwards. The public policy exception is a construct of the court.

Mr. HOSTETTLER. Yes.

Mr. NADLER. But remember, the people who are opposed to gay marriage are afraid that if Massachusetts recognizes the gay marriages, the full faith and credit clause may force every other State to do so. The public policy exception says, wait a minute. The full faith and credit—and this is a construct of the courts for the last 150 or 200 years—says that the State need not—under the full faith and credit doctrine need not recognize an action of another State if it violates the public policy of the court. Therefore, the State need not recognize the gay marriage.

Now, the question then is in order to protect the State against recognizing a gay marriage, which you would want to do, but I would not want to do, the question, therefore, one would say that the public policy exception is all that is necessary. And it is all that is necessary unless the courts would hold that its application in this case violates the equal protection clause. That is the only question that would be before the court. DOMA and, therefore, this bill would never arise.

Mr. HOSTETTLER. Reclaiming my time. Once again, there are two constructs of the court. And I will remind the gentleman that in *Lawrence* v. *Texas* the majority opinion was not an equal protection argument. It was a due process argument. Equal protection was a concurring opinion by one Justice, Sandra Day O'Connor. And so what you are saying is that equal protection, due process, any other construct of the court, that they can—that they see in the Constitution that they want to use as the excuse of the day to overturn any full faith and credit provision that Congress has enacted according to our Article IV, Section 1, there is nothing that we could do. And so that is why we must assert our constitutional authority.

Mr. NADLER. Would the gentleman yield?

Mr. HOSTETTLER. I have yielded quite a bit of time. Let me just try to make my point.

What you are saying, that because the Court has created a, quote, public policy exception, end quote, and because the Court applies equal protection to whoever it wants to and due process to whomever it wants to, and any other construct that they can find two or three words in the Constitution that they want to apply to any particular provision, that you have said, just as Dr. Gerhardt

said here a couple of weeks ago, that Congress can do nothing. He couldn't tell us if Congress could repeal a previous law. He couldn't tell us if Congress could impeach someone without any impediment by the Court. He couldn't even say that—with clarity that the President could pardon someone after they had been convicted and their conviction upheld by the Supreme Court.

You are telling us, and Dr. Gerhardt has told us, that Congress can only do—regardless of the explicit and exclusive authority all over the Constitution, Congress cannot do those things that the court doesn't want it to do.

Mr. NADLER. Now would the gentleman yield?

Mr. HOSTETTLER. And so that is why—that is why the idea of a public policy exception, a construct of the court, is not a construct of the Constitution.

Ms. JACKSON LEE. Would the gentleman yield?

Mr. HOSTETTLER. And that gives us the authority to deal in this situation with regard to the Defense of Marriage Act.

Mr. NADLER. Now would the gentleman yield?

Mr. HOSTETTLER. And it gives us the authority to decide the jurisdiction of the inferior Federal courts and the Supreme Court.

And I yield to the gentlelady from Texas Ms. Jackson Lee.

Ms. JACKSON LEE. I just want to say one point. You are suggesting that we cannot at any time have appellate authority. I yield to—I yield back.

Chairman SENSENBRENNER. The gentleman's time has expired. The question is on the Jackson Lee amendment to the amendment in the nature of a substitute.

Mr. SCOTT. Mr. Chairman, I move to strike the last word

Chairman SENSENBRENNER. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. I yield to the gentleman from New York.

Mr. NADLER. Thank you. Thank the gentleman for yielding. I think the gentleman Mr. Hostettler simply doesn't understand the key point. Whatever he wants to say about construct, et cetera, the key point is very simple. The issue that would be before a Federal court is whether—the only issue that would be before a Federal court is whether a State's refusing to enforce a gay marriage or recognize a gay marriage from a different State violates the equal protection or perhaps the due process clause of the Constitution.

I maintain that under the case law, Congress would have no power to strip the Federal courts of the ability to adjudicate that question. You have to give a Federal forum for a Federal constitutional right.

But that question aside, that doesn't arise under this bill because this bill doesn't deal with that. This bill simply says you can't adjudicate questions arising under DOMA. The question would not arise under DOMA. Therefore, this bill is irrelevant, whether what you say is true or not.

I yield back.

Mr. HOSTETTLER. Would the gentleman from Virginia yield for a question?

Mr. SCOTT. I yield.

Mr. HOSTETTLER. I thank the gentleman for yielding, and I ask the gentleman from New York a question, and that is very simply this: Do you believe that according to the Constitution or according

to *Marbury* v. *Madison* or whoever you want to quote, whatever source you want to quote, that the Supreme Court has the authority to overturn any act of the United States Congress passed by Congress, signed into law by the President? Do you believe that they have the authority to invalidate any act that they deem repugnant, in Marshall's words, quote, repugnant to the Constitution, end quote; do you believe that?

Mr. NADLER. If they believe it is repugnant to the Constitution, yes. That was *Marbury* v. *Madison*, and that has been the constitutional history of this country for the last 200 years.

Mr. HOSTETTLER. I thank the gentleman.

Mr. WEINER. Will the gentleman yield?

Mr. SCOTT. I will yield.

Mr. WEINER. You know, I am actually eager to know what the multiple choice part of that question would be. I mean, who are the other options? I mean, what are the other choices that we are presented with? Is it going to be like American Idol, or are we going to do it that way, just have people vote in on their phones?

Yeah, this is an imperfect system that the Constitution was strangely silent on, and we allowed men of good faith to come up with—hopefully come up with a great idea, and I think John Marshall—and we are going to vote on a resolution today creating a coin in his honor, and in the very text of the resolution, it refers to the things that we praise him for in the resolution. If you will permit me, I will read—this is the resolution we are voting on today. It is a very long list of sponsors. You may be among them.

Under his leadership, the Supreme Court of the United States gave shape to the fundamental principles of the constitution, most notably the principle of judicial review.

The gentleman to your immediate left probably wrote this. This is his resolution.

So the answer is I would be eager to hear if there is another choice that we can be presented with, because it certainly isn't going to be Congress to say what Congress—and I would make one further point that seems to get lost here. Let us remember the courts are created as the place to protect the minority. The majority has the Legislature. The majority has the executive. Majority has the power to amend the Constitution. The minority has only one place, and that place is the courts, and we feel so—that that is so important that the minority have that rule, the only way to have them trump—and I have to tell you, I have heard so much today about the overreaching judiciary. You know, on our side we haven't won one of these cases in a while. We had an overreaching—we should be the ones complaining about it. We had the guys across the street choose our President incorrectly. We should be the ones complaining. But you know what? We are taking our lumps. *Marbury* v. *Madison* was soundly decided. We have no other choice. We have to leave it to men and women of good faith to interpret the law. And the overreaching judiciary, they are overreaching in your favor. It should be us complaining about all of this, except we are here defending them, and Lord knows why.

And I yield back.

Chairman SENSENBRENNER. The time still belongs to the gentleman from Virginia. The question is on the Jackson Lee amend-

ment to the amendment in the nature of a substitute. Those in favor will say aye.

Opposed, no.

Ms. JACKSON LEE. Ask for a rollcall.

Mr. SENSENBRENNER. The noes appear to have it.

Ms. JACKSON LEE. I ask for a rollcall, Mr. Chairman.

Chairman SENSENBRENNER. Pursuant to Committee rule 2(h)1, the Chair will postpone the rollcall on this amendment until after we reconvene following the votes.

Pursuant to subsection 2, the Chair will notify Members that this vote will take place following the first rollcall on an amendment that will be voted on after the recess.

Are there further amendments?

Mr. SCOTT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia Mr. Scott.

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Mr. Chairman, I don't have an amendment.

Chairman SENSENBRENNER. The gentleman from Virginia will supply the clerk with an amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 3313 offered by Mr. Scott of Virginia. Add at the end the following new section.

Mr. SCOTT. Mr. Chairman, I move that the reading of the amendment be waived.

Chairman SENSENBRENNER. Without objection, so ordered.

[The amendment to the amendment in the nature of a substitute offered by Mr. Scott of Virginia follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3313 OFFERED BY MR. SCOTT OF VIRGINIA

Add at the end the following new section:

1 **SEC. 3. ATTORNEY'S FEES IN CERTAIN CASE.**

2 If, in any action brought against the United States,
3 the court determines that any provision of section 1632
4 of title 28, United States Code, as added by section 2 of
5 this Act, violates the Constitution of the United States,
6 then the court may allow the prevailing party, other than
7 the United States, a reasonable attorney's fee, including
8 litigation expenses and costs, and the United States shall
9 be liable for such fees, expenses, and costs to the same
10 extent as a private individual.

Chairman SENSENBRENNER. And I think this is a good time to take a recess, so the Committee will be recessed until 30 minutes following the conclusion of the last of the series of votes that will be called on the floor within the next 15 to 30 minutes. The Committee stands in recess.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

When the Committee recessed earlier today, pending before the Committee was a motion to report the bill, H.R. 3313, favorably to the House. An amendment in the nature of a substitute was offered by the Chairman. The gentleman from Virginia Mr. Scott offered an amendment to the amendment in the nature of a substitute, which—which the reading was dispensed with, but the gentleman from Virginia had not been recognized in support of his amendment.

The gentleman from Virginia is now recognized for 5 minutes in support of his amendment.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, this amendment would allow the prevailing party in the case against the United States involving H.R. 3313 to recoup reasonable attorney's fees including litigation expenses and costs as part—if part or all of H.R. 3313 is found unconstitutional by the presiding court, as many of us expect it will.

The laws of this country traditionally protect people from losing constitutional rights they currently possess. Federal courts are empowered to hear cases and circumstances in which those rights have been infringed upon. This bill is an undisguised attempt to prevent Federal courts from hearing cases relating to rights, benefits and protections that are guaranteed under our Constitution, including the due process and equal protection clause of the Constitution.

Within our constitutional framework, although Congress is expected to follow the Constitution, it is not for this Congress to make the final decision as to what is constitutional and what is not. Since *Marbury* v. *Madison* in 1803, I guess, until the gentleman from Indiana spoke earlier today, there has been a consensus that the United States Supreme Court would be the final arbiter of what is constitutional and what is not.

On June 24, the Constitution Subcommittee held a hearing on the issue of limiting Federal court jurisdiction to protect marriage for the States. Michael Gerhardt, professor of law at William and Mary Law School, testified that while Congress does have the authority to regulate Federal jurisdiction, the power is not unlimited, and that an act to totally prevent the Federal courts from ensuring that a State complies with the Constitution will be unconstitutional. He also testified that it is unconstitutional for the Congress to withdraw jurisdiction in such a way that eviscerates the Supreme Court's basic function in deciding cases arising under the Constitution and ensuring finality and uniformity in the interpretation and enforcement of Federal law.

This bill violates that principle and attempts to prevent Federal courts from deciding cases involving the Defense of Marriage Act that call into question the full faith and credit clause as well as provisions of the 5th and 14th amendments to the Constitution. It thereby usurps the court's ability to create a uniform standard for States to follow, and instead allows each State to interpret and decide whether to grant or deny constitutional rights on an individual State basis.

Professor Gerhardt was not the only witness to caution against the drastic step of court-stripping. Martin Redish, professor of law at Northwestern Law School, agreed that there are limits to the power of Congress to limit Federal court jurisdiction, including the due process clause, equal protection, and the concept of separation of powers. Professor Redish also testified that Congress cannot remove Federal jurisdiction in a discriminatory manner, as this bill obviously does.

Mr. Chairman, this bill violates many constitutional principles. If it were to be found constitutional, there would be no prohibition against boilerplate language stuck in every bill we pass stripping judicial review from every bill that we consider, on each statute

that would be passed. If it is constitutional, I would frankly be glad that nobody thought of that before 1954 where they could have stripped the court from jurisdiction from reviewing segregation in public schools; or before the 1960's, when activist judges required Virginia to recognize racially mixed marriages. Since the Dred Scott decision was mentioned earlier today, I am glad that no one stripped the Court from the possibility of reversing itself on that case, or *Plessy* v. *Ferguson*, the separate but equal decision.

Mr. Chairman, since we defeated the Baldwin amendment, I am glad no one thought of allowing the States, State courts and State legislatures to decide for themselves the constitutional issues involving civil rights. If it is constitutional, Mr. Chairman, some States will rule that DOMA is, in fact, unconstitutional; other States, it is constitutional because of the public policy exception applies. In fact, the prior hearing, Judge Robert Bork implied that the full faith and credit may apply to marriages and civil unions whether or not the Musgrave amendment may pass. If this bill—but maybe not to marriages if the amendment passes, but certainly to civil unions. So if this bill passes, there will be no Federal rule. Some States will adopt full faith and credit principles; others will not. A Massachusetts or Vermont couple moving to another State may have their relationship recognized in some States and not in others.

Mr. Chairman, I ask for 1 additional minute.

Chairman SENSENBRENNER. Without objection.

Mr. SCOTT. Mr. Chairman, this bill violates many constitutional principles and undermines the credibility of our system of Government for those reasons. And therefore, all of that said, if we pass this law and force someone to challenge it, that person should not have to pay out of his or her pocket to prove the unconstitutionality of our actions.

Similar attorney's fees provisions exist in other areas of the laws where it has been necessary to file suit to vindicate civil rights in employment cases and other civil rights actions. For example, Federal law allows the court in its discretion to award reasonable attorney's fees to a prevailing party in an action brought pursuant to the Americans with Disabilities Act. Likewise, we should not force any American to pay exorbitant costs associated with litigation in order to have a court rule that this thing is unconstitutional.

For all of these reasons, Mr. Chairman, I ask my colleagues to support the amendment.

Chairman SENSENBRENNER. The gentleman from Indiana Mr. Hostettler.

Mr. HOSTETTLER. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Thank the Chairman.

Mr. Chairman, I rise in opposition to the Scott amendment. First, this amendment applies to cases brought against the United States. This bill only applies to the part of DOMA that states no State shall be required to accept an out-of-State same-sex marriage license. In any case brought to challenge the constitutionality of this bill, the defendant would be the entity granting or not granting recognition to a particular marriage. States and not the United

States grant marriage licenses in this country. So the United States would not be the proper party.

Second, even if this amendment were made to apply to proper defendants, this amendment would allow Federal courts to not only define the limits of their own power, but it would allow Federal courts to tax the States, because the States would be the very victims of the Federal court's usurpation of authority. And so I oppose the amendment, Mr. Chairman.

At this time, Mr. Chairman, I would like to ask unanimous consent that section 2 of a report, a CRS report for Congress, Congressional Checks on the Judiciary, would be entered into the record.

Chairman SENSENBRENNER. Without objection.

[The material referred to follows:]

97-497 GOV

CRS Report for Congress

Congressional Checks on the Judiciary

April 29, 1997

Louis Fisher
Senior Specialist in Separation of Powers
Government Division

Congressional Research Service · The Library of Congress

Court in 1974, the Court held that the plaintiffs lacked standing to bring the case. Schlesinger v. Reservists to Stop the War, 418 U.S. 209-09 (1974).

The Constitution prohibits Members of Congress from being appointed to any federal position whose salary has been increased during their term of office. The constitutional language, called the Ineligibility Clause, provides that "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under which the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." U.S. Const., art. I, § 6, cl. 2. Interpretations of this provision by Congress and the executive branch have far outweighed contributions from the courts. Efforts to litigate the issue have been unsuccessful, either because the plaintiff lacked standing or because a court decided not to decide. Ex parte Levitt, 302 U.S. 633 (1937); McClure v. Carter, 513 F.Supp. 265 (D. Idaho 1981), aff'd sub nom. McClure v. Reagan, 454 U.S. 1025 (1981).

Members of Congress have gone to court to contest military initiatives by the President, but these efforts are regularly turned aside by federal judges. Throughout the Vietnam War, such cases were regarded as political questions to be resolved solely by the elected branches.[7] By the time of the Reagan and Bush years, federal judges offered other reasons to avoid decisions on such disputes: the issue was moot; it was not ripe; plaintiffs lacked standing; a variety of doctrines on judicial prudence and "equitable discretion;" and a finding of nonjusticiability because judicial resolution would require fact-finding better done by Congress.[8] For the most part, constitutional questions of war and peace are left to the legislative and executive branches.

II. The Issue of Judicial Supremacy

Particularly in the twentieth century, scholars, judges, and sometimes Members of Congress claim that the U.S. Supreme Court has the "last word" on the meaning of the Constitution. Under this theory, if Congress disagrees with a Court ruling the only alternative is to pass a constitutional amendment to overturn the Court. This claim of judicial supremacy overlooks much of the flexibility and political considerations that characterize the relationship between

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[7] E.g., Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967); Velvel v. Johnson, 287 F.Supp. 846 (D. Kans. 1968); Berk v. Laird, 317 F.Supp. 715 (E.D. N.Y. 1970); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); Atlee v. Laird, 347 F.Supp. 689 (E.D. Pa. 1972); Gravel v. Laird, 347 F.Supp. 7 (D.D.C. 1972); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); and Mitchell v. Laird, 488 F.2d 611 (D.D.C. 1973).

[8] Mootness: Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985); ripeness: Dellums v. Bush, 752 F.Supp. 1141, 1149-62 (D.D.C. 1990); standing: Dornan v. U.S. Secretary of Defense, 851 F.2d 456 (D.C. Cir. 1988); judicial prudence and equitable discretion: Lowry v. Reagan, 676 F.Supp. 333, 337-39 (D.D.C. 1987); Conyers v. Reagan, 578 F.Supp. 924 (D.D.C. 1984); nonjusticiability: Crockett v. Reagan, 558 F.Supp. 893, 898 (D.D.C. 1982); Sanchez-Espinoza v. Reagan, 568 F.Supp. 596, 600 (D.D.C. 1983).

the judiciary and other elements of the political system: Congress, the President, the states, and the general public.

There are many examples of judicial opinions being challenged and reversed through means other than constitutional amendments. Congress regularly overturns judicial rulings that involve statutory interpretations ("Statutory Reversals," treated in a subsequent section), but even when the Court renders a constitutional interpretation there are many methods available to Congress to counter the Court.

A. Judicial Positions on Finality

Justices of the Supreme Court have taken different positions regarding the finality of Court decisions. Some see a decision as wholly binding on nonjudicial parties, including Congress. Others leave room for a sharing of jurisdiction among federal institutions over statutory and constitutional questions.

Justice Robert H. Jackson once said: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953). However, the record of the last two centuries demonstrates convincingly that the Supreme Court is neither infallible nor final. Its decisions are regularly reshaped by other political institutions, both at the national and the state levels. In a speech, Jackson acknowledged the force of politics and majority rule in the shaping of constitutional values:

> . . . let us not deceive ourselves; long-sustained public opinion does influence the process of constitutional interpretation. Each new member of the ever-changing personnel of our courts brings to his task the assumptions and accustomed thought of a later period. The practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority.[9]

To Justice Frankfurter, "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 491-92 (1939). Before joining the Court, he put the point more bluntly to President Franklin D. Roosevelt: "People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and not the Constitution."[10]

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[9] Robert H. Jackson, "Maintaining Our Freedoms: The Role of the Judiciary," delivered to the American Bar Association, Boston, Mass., August 24, 1953; reprinted in *Vital Speeches*, No. 24, Vol. XIX, p. 761 (October 1, 1953).

[10] Max Freedman, anno., *Roosevelt and Frankfurter: Their Correspondence* 383 (1967).

Chief Justice Earl Warren cautioned against an overreliance on the courts for the protection of constitutional rights. In an article in 1962 he spoke with regret about *Hirabayashi* v. *United States*, 320 U.S. 81 (1943), in which the Court unanimously upheld a curfew order directed against more than 100,000 Japanese-Americans, about two-thirds of them naturally born United States citizens. Warren said that the "fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is." Earl Warren, "The Bill of Rights and the Military," 37 N.Y.U. L. Rev. 181, 193 (1962). The Court's failure to invalidate a governmental action did not, by itself, mean that constitutional standards had been followed. Warren emphasized that in a democratic society, "it is still the Legislature and the elected Executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution." Id. at 202. He even warned against depending two much on Congress and the President: "[T]he day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen." Id.

At certain points in our constitutional history, there has been a compelling need for an authoritative and binding decision by the Supreme Court. The unanimous ruling in 1958, signed by each justice, was essential in dealing with the Little Rock desegregation crisis. Cooper v. Aaron, 358 U.S. 1 (1958). Another unanimous decision in 1974 disposed of the confrontation between President Nixon and the judiciary regarding the Watergate tapes. United States v. Nixon, 418 U.S. 683 (1974). For the most part, however, court decisions are tentative and reversible like other political events.

On February 19, 1997, the Supreme Court heard oral argument on the constitutionality of the Religious Freedom Restoration Act, which Congress enacted in 1993 in response to *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Justice O'Connor asked one of the attorneys: "Do you agree that Congress can't overrule the court's interpretation of the Constitution?" The attorney replied: "We agree." 65 LW 3579. Examples will be provided in this paper where Congress does, in effect, overrule the court's interpretation of the Constitution.

B. The "Binding Precedent" of *Marbury*

The Supreme Court's 1803 opinion in *Marbury* v. *Madison* is the most famous case for the proposition that the Court is supreme on constitutional questions. Chief Justice John Marshall stated that it is "emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cr.) 137, 177 (1803). When this statement is placed in context, both legal and political, there is less sweep to Marshall's words than contemporary authors often imply. Nonetheless, *Marbury* is often cited by the Court as evidence that it alone delivers the "final word" on the meaning of the Constitution. According to a 1958 decision, *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution." Cooper v. Aaron, 358 U.S. 1, 18 (1958). The Court reasserted this principle in 1962: "Deciding whether a matter has in any measure been committed by the

Constitution to another branch of government, or whether action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and a responsibility of this Court as ultimate interpreter of the Constitution." Baker v. Carr, 369 U.S. 186, 211 (1962). In a 1969 decision, the Court referred to itself as the "ultimate interpreter" of the Constitution. Powell v. McCormack, 395 U.S. 486, 549 (1969).

"Ultimate interpreter" does not mean exclusive interpreter. The courts expect other branches of government to interpret the Constitution in their initial deliberations. As the Court noted in 1975: "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." United States v. Nixon, 418 U.S. 683, 703 (1974).

The meaning of *Marbury* has been debated in recent confirmation hearings for Supreme Court justices. In 1986, when Justice William H. Rehnquist appeared before the Senate Judiciary Committee as nominee for Chief Justice, Senator Arlen Specter inquired about the "binding precedent" of *Marbury*. He asked Rehnquist whether the Court "is the final arbiter, the final decision maker of what the Constitution means." Rehnquist replied: "Unquestionably." Specter pursued the point. If the Court ruled on a legal issue, would the President and Congress "have a responsibility to observe the decisions of the Supreme Court of the United States on a constitutional matter?" Rehnquist answered: "Yes, I think they do." "Nomination of Justice William Hubbs Rehnquist," hearings before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. 187 (1986).

The same question, put to Supreme Court nominees Antonin Scalia, Anthony Kennedy, and Ruth Bader Ginsburg, yielded different and more measured responses. In his 1986 confirmation hearings, Scalia was asked by Senator Strom Thurmond: "Do you agree that *Marbury* requires the President and Congress to always adhere to the Court's interpretation of the Constitution?" Conceding that the case was one of the "great pillars of American law," Scalia hesitated to say whether "in no instance can either of the other branches call into question the action of the Supreme Court." "Nomination of Judge Antonin Scalia," hearings before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. 33 (1986). In this exchange, Scalia declined to state that the Court is the exclusive, final authority on constitutional questions.

A year later, Senator Specter and his colleagues on the committee listened to Anthony Kennedy challenge the notion of judicial supremacy. In 1982, while serving as a federal appellate judge in the Ninth Circuit, Kennedy had already expressed his view that other branches of government play major roles in interpreting the Constitution. He stated at that time: "As I have pointed out, the Constitution, in some of its most critical aspects, is what the political branches of the government have made it, whether the judiciary approves or not." "Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States," hearings before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 221 (1987).

At the hearings in 1987, Kennedy explained to the committee that in such areas as separation of powers, the office of the presidency, the commerce clause, and federalism, the meaning of the Constitution depends largely on the judgments of the executive and legislative branches, not the Court. Although he agreed that Supreme Court decisions are the law of the land and must be obeyed, he was "somewhat reluctant to say that in all circumstances each legislator is immediately bound by the full circumstances of a Supreme Court decree." Id. at 221-22. He gave the following example. If the Supreme Court were to overrule *New York Times* v. *Sullivan*, exposing newspapers fully to libel suits, Kennedy said that legislators should challenge the Court: "I think you could stand up on the floor of the U.S. Senate and say I am introducing this legislation because in my view the Supreme Court of the United States is 180 degrees wrong under the Constitution." Id. at 222-23.

In her nomination hearings in 1993, Ruth Bader Ginsburg told the Senate Judiciary Committee that Justices "do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the President, the States, and the people. Constant realization of a more perfect Union, the Constitution's aspiration, requires the widest, broadest, deepest participation on matters of government and government policy." "Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States," hearings before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. 50 (1993).

C. The Scope and Reach of *Marbury*

No specific language in the Constitution gives the Supreme Court the power to declare unconstitutional an act of Congress or the President. Several delegates at the constitutional convention at Philadelphia spoke in favor of judicial review when invoked against *state* laws. State actions inconsistent with the U.S. Constitution "would clearly not be valid," said Gouverneur Morris, and judges "would consider them as null & void." 2 The Records of the Federal Convention 92 (Max Farrand ed. 1937).

Judicial review over Congress and the President, as coequal branches, is much more difficult to establish. The Court would need power to strike down congressional legislation that threatened the integrity or existence of the judiciary. Such actions of self-defense were part of the system of checks and balances and separation of powers. Beyond those justifications, the picture was unclear.

From 1789 to 1803, several precedents suggested a broader role for judicial review when applied to congressional and presidential actions. A statute enacted in 1792 required federal judges to serve as commissioners on claims settlement. Since their decisions could be set aside by the Secretary of War, judges were essentially issuing "advisory opinions" and serving in a subordinate capacity to executive officials. Before the Court could rule on the constitutionality of the statute, Congress repealed the offending sections and

removed the Secretary's authority to veto decisions rendered by federal judges.[11]

In 1796, the Court upheld a carriage tax passed by Congress. Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796). If the Court had the power to uphold a congressional statute, presumably it had the power to strike one down. Justices of the Court remained uncertain about their authority to invalidate congressional statutes. Justice Chase, writing in this case, said it was unnecessary "*at this time*, for me to determine, whether this court, *constitutionally* possesses the power to declare an act of Congress *void* . . but if the court have such power, I am free to declare, that I will never exercise it, *but in a very clear case*." Id. at 175 (emphasis in original). As late as 1800, the Court was still unsure about its authority to invalidate an act of Congress. Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800).

Chief Justice Marshall's decision in *Marbury* represents what many regard as the definitive basis for judicial review over congressional and presidential actions. But Marshall's opinion stands for a much more modest claim. He stated that it is "emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cr.) at 177. So it is, but Congress and the President are also empowered under the Constitution to "say what the law is." Marshall's statement can stand only for the proposition that the Court is responsible for stating what it thinks a statute means, after which Congress may enact another law to override the Court's interpretation. The Court states what the law is on the day the decision comes down; the law may change later. Several examples of this institutional interplay will be identified in this report.

It is evident that Marshall did not think he was powerful enough in 1803 to give orders to Congress and the President. He realized that he could not uphold the constitutionality of section 13 of the Judiciary Act of 1789 and direct Secretary of State James Madison to deliver the commissions to the disappointed would-be judges. President Thomas Jefferson and Madison would have ignored such an order.[12] Everyone knew that, including Marshall. As Chief Justice Warren Burger noted, "The Court could stand hard blows, but not ridicule, and the ale houses would rock with hilarious laughter" had Marshall issued a mandamus that the Jefferson administration ignored."[13]

Under these circumstances, it is doubtful that Marshall believed that the Court was supreme on constitutional interpretation. The impeachment hearings of Judge Pickering and Justice Chase add to these doubts. *Marbury*

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[11] 1 Stat. 243-45 (1792); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); 1 Stat. 324-25 (1793).

[12] 2 George L. Haskins & Herbert A. Johnson, *History of the Supreme Court of the United States* 185 (1981); 3 Albert J. Beveridge, *The Life of John Marshall* 126-27 (1919).

[13] Warren E. Burger, "The Doctrine of Judicial Review: Mr. Marshall, Mr. Jefferson, and Mr. Marbury," in *Views From the Bench* 14 (Mark Cannon & David O'Brien eds. 1985).

was issued on February 24, 1803. The House impeached Pickering on March 2, 1803 and the Senate convicted him on March 12, 1804. As soon as the House impeached Pickering, it turned its guns on Chase. If that move succeeded, Marshall had reason to believe he was next in line.

With these threats pressing upon the Court, Marshall wrote to Chase on January 23, 1804, suggesting that Members of Congress did not have to impeach judges because they objected to their judicial opinions. Instead, Congress could simply review and reverse objectionable decisions through the regular legislative process. Here is Marshall's language in a letter to Chase:

> I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.[14]

The use of impeachment to punish the Court for issuing unsound decisions has precedent dating back to such prominent works as Federalist No. 81, in which Alexander Hamilton denied that there was great danger of the judiciary encroaching upon executive authority. Congress had adequate checks to rein in an overactive Court:

> [T]he inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations.[15]

As to the scope and reach of *Marbury*, it is highly significant that Marshall never again struck down a congressional statute during his long tenure, lasting to 1835. Instead, he played a consistently supportive role in upholding congressional power. After *Marbury*, Marshall upheld the power of Congress to exercise its commerce power, to create a U.S. Bank, and to discharge other constitutional responsibilities, whether express or implied, without being second-guessed by the Court. The judiciary functioned as a yea-saying, not a negative, branch. As Professor Walter Murphy has written, "For his part, Marshall in *Marbury* never claimed a judicial monopoly on constitutional

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[14] 3 Albert J. Beveridge, *The Life of John Marshall* 177 (1919).

[15] *The Federalist* 508-09 (Benjamin Fletcher Wright ed. 1961).

interpretation, nor did he allege judicial supremacy, only authority to interpret the Constitution in cases before the Court."[16]

III. Political and Legislative Pressures

Other than the checks expressly stated in the Constitution, federal courts are subject to constraints that arise through the regular functioning of the political system. These limitations operate not only when courts sustain the constitutionality of a statute but when they declare it to be invalid.

A. When the Court Upholds Constitutionality

When the Court decides that a congressional statute or a presidential action is constitutional, the controversy may remain open for different treatments by the legislative and executive branches.

U.S. Bank. In 1832, President Andrew Jackson received a bill to recharter the United States Bank. Several Presidents before him and previous Congresses had decided that the bank was constitutional. In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 315 (1819), the Supreme Court ruled that the bank was constitutional. Nevertheless, Jackson vetoed the bill on the ground that it was unconstitutional. In his veto message, he said that he had taken an oath of office to support the Constitution "as he understands it, and not as it is understood by others." The opinion of judges, he said,

> has no more authority over Congress than the opinion of Congress had over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.[17]

Jackson's position on the veto power has been followed by all subsequent Presidents. Regardless of the constitutional decisions reached by Congress and the courts, Presidents may independently analyze the constitutionality of bills presented to them.

Independent Counsel. Presidents Reagan and Clinton signed legislation creating and reauthorizing the office of independent counsel. In

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[16] Walter Murphy, "Why *Marbury* Matters," 1 Constitution 62, 68 (1989). For an analysis that concludes that *Marbury* did not vest in the Court the final authority to interpret the Constitution, see Robert Clinton, *Marbury* v. *Madison* and Judicial Review (1989). Another detailed critique of Marshall's reasoning in *Marbury* is by William W. Van Alstyne, "A Critical Guide to *Marbury* v. *Madison*," 1969 Duke L. J. 1.

[17] 2 *A Compilation of the Messages and Papers of the Presidents* 1145 (James D. Richardson ed. 1897).

Mr. HOSTETTLER. And I will read from that, because I believe that we need to put the case *Marbury* v. *Madison*, especially this day when we will be voting on a commemorative coin for the former Chief Justice, in proper context, in that Lewis Fisher, who is senior specialist in separation of powers for the Government Division of the Library of Congress, says, quote, Chief Justice Marshall's decision in *Marbury* represents what many regard as the definitive basis for judicial review over congressional and Presidential actions.

But Marshall's opinion stands for a much more modest claim. He stated that it is, quote, emphatically the province and duty of the judicial department to say what the law is, end quote. So it is that Congress and the President are also empowered under the Constitution to, quote, say what the law is, end quote.

Marshall's statement can stand only for the proposition that the court is responsible for stating what it thinks a statute means, after which Congress may enact another law to override the court's interpretation. The court states what the law is on the day the decision comes down. The law may change later. Several examples of this institution in the interplay will be identified in this report.

Fisher goes on to say, quote, it is evident that Marshall did not think he was powerful enough in 1803 to give orders to Congress and the President. He realized that he could not uphold the constitutionality of section 13 of the Judiciary Act of 1789 and direct Secretary of State James Madison to deliver the commissions to the disappointed would-be judges.

Now why did he know that couldn't happen? The reason is this: President Thomas Jefferson and Madison would have ignored such an order. Everyone knew that, Fisher says, including Marshall. As Chief Justice Warren Berger noted, quote, the Court could stand hard blows, but not ridicule, and the alehouses would rock with hilarious laughter had Marshall issued a mandamus that the Jefferson administration ignored. And so we thinking much more highly of this decision of *Marbury* v. *Madison* than we ought to think.

And I will close, Mr. Chairman, by quoting from a distinguished former jurist that said in a Pulitzer Prize-winning book of Albert Beveridge, quote, I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the Legislature. A reversal of those legal opinions deemed unsound by the Legislature would certainly better comport with the mildness of our character than would a removal of a judge who has rendered them unknowing of his fault, end quote.

The question is who is the heretic that suggested that there is appellate jurisdiction in the Legislature for the Supreme Court? Well, it was a gentleman—it was actually in this book, a biography of a gentleman by the name of John Marshall, who said in a letter to Justice Samuel Chase that, in fact, the Legislature, the Congress, is the appellate jurisdiction for a, quote, opinion deemed unsound by the Legislature.

Mr. Chairman, I oppose this amendment, and I would ask my colleagues to support the underlying bill so that we do not have to deem a future decision by the Supreme Court unsound, and I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from North Carolina Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I rise in support of Mr. Scott's amendment. Ithink there is going to be, I suspect, a substantial amount of litigation associated with this provision if it passes, and it would be a shame that private litigants would have to try to sort this out without benefit of having their fees paid just because we are here engaged in a political act that substantially undermines a constitutional principle.

Having said that, I would like to ask the Chairman a question that has been raised to me, and I am not sure that I have a good answer to it. And I think the Chairman is probably better prepared to—much better prepared to answer that question than Mr. Hostettler, since it is the Chairman's substitute that we are dealing with.

Under the bill, I am wondering whether a defendant could remove a case, any kind of case, under this statute to the Federal courts, and whether, given the language of the amendment in the nature of a substitute, the Federal courts would then have to dismiss the case; and if under those circumstances the case was dismissed, whether that would deprive a litigant of any determination either by a Federal or State court of constitutionality. And I will yield to the gentleman.

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. WATT. Yes, sir.

Chairman SENSENBRENNER. I am not intimately familiar with the removal statute, but if the Federal court does not have jurisdiction over the case, my belief is that the Federal court would be constrained to deny the motion to remove, and thus the case would continue to be pending in the State court.

Mr. WATT. I hear—and I guess that makes a lot of sense, except that on line 11 of the substitute, you say that no court or the Supreme Court on an appeal can hear or decide any question pertaining to the interpretation of. So if the case were tried to be removed, who would make a determination of even the ability to remove it under those circumstances? And if the Court decided that——

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. WATT. Wouldn't it be deciding the ultimate constitutionality, or would that be improper, or could it go back to the State court to even have a State court——

Chairman SENSENBRENNER. My understanding is that the removal statute is a discretionary statute.

Mr. WATT. Well, somebody has to exercise the discretion is the point I am trying to make. Who under these circumstances would exercise that discretion?

Chairman SENSENBRENNER. Well, it would be the Federal district judge that would determine if the matter was not removable under the Federal law because the Federal district court did not have jurisdiction.

Mr. WATT. Wouldn't that be any question pertaining, or would it not? I just raise that as an academic proposition.

Chairman SENSENBRENNER. Well, if the gentleman will yield further. Say there is a suit that is filed in the Federal district court that the court——

Mr. WATT. I am talking about a suit that is filed in the State court and then a motion to remove it filed to the Federal court. Who would then decide that if under the statute you are saying——

Chairman SENSENBRENNER. If the gentleman will yield, it would be the Federal district judge, as a Federal district judge would decide a motion to dismiss a case that was originally filed in the Federal court if the court had no jurisdiction over it. There would be a motion to dismiss, and the court would have to grant it.

Mr. WATT. I will yield to Mr. Scott.

Mr. SCOTT. I would ask the same question in a slightly different way. The case may have a lot of different parts to it, and if it is removed, the Federal court would not be able to rule on any of this part of it, would have the rest of the case before it. So if the plaintiff's argument is that the law is unconstitutional the—that the DOMA is unconstitutional, or constitutional, you don't get to review that, and you lose, most of the rest of the case is sitting there. I don't know what happens to it.

Mr. WATT. Well, I think that is the question I am raising. I—it is one thing to say that the Federal courts and the Supreme Court don't have jurisdiction to decide a constitutional question, but I think we may be setting up a trap here where no court, not even the State courts, end up.

Chairman SENSENBRENNER. The time of the gentleman from North Carolina has once again expired.

For what purpose does the gentleman from New York seek recognition?

Mr. WEINER. To briefly strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for a brief 5 minutes.

Mr. WEINER. Just in response to my good friend from Indiana, and it seems mysterious to me about why in the context of this amendment you truly want to relitigate *Marbury* v. *Madison*. But if we are going to, let us not learn the wrong lessons.

The experience in *Marbury* v. *Madison*, and one of the reasons that we honor John Marshall today on the floor of Congress, was that in the same decision he ruled that that court ruled they had the authority to overrule congressional acts, but also demonstrated something else that the present Supreme Court hasn't, which is that sometimes you use restraint by not doing so. And by not striking down the Judiciary Act of 1789, they showed restraint.

Now, the question that you continue to raise is should this be the way it is done. And maybe it is not. I would argue it is the most settled of settled law, the most settled, because, frankly, without this interpretation and without this ruling, virtually there is no place that the buck stops.

And you posited or you read from someone's article exactly the way the system works. If Congress has a law stricken down, they ultimately do have the last word in a strange way. They can go back—we can go back and change the law and change it again and keep trying. I mean, for those of you who are familiar with the debate over late-term abortion, you know that is exactly what this

panel does every 6 months, get struck down. You change the words, you go back, you do it again. It serves their political needs, but it also is an exercise for even the most rudimentary student of the Supreme Court for how the system works.

Yeah, we can keep trying, we can keep trying, and that is the example that whoever's article you read from was talking about; that if you are really concerned about judicial overreaching, you can go back and go back. But at the end of the day, the threshold test of whether something is violative of the Constitution of the United States of America only can be handled one of two ways: The courts rule that it is or is not, or an overwhelming majority of American citizens change the Constitution. Those are the only two choices that we have.

If you want to create a third choice, which is Congress gets to do it without judicial review, you will be rolling back 201 years of jurisprudence in this country that has, in many cases, I am sure you would agree, served your interests well. Sometimes it hasn't, but it is the only option that we have.

We have to leave this to smart hopefully, judicious hopefully, restrained hopefully men and women, flesh and blood, to finally say, look, you did the best you could, but, no, you didn't pass constitutional muster here.

It is remarkable to me that in the context of this bill you freely admit you want to relitigate *Marbury* v. *Madison*. I would be surprised if you got 10 votes on the floor of Congress for the idea that *Marbury* v. *Madison* was wrongly settled law. I mean, where does that leave us? That leaves us with the scenario where conceivably the Supreme Court can choose one President, Congress can choose a different President, and who settles the dispute? And you have a constitutional crisis.

John Marshall was brilliant. His decision that you deride was a brilliant compromise. It was a way to get out from under the problem of the political fight that was going on at that time between the Federalists and the Republicans. It was a way to answer this question about who is in charge, and it has served this country remarkably well; so well, in fact, that today I was proud to cast a vote to dedicate a coin in his honor in a piece of legislation authored by the good gentleman to your left.

It was really a master stroke, and it reminded us of something else. It reminded us, I say to the gentleman from Indiana and my colleagues on the Majority, you win some and you lose some. There is nothing about this deal that says you have to win every single one. You know, you have won some very important cases recently with a court that has become increasingly conservative. It doesn't mean you win every single case. You are going to lose a couple. You are going to lose some.

And we all essentially buy into this, and we teach in constitutional law classes, in high school classes about what it is in that building across the way with the nine pillars, what they do there. What they do there is take work that we do, with all of our best instincts, and they decide when it comes running up against that document called the Constitution whether or not we have passed a basic threshold. They do it. Sometimes they get it wrong. Sometimes they get it right. But it is, I reiterate, the only available sys-

tem that we have. And of all of the available worlds, it is the best of all available worlds, and I am——

Chairman SENSENBRENNER. The gentleman's brief 5 minutes has expired.

Ms. JACKSON LEE. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Alabama Mr. Bachus.

Mr. BACHUS. I thank the Chairman.

Mr. Chairman, I would first like to—I move to strike the last word.

Chairman SENSENBRENNER. Gentleman is recognized for 5 minutes.

Mr. BACHUS. Mr. Chairman, I am that famous man to your left, I think, that he keeps referring to that is going to bring the John Marshall coin bill to the floor later this afternoon, and I want the record to show that I will be honoring Justice Marshall. I will not be marrying him. So—and with that——

Mr. WEINER. Imagine my relief.

Mr. BACHUS. Thank you.

Ms. JACKSON LEE. Mr. Chairman.

Mr. BACHUS. And with that I yield the balance of my time to the gentleman from Indiana.

Mr. HOSTETTLER. I thank the gentleman, and I want to, first of all, return to *Marbury* v. *Madison* and say how much I appreciate the fact that we are going to enter a copy of the decision in the record, because then many people may read it, especially on this Committee, because twice now the gentleman from New York has suggested that the Court did not strike down in *Marbury* v. *Madison* article 13, the Judiciary Act of 1789; that, in fact, Jefferson did.

Marbury v. *Madison*, that is exactly what the Court did. The Court found article 13 of the Judiciary Act of 1789, quote, repugnant to the Constitution, end quote, and said that, quote, the Congress cannot give original jurisdiction to the Supreme Court where the Constitution only gives us appellate jurisdiction, end quote.

And so it was the Court that created the political dodge, because as I pointed out earlier, and Chief Justice Warren Berger said it much more eloquently than I, that Marshall knew that Jefferson and Madison—Jefferson, the chief architect of the Declaration of Independence; Madison, the chief architect of the United States Constitution—were in no way going to seat the Federalist magistrates, Mr. Marbury and his associates. But he needed to find a way to get out of this very, very politically sensitive situation, and so he struck down the Judiciary Act, article 13 that gave original jurisdiction to the Supreme Court where the—as Marshall said, the Constitution only gives them appellate jurisdiction.

So it will be fantastic, I think, for my colleagues to have the opportunity to actually read *Marbury* v. *Madison* and not, for example, to take the word of their law school professor to see what was actually determined in the case. And, in fact, they might want to go back and read the history of the situation with Mr. Marbury and his associates and find out who was the individual under Adams, as President of the United States, that was supposedly to have delivered the commissions that did not do so because he had been appointed to the United States Supreme Court.

So I would hope that whenever we—my father used to say, before he passed away, from time to time that we learn something new every day. And so Members of this Committee who have spoken a lot about *Marbury* v. *Madison* because it is entered into the record will finally have the opportunity to learn something today when they read the decision.

Mr. WEINER. Would the gentleman yield?

Mr. HOSTETTLER. It is actually the gentleman from Alabama.

Chairman SENSENBRENNER. The time belongs to the gentleman from Alabama.

Mr. WEINER. Would the gentleman from Alabama yield for just a brief moment?

Mr. BACHUS. For a brief moment.

Mr. WEINER. Yeah, sure. I just want to read—in keeping with what the gentleman from Indiana said, I am going to read a sentence from the decision: The judicial power of the United States is extended to all cases arising under the Constitution. Not the legislative power. Not the executive power. What this court did, it said that we take to ourselves the Supreme Court of the United States over all cases arising under the Constitution. That is in the case. My law school professor didn't tell me that, as you know, not ever having had one. This is in the decision, and it is fairly—it is about as clear as it gets.

Mr. BACHUS. Let me——

Chairman SENSENBRENNER. The gentleman from Alabama.

Mr. BACHUS. Let me simply say this. All Madison or *Marbury* v. *Madison* stands for is the proposition that the Supreme Court is the final authority on issues it decides, provided Congress by statute has granted the Supreme Court the authority to hear the issue in the first place. If you will read that decision, you will see that that is clearly what it said. In other words, Congress has to provide the jurisdiction in the first place, and it is that simple.

Mr. WEINER. Would the gentleman yield on that point?

Mr. BACHUS. The case doesn't fall within the jurisdiction of the Federal courts because Congress has not granted the required jurisdiction, or removed jurisdiction. The Federal court simply can't hear the case. And the Supreme Court in the past in many decisions has dismissed cases in which it was not given——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. BACHUS.—jurisdiction to hear the case.

Ms. JACKSON LEE. Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from Texas. For what purpose do you seek recognition?

Ms. JACKSON LEE. Strike the requisite number of words.

Mr. Chairman, I rise to support the amendment of the distinguished gentleman from Virginia, because I think, in part, it raises the specter of the very debate or the crux of the debate, and that is to reinforce rights as opposed to taking rights away.

His amendment simply says, if you prevail in determining that this is an unconstitutional position, then attorney's fees are to be granted, which goes back to the point of my earlier amendment which simply recounts for the Members and adds to this legislation a restating of the responsibilities or the guidelines or the governance of the Article III Courts which is that the Supreme Court and the appellate courts have jurisdiction of all cases in law and equity

arising under the Constitution, the laws of the United States and treaties.

I guess if this was simply a debate on policy, a debate on your religious belief, your social belief, we delineate simply that, maybe, we would spend a couple of weeks dealing with this.

But embodied in this amendment that Mr. Hostettler has offered is a cutting away of the appellate responsibilities of these Article III Courts, and we go back and forth about what the Congress can and cannot do. The preciousness of these Article III Courts is the fact that they do not close the doors to any petitioner who desires to seek relief. They may not come away with the relief they desire, but they have the opportunity to go inside the courthouse.

As I reminded my colleagues, many of us were dissatisfied with the 2000 decision done by a Supreme Court. Our colleagues are also reminded by Mr. Weiner that, for many of us, that case is one that we might have chosen to rewrite the law. We did not. But we do, as a Congress, have the right, as we are receiving decisions that we dislike, we can come and go and come and go.

This amendment cuts away at the very infrastructure of the Constitution. How in the world can we have three distinct branches when we are seeking, not to talk about policy, we are talking about procedure? We are talking about eliminating the appellate jurisdiction, the right of review, of these courts. That, in essence, is taking away rights and closing the courthouse door.

I request that we support the amendment which grants attorney's fee but would hope that we be reminded that this amendment is not just about policy and whether or not you agree with a lifestyle or that you promote marriage. This is not the Federal Marriage Act. This is a cutaway at the very structure of the third branch of Government of which the Constitution says, in essence, the Supreme Court has final arbiter's power to make final decisions.

I would ask that both the present or underlying bill be defeated but that the amendment of Mr. Scott be supported.

Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the Scott amendment to the amendment in the nature of a substitute. Those in favor will say aye. Opposed, no.

The noes appear to have it. The noes have it.

The amendment is not agreed to.

The unfinished business is the recorded vote on the amendment by the gentlewoman from Texas, Ms. Jackson-Lee, to the amendment in the nature of a substitute upon which further proceedings were postponed.

Those in favor of the Jackson-Lee amendment to the amendment in the nature of a substitute will, as your names are called, answer aye. Those opposed, no.

The clerk will call the role.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble votes no. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

[No response.]
The CLERK. Mr. Goodlatte?
[No response.]
The CLERK. Mr. Chabot?
Mr. CHABOT. No.
The CLERK. Mr. Chabot votes no. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins votes no. Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon votes no. Mr. Bachus?
Mr. BACHUS. No.
The CLERK. Mr. Bachus votes no. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler votes no. Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green votes no. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller votes no. Ms. Hart?
Ms. HART. No.
The CLERK. Ms. Hart votes no. Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake votes no.Mr. Pence?
Mr. PENCE. No.
The CLERK. Mr. Pence votes no. Mr. Forbes?
Mr. FORBES. No
The CLERK. Mr. Forbes votes no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King votes no. Mr. Carter?
Mr. CARTER. No.
The CLERK. Mr. Carter votes no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney votes no. Mrs. Blackburn?
Mrs. BLACKBURN. No.
The CLERK. Mrs. Blackburn votes no. Mr. Conyers?
[No response.]
The CLERK. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye
The CLERK. Mr. Nadler votes aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott votes aye. Mr. Watt?
Mr. WATT. Pass
The CLERK. Mr. Watt votes pass. Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren votes aye. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee votes aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters votes aye. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan votes aye. Mr. Delahunt?
[No response.]

The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin votes aye. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner votes aye.Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff votes aye. Ms. Sanchez?
Ms. SANCHEZ. Aye.
The CLERK. Ms. Sanchez votes aye. Mr. Sensenbrenner?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Sensenbrenner votes no.
Chairman SENSENBRENNER. Are there Members in the Chamber who wish to cast or change their vote?
The gentleman from California, Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman votes aye.
Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith?
Mr. SMITH. Mr. Chairman, I vote no.
The CLERK. Mr. Smith votes no.
Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte?
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte votes no.
Chairman SENSENBRENNER. Are there further Members in the Chamber who wish to cast or change their vote? If not, the Clerk will report.
The CLERK. Mr. Chairman, there are 11 ayes and 19 noes.
Chairman SENSENBRENNER. And the amendment is not agreed to.
Are there further amendments?
If not, the question is on agreeing to the amendment in the nature of a substitute offered by the Chair. Those in favor will signify by saying aye. Opposed, no.
The ayes appear to have it. The ayes have it, and the amendment in the nature of a substitute is agreed to.
A reporting quorum is present.
The question now is on the motion to report the bill, H.R. 3313, favorably as amended. All in favor, say aye. Opposed, no.
The ayes appear to have it.
Mr. NADLER. Mr. Chairman, rollcall.
Chairman SENSENBRENNER. rollcall is ordered. Those in favor of reporting the bill favorably, as amended, will, as your names are called, answer aye. Those opposed, no.
The Clerk will call the roll.
The CLERK. Mr. Hyde?
[No response.]
The CLERK. Mr. Coble?
Mr. COBLE. Aye.
The CLERK. Mr. Coble votes aye. Mr. Smith?
Mr. SMITH. Aye.
The CLERK. Mr. Smith votes aye. Mr. Gallegly?
Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly votes aye. Mr. Goodlatte?
Mr. GOODLATTE. Aye.
The CLERK. Mr. Goodlatte votes aye.Mr. Chabot?
Mr. CHABOT. Aye
The CLERK. Mr. Chabot votes aye. Mr. Jenkins?
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins votes aye. Mr. Cannon?
Mr. CANNON. Aye
The CLERK. Mr. Cannon votes aye. Mr. Bachus?
Mr. BACHUS. Aye.
The CLERK. Mr. Bachus votes aye. Mr. Hostettler?
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler votes aye. Mr. Green?
Mr. GREEN. Aye
The CLERK. Mr. Green votes aye. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller votes aye. Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart votes aye. Mr. Flake?
Mr. FLAKE. Aye.
The CLERK. Mr. Flake votes aye.Mr. Pence?
Mr. PENCE. Aye
The CLERK. Mr. Pence votes aye. Mr. Forbes?
Mr. FORBES. Aye.
The CLERK. Mr. Forbes votes aye. Mr. King?
Mr. KING. Aye.
The CLERK. Mr. King votes aye. Mr. Carter?
Mr. CARTER. Aye.
The CLERK. Mr. Carter votes aye. Mr. Feeney?
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney votes aye. Mrs. Blackburn?
Mrs. BLACKBURN. Aye
The CLERK. Mrs. Blackburn votes aye.Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers votes no. Mr. Berman?
Mr. BERMAN. No.
The CLERK. Mr. Berman votes no. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler votes no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott votes no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt votes no. Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren votes no. Ms. Jackson Lee?
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee votes no. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters votes no. Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan votes no. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?

[No response.]

The CLERK. Ms. Baldwin?

Ms. BALDWIN. No.

The CLERK. Ms. Baldwin votes no. Mr. Weiner?

Mr. WEINER. No.

The CLERK. Mr. Weiner votes no.Mr. Schiff?

Mr. SCHIFF. No.

The CLERK. Mr. Schiff votes no. Ms. Sanchez?

Ms. SANCHEZ. No.

The CLERK. Ms. Sanchez votes no. Mr. Sensenbrenner?

Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Sensenbrenner votes aye.

Chairman SENSENBRENNER. Are there Members in the Chamber who wish to cast or change their votes?

The gentleman from Virginia, Mr. Boucher?

Mr. BOUCHER. Votes aye.

The CLERK. Mr. Boucher votes aye.

Chairman SENSENBRENNER. Further Members in the Chamber who wish to cast or change their vote?

If not, the clerk will report.

The CLERK. Mr. Chairman, there are 21 ayes and 13 noes.

Chairman SENSENBRENNER. The motion to report favorably is agreed to.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today.

Without objection, the Chairman is authorized to move to go to conference pursuant to House Rules.

Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days, as provided by the House Rules, in which to submit additional dissenting, supplemental or minority views.

The business for which this meeting was called having been completed, the Committee stands adjourned.

[Whereupon, at 3:42 p.m., the Committee was adjourned.]

DISSENTING VIEWS

We strongly dissent from H.R. 3313, the so-called "Marriage Protection Act of 2003," which is not only unprecedented but also unconstitutional.

If H.R. 3313 is passed into law, it would constitute the first and only time Congress has enacted legislation totally eliminating any federal court from considering the constitutionality of federal legislation – in this case, the provision in the Defense of Marriage Act ("DOMA") that provides that states need not give full faith and credit to any same sex marriages entered into in other states.[1] At a time when not a single federal court has issued an opinion concerning DOMA, let alone striking it down, we believe it is inexcusable for Congress to attack the federal judiciary to score political points.

The operative language of H.R. 3313 constitutes but a single sentence. It provides:

> "[n]o court created by an Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question to pertaining to the interpretation of, or the validity under the Constitution of, section 1738C or this section."[2]

As such, the legislation effectively precludes any federal judicial review, either by a lower federal court or the Supreme Court, of any constitutional challenge to DOMA's validity. Instead, the bill relegates state courts to review any challenges to DOMA or H.R. 3313, creating the very real possibility of having differing legal constructions across the 50 states and the District of Columbia.

It is ironic that on the very day that Congress celebrated Justice John Marshall by authorizing a commemorative coin in his honor,[3] the Judiciary Committee would disparage him

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[1]Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (defining 'marriage' and 'spouse for the purposes of federal law, and purporting to permit states not to give full faith and credit to any marriage, or any legal relationship "treated as a marriage" under the laws of another state, territory, possession or tribe).

[2]28 U.S.C. § 1738C states that ""No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." DOMA, sec. 3, 110 stat. 2419.

[3]John Marshall Commemorative Coin Act, H.R. 2768, 108th Cong. (2004). In support of the legislation, the bill's sponsor, Rep. Spencer Bachus (R-AL), said, "John Marshall served as

by passing legislation that is totally inconsistent with Marshall's seminal legal opinion, *Marbury v. Madison*.[4] As emotionally charged and politicized as the issue of same sex marriage has become, we should not use that issue to permanently damage our courts, our constitution, and Congress. At a time when it is more important than ever that our nation stand out as a beacon of freedom, we cannot countenance a bill which undermines the very protector of those freedoms – our independent federal judiciary.

This unprecedented and dangerous legislation is strongly opposed by a variety of organizations, including the Leadership Conference on Civil Rights; the American Civil Liberties Union; People for the American Way; the Human Rights Campaign; Americans United for Separation of Church and State; Alliance for Justice; Human Rights Watch; Legal Momentum (formerly NOW Legal Defense and Education Fund); the National Asian Pacific Legal Foundation; National Conference of Jewish Women; PFLAG; Planned Parenthood; Pride at Work; AFL-CIO; and the American Federation of State, County, and Municipal Employees; among others.[5]

Chief Justice of the United States Supreme Court from 1801 to 1835, much of that time spent in this very building, holding the longest tenure of any Chief Justice in the Nation's history. He authored more than 500 opinions, including virtually all of the most important cases that the Court decided during his tenure. Under his leadership, the Supreme Court gave shape to the fundamental principles of the Constitution." 150 CONG. REC. H5781 (July 14, 2004).

[4]*Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803).

[5]*See Letter to Members of the U.S. House of Representatives from Laura W. Murphy, Director, and Christopher E. Anders, Legislative Counsel, American Civil Liberties Union* (July 13, 2004); *Letter to Rep. F. James Sensenbrenner and Rep. John Conyers, Jr. from Rev. Barry Lynn, Executive Director, Americans United for the Separation of Church and State* (July 13, 2004); *Letter to Members of the U.S. House of Representatives from Cheryl Jacques, President, Human Rights Campaign* (July 13, 2004); *Letter to Members of the U.S. House of Representatives from American Civil Liberties Union, AFL-CIO, Americans for Democratic Action, Americans For Religious Liberty, American Humanist Association, Americans United For the Separation of Church and State, Central Conference of American Rabbis, DontAmend.com, Human Rights Campaign, Human Rights Watch, Leadership Conference on Civil Rights, Legal Momentum (formerly the NOW Legal Defense and Education Fund), MoveOn.org, The Multiracial Activist, National Asian Pacific American Legal Consortium, National Black Justice Coalition, National Council of Jewish Women, National Gay and Lesbian Taskforce, National Fair Housing Alliance Parents, Families and Friends of Lesbians and Gays*

For these and the other reasons set forth herein, we dissent from H.R. 3313.

I. H.R. 3313 is Unconstitutional

While it is clear that Congress has the authority to regulate federal court jurisdiction,[6] it is also clear that such power is not plenary. Rather, the power is subject to other overarching constitutional rights, such as freedom of speech and equal protection. In this regard, one of the preeminent treatises on Constitutional Law concludes:

> There is little doubt that other constitutional provisions, like the equal protection clause, limit Congress's power under the Exceptions Clause. For example, Congress could not constitutionally provide that Republicans, but no one else, may have access to the Supreme Court. Such a provision would violate the first amendment and thus would be *independently* unconstitutional.[7]

Both of the constitutional scholars that testified at the Committee's hearings concerning court-stripping legislation agreed with this conclusion. The Minority witness, Professor Michael J. Gerhardt of William & Mary Law School, testified "Congress cannot exercise any of its powers under the Constitution – not the power to regulate interstate commerce, not the Spending power, and not the authority to define federal jurisdiction – in a manner that violates the Constitution."[8] Similarly, the Majority's witness, Prof. Martin H. Redish of Northwestern

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(PFLAG), People For the American Way Planned Parenthood Federation of America, Pride at Work, Union for Reform, Judaism United Church of Christ Justice, and Witness Ministries, United States Students Association, Unitarian Universalist Association of Congregations, Women of Reform Judaism (July 16, 2004); *Letter to Rep. John Conyers, Jr. and Rep. Jerrold Nadler from Ron Schlitter, Interim Executive Director, Parents, Families & Friends of Lesbians & Gays (PFLAG)*(July 14, 2004) [hereinafter *Group Sign-On Letter*].

[6]Article III of the Constitution authorizes Congress to establish judicial power in lower federal courts, and to regulate the Supreme Court's appellate jurisdiction.

[7]STONE, SEIDMAN, ET AL., CONSTITUTIONAL LAW 85 (3d ed.) (emphasis added).

[8]*Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 108th Cong., 2d Sess. (Mar. 30, 2004) (testimony of Professor Michael Gerhardt) [hereinafter *Federal Court Jurisdiction Hearing*].

University School of Law, acknowledged that there were limits on Congress' Article III powers:

> To be sure, several other guarantees contained in the Constitution – due process, separation of powers, and equal protection – may well impose limitations on the scope of congressional power. The Due Process Clause of the Fifth Amendment requires that a neutral, independent and competent judicial forum remain available in cases in which the liberty or property interests of an individual or entity are at stake. . . . The constitutional directive of equal protection restricts congressional power to employ its power to restrict jurisdiction in an unconstitutionally discriminatory manner.[9]

A. Separation of Powers

In the present case, there are several constitutional requirements that are contravened by H.R. 3313. First, the legislation intrudes upon the long-standing principle of separation of powers between the branches of government. In the present case, by denying the Supreme Court its historical role as the final authority on the constitutionality of federal laws, the bill unnecessarily and unconstitutionally usurps the Court's power.

Since the Supreme Court's historic ruling in *Marbury v. Madison*, the separation of powers doctrine has been well established. *Marbury* concerned the validity of a judicial commission that was signed, but not delivered prior to the end of John Adams' presidency. Justice Marshall agreed with President Jefferson that the commission should not be given effect, but he did so only by declaring unconstitutional the provision of the Judiciary Act of 1789 granting courts *mandamus* powers over these commissions. In so doing, the Court enunciated the principle of federal judicial review of federal laws. Marshall's opinion included the now famous declaration that "It is emphatically the province and duty of the judicial department to say what the law is." [10]

In the more than 200 years that have passed since this legal decision was issued, judicial review has served as the very touchstone of our constitutional system and our democracy. As the Congressional Research Service's chief authority on separation of powers stated, "*Marbury v. Madison* is famous for the proposition that the [Supreme] Court is supreme on constitutional

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[9] *Federal Court Jurisdiction Hearing* (statement of Professor Martin Redish at 3-4).

[10] Marbury v. Madison, 5 U.S. (1 Cr.) at 178 (emphasis added).

questions."[11]

Unfortunately, the concept of separation of powers is being challenged by H.R. 3313, and its principal author, Rep. Hostettler. At the Committee's markup, Rep. John N. Hostettler (R-IN) admitted that he disagreed with *Marbury's* long established principal of federal judicial review:

Mr. Weiner:	Just so I understand the sponsor, do you believe that *Marbury v. Madison* was wrongly decided? Just so I understand where you are coming from.
Mr. Hostettler:	I believe that part of the case was wrongly decided. [Rep. Hostettler later makes clear that he supports the Court's decision to defer to President Jefferson regarding judicial appointments, but disagrees with the rationale it used – that the Supreme Court had the right to strike down the congressionally enacted Judiciary Act of 1789].
Mr. Weiner:	Judicial Review. Thank you. I yield back.

The failure – until now – of Congress to enact legislation totally eliminating federal judicial jurisdiction to review the constitutionality of federal statutes is evidence of the long deference and respect maintained by Congress for the principle of federal judicial review. In addition, several of the Supreme Court's own subsequent decisions reaffirm that Congress may not contravene the doctrine of judicial review.

Not too long after *Marbury*, the need for some federal judicial review in all cases was further confirmed by Justice Story in *Martin v. Hunter's Lessee*, when he wrote, "the whole judicial power of the United States should be, at all times, vested in an original or appellate form, in some courts created under its authority."[12] That is to say, a federal court ought to be empowered to exercise judicial power on behalf of the United States.

H.R. 3313 also contradicts existing precedent on legislature's ability to restrict the power

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[11] LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 42 (5th ed. 2003).

[12] 14 U.S. (1Wheat.) 304 (1816).

of the judiciary. For example, in *United States v. Klein*,[13] the only case in which the Supreme Court addressed directly the question whether the Congress could impose a legislative restriction on court power if framed in jurisdictional terms, the Court made clear that "the language [of the challenged law] shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end .... We believe that Congress has inadvertently passed the limit which separates the legislative from the judicial power."[14]

In an analogous vein, in *City of Boerne v. Flores,* the Court held that it is improper and unconstitutional for Congress to attempt to legislate its view of the free exercise clause of the First Amendment.[15] Also, in *Dickerson v. United States*, the Court struck down a federal statute narrowing the scope of statements held inadmissable under *Miranda v. Arizona*, 384 U.S. 436 (1966).[16] It is telling that as recently as this term, the Supreme Court rebuffed an attempt by the Executive Branch unilaterally to withdraw certain *habeas corpus* cases from the jurisdiction of the federal courts.[17]

Numerous esteemed legal scholars have emphasized that it would be a constitutional violation of separation of powers principles for Congress to seek to completely strip federal courts of jurisdiction over constitutional claims. The most noted of these views was put forth by Stanford Law Professor Henry Hart when he concluded that under *Marbury's* restrictions on federal jurisdiction are unconstitutional when "they destroy the essential role of the Supreme

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[13]80 U.S. 128, 178 (1872).

[14]80 U.S. at 145.

[15]521 U.S. 507 (1997).

[16]530 U.S. 428, 432 (2000) ("Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves.").

[17]*See* Rasul v. Bush, 542 U.S. ___ (2004); Hamdi v. Rumsfeld, 542 U.S. ___ (2004); Rumsfeld v. Padilla, 542 U.S. ___ (2004).

Court in the constitutional system."[18] More recently, Yale Law Professor Akhil Amar concluded that article III requires that "all" cases arising under federal law must be vested, either as an original or appellate matter, in a federal court.[19]

The views of these legal scholars concerning complete federal court stripping are consistent with the findings of the Task Force of the Courts Initiative of the Constitution Project, a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues through a unique combination of scholarship and activism. The Constitution Project concluded "legislation precluding court jurisdiction that prevents the judiciary from invalidating unconstitutional laws is impermissible. Neither Congress nor state legislatures may use their powers to prevent courts from performing their essential functions of upholding the Constitution."[20]

As a corollary, the Constitution Project found that Congress cannot vest jurisdiction in courts to enforce a law while preventing the same courts from reviewing the constitutionality of the same law, as appears to be the case with H.R. 3313. Their unanimous finding was that "the Constitution's structure would be compromised if Congress could enact a law and immunize that law from constitutional review."[21]

B. Equal Protection and Due Process

H.R. 3313 also violates the Fifth Amendment's protection of equal protection,[22] in that it

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

[19]Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 BOSTON UNIV. L. REV. 205 (1985).

[20] Report of the Cizens for Independent Courts Task Force on the Role of the Legislature in Setting the Power and Jurisdictino of the Courts, reprinted in: The Century Foundation, *Uncertain Justice: Politics in America's Courts* 206, at 217 (2002).

[21]*Id.*

[22]The Fifth Amendment Due Process has long been interpreted to include a requirement of equal protection parallel to the requirement of the Equal Protection Clause of the Fourteenth Amendment. *See., e.g.*, Adarand Contractors, Inc. v. Pena, 515 U.S. 200 (1995).

imposes an undue burden on a specific class of individuals without a rational basis. The critical case in this regard is *Roemer v. Evans*, a 1996 Supreme Court decision invalidating a Colorado law preventing the state or any political subdivision from enacting legislation to protect gay and lesbian citizens from discrimination.[23]

Roemer held in a 6 to 3 decision by Justice Kennedy that it was unacceptable for the state of Colorado to exclude a class of individuals from legal protections:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance .... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid form the government is itself a denial of equal protection of the laws in the most literal sense[24]

Absent a rational basis, the *Roemer* Court found that laws of this nature cannot stand. It found that such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[25] In *Roemer*, the general provision "that gays and lesbians shall not have any particular protection from the law, inflicts on them immediate, continuing and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[26] Specifically, the Court found the principal motivation for the legislation was animus towards gays and lesbians, which had no rational relationship to a legitimate governmental purpose; it concluded, "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[27]

These same concerns will no doubt invalidate H.R. 3313 on Equal Protection grounds should it pass into law. The record for this legislation is replete with animosity towards gays and

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[23]517 U.S. 620 (1996).

[24]*Id.* at 633.

[25]*Id.*

[26]*Id.*

[27]*Id.* (citing Dep't of Agric. v. Moreno, 143 U.S. 528, 534 (1973)).

lesbians[28] and distrust of federal judges.[29]

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[28]"I am not worried about the high-school kids today, I am worried about the ones that are just born and those yet to be born that will grow into a society that they do not know the traditions that we have. They will be told, you don't know what you might be and what your preferences might be, so you ought to experiment with a number and settle on one or two or three, or rotate throughout a lifetime. They will be told that one relationship is as good as any other. They will have a menu of life far different than the one that we are talking about here, and that menu of life will encourage them to try to sample along that list. When that happens, you will see relationships form for reasons other than personal love. For example, there will be relationships formed because they want to access someone's 401(k)plan or somebody's health care plan or retirement plan or inheritance." *H.R. 3313 Markup* (statement of Rep. Steve King).

"Mr. Bachus. Mr. Chairman, I am that famous man to your left, I think, that he keeps referring to that is going to bring the John Marshall coin bill to the floor later this afternoon, and I want the record to show that I will be honoring Justice Marshall. I will not be marrying him. So—and with that——

Mr. Weiner. Imagine my relief.

Mr. Bachus. Thank you." *Id.* (colloquy between Reps. Bachus and Weiner).

[29]"The threat posed to traditional marriage by a handful of Federal judges whose decision can have an impact across State boundaries has renewed concern over the abuse of power by Federal judges." *H.R. 3313 Markup* (statement of Rep. Sensenbrenner).

"All Americans are entitled to a fair hearing before independent minded judges whose only allegiance is to the law. Too often we take for granted. But what should citizens do or their elected representatives when a few judges step out of bounds and try to change the rules of the game? Federal judges decide cases arising under the Constitution. However, over the last several years we have witnessed some judges wanting to determine social policy rather than interpret the Constitution. They seem to be legislators, not judges, promoters of a partisan agenda, not wise teachers relying on established law. . . . While judicial activism has existed since the founding of our Nation, it seems to have reached a crisis. Judges routinely overrule the will of the people and invent new rights and ignore traditional morality. Judges have redefined marriage, deemed the pledge of allegiance unconstitutional, outlawed religious practices and imposed their personal views on Americans." *Id.* (statement of Rep. Lamar Smith).

As Professor Gerhardt noted in his testimony before the Committee, "distrust of 'unelected judges' does not qualify as a legitimate basis, much less a compelling justification, for congressional action."[30]

This is the same conclusion reached by the ACLU in their review of the legislation:

> The Marriage Protection Act – which derives from the same animus that motivated Colorado voters to pass the state amendment invalidated by the Supreme Court – is similarly unconstitutional. The sole objective of the Marriage Protection Act is to prohibit federal courts from reviewing the Defense of Marriage Act because some supporters of the Marriage Protection Act believe that the federal courts, including the U.S. Supreme Court, will find DOMA to be unconstitutional. Denying courts the ability to review a law for its constitutionality because of a concern that the law might be unconstitutional does not serve any legitimate purpose of government.[31]

It is also possible that the courts will find that H.R. 3313 violates the Fifth Amendment's Due Process clause as well. As Professor Gerhardt noted, "a proposal excluding all federal jurisdiction may violate the Fifth Amendment's Due Process Clause's guarantee of procedural fairness."[32] This is because on its face the law denies federal courts the opportunity to review a federal law. Given the traditional expertise the federal courts have in reviewing the constitutionality of federal laws, relegating such claims to state court can hardly be considered a fair or rationale process.

II. H.R. 3313 Undermines the Federal Judiciary

"Lord Acton once stated that 'power tends to corrupt, and absolute power corrupts absolutely.' No branch of the Government can be entrusted with absolute power; certainly not a handful of tenured Federal judges appointed for life. Those same judges should not be allowed to judge the extent of their own authority." *Id.* (statement of Rep. Steve Chabot).

[30]*Federal Court Jurisdiction Hearing* (statement of Professor Gerhardt at 2).

[31]*Letter to Members of the U.S. House of Representatives from Laura W. Murphy, Director, and Christopher E. Anders, Legislative Counsel, American Civil Liberties Union* 2 (July 13, 2004).

[32]*Federal Court Jurisdiction Hearing* (statement of Professor Gerhardt at 10).

Aside from the obvious constitutional flaws inherent in H.R. 3313, the idea of Congress unilaterally cutting off federal constitutional review constitute both a poor and dangerous legal precedent. The legislation not only degrades the independence of federal judges, but eliminates any possibility of developing a single uniform policy with regard to DOMA from the 50 state supreme courts.

Both of the legal scholars who testified at the Committee's hearings agreed that court-stripping legislation such as H.R. 3313 was inadvisable from a policy perspective. Professor Gerhardt testified that "a proposal excluding all federal jurisdiction regarding a particular federal question undermines the Supreme Court's ability to ensure the uniformity of federal law. . . . This allows for the possibility that different state courts will construe the law differently, and no review in a higher tribunal is possible."[33]

The Majority's witness, Professor Martin Redish, was even more blunt in criticizing the legislation:

> as a matter of policy . . . I . . . firmly believe that were Congress to [strip federal courts of jurisdiction in DOMA cases, it] would risk undermining public faith in both Congress and the federal courts. Due to their constitutionally granted independence and insulation from the majoritarian branches of the federal government, the judiciary possesses a unique ability to provide legitimacy to governmental action in the eyes of the populace. Congressional manipulation of federal judicial authority therefore threatens the legitimacy of federal political actions.[34]

Such a complete and unprecedented stripping of federal court jurisdiction would be totally at odds with the policy of checks and balances envisioned by the nation's founders. Contemporaneous writings by two of the nation's most important founding fathers – the principal drafter of the Constitution and Bill of Rights, James Madison, as well as the author of the Federalist Papers, Alexander Hamilton – indicate the importance they placed on a strong and independent federal judiciary.

Thus, when there was disagreement at the constitutional convention regarding the need for lower federal courts, Madison insisted on provisions permitting their creation. He argued,

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[33] *Id.*

[34] *Id.* (written statement of Martin Redish).

"confidence cannot be put in the state tribunals as guardians of the national authority and interests."[35] Similarly, when he introduced the Bill of Rights in the First Congress, Madison again emphasized the importance of federal courts:

> [I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[36]

Alexander Hamilton also wrote about the importance of federal court jurisdiction. In Federalist Number 78, Hamilton emphasized the importance of an independent federal judiciary: "In a monarchy it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body."[37] In Federalist Number 81, Hamilton expressed further support for federal courts being the appropriate venue for federal issues, writing:

> But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union.[38]

Given the importance of developing a single national standard on constitutional questions and the fact that it was a state court that authorized same sex marriages in Massachusetts, it seems particularly odd that the Majority would seek to strip federal courts of their power in the context of DOMA. As People for the American Way and other non-profit advocacy groups noted in their letter to Congress:

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[35] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 27 (1937).

[36] 1 ANNALS OF CONG. 458 (Gales & Seaton ed.) (June 8, 1789).

[37] THE FEDERALIST NO. 78 (Alexander Hamilton).

[38] *Id.* No. 81 (Alexander Hamilton).

> Ironically, while supporters of H.R. 3313 seek to assert greater congressional control over review of the laws it passes, making state courts the primary avenues for challenges to federal actions actually erodes Congress' control over judicial review. Unlike with the federal judiciary, Congress has no impeachment power over state judges or authority to regulate state courts, and the Senate has no power to advise and consent in their selection.[39]

The legal precedent that will be set if Congress is permitted to simply "end run" the Bill of Rights by circumventing the federal courts could be far-reaching is adopted here. If this bill passes, we must ask, what other rights will next be placed at risk? The right to freedom of speech and religion? The right to vote? The right to privacy? Indeed, many of these proposals are already introduced in statutory form.[40] If H.R. 3313 passes into law, it truly could be open season on our precious rights and liberties. Moreover, if court stripping had been used in the past, the Court might never have overturned laws prohibiting inter-racial marriage[41] or permitting segregated education.[42]

It is no wonder that principled conservatives such as former Senator Barry Goldwater found court stripping legislation to be so repugnant. When court stripping legislation was proposed in the 1970's concerning school prayer, abortion, and busing, Senator Goldwater opposed them, warning that the "frontal assault on the independence of the Federal courts is a dangerous blow to the foundations of a free society."[43]

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[39]*Group Sign-On Letter*. It is particularly puzzling that the Majority is so bent on undermining federal judicial power with respect to constitutional law interpretations, while in other contexts it seeks to expand federal judicial power at the expense of state courts over matters such as state class action claims, state drug laws, and state abortion laws.

[40]*See, e.g.*, H.R. 3893 (regarding government exercise of religion, sexual orientation, and the right to marry); H.R. 3190 (regarding government exercise of religion); H.R. 3799 (regarding official acknowledgments of religious authority); and H.R. 2045 (regarding government recognition of the Ten Commandments).

[41]Loving v. Virginia, 388 U.S. 1 (1967).

[42]Brown v. Board of Educ., 347 U.S. 483 (1954).

[43]*See* Linda Greenhouse, *The Nation: How Congress Curtailed the Courts' Jurisdiction*, N.Y. TIMES, Oct. 27, 1996, §4 at 5.

Efforts by Republicans to discredit our judiciary by painting it with the broad brush of "judicial activism" are both disingenuous and demeaning. Once we parse through the thick rhetorical fog surrounding this issue, it becomes clear that Republicans' real gripe is with the results, not the activist nature, of judicial decisions. As Roger Pilon, a Cato Institute Director, acknowledged, "examples of 'judicial activism' that are cited, turn out, when examined more closely, not to be cases in which the judge failed to apply the law but applied the law differently, or applied different law, to reach a result different than the result thought correct by the person charging activism."[44]

Republican "conservatives" are prone to assert that Supreme Court decisions protecting a woman's right to choose (*Roe v. Wade* [45]) and a child's right to attend school without being subject to compulsory prayer (*Engel v. Vitale*[46]) constitute judicial activism. They herald, however, as landmark examples of the Court restraining excessive legislative power those decisions that limit Congress's ability to provide affirmative action as a remedy to respond to racial discrimination (*Adarand v. Pena*[47]), ban guns in schools (*United States v. Lopez* [48]), require background checks before felons can purchase handguns (*Printz v. United States*[49]), and limit campaign expenditures (*Buckley v. Valeo*[50]).

Similarly, when a Bush I-appointed district judge enjoins an Oregon ballot initiative allowing for assisted suicide,[51] or a Reagan-appointed district judge dismisses a contempt order

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[44]*Hearing on H.R. 1252, The Judicial Reform Act of 1997 and Federal Judicial Term Limits Before the Subcomm. on Courts and Intellectual Property of the House Comm. On the Judiciary,* 105th Cong. (1997) (written statement of Roger Pilon, Director, Center for Constitutional Studies, Cato Institute).

[45]410 U.S. 113 (1973).

[46]370 U.S. 421 (1962).

[47]515 U.S. 200 (1995).

[48]514 U.S. 549 (1995).

[49]521 U.S. 898 (1997).

[50]424 U.S. 1 (1976).

[51]Lee v. Oregon, Civil No. 94-6467-HO, 2 (D.Or. 1994).

for violating the Freedom of Access to Clinic Entrances Act because the defendants lack the requisite "wilfulness" on account of their religious convictions,[52] we hear scant criticism from the right wing. But when federal courts in California have the temerity to suggest that referenda that deny alien children the right to an education[53] or prevent minorities subject to discrimination from benefitting from affirmative action may be illegal or inappropriate,[54] we hear storms of protest from the same conservatives.

III. H.R. 3313 is Unprecedented

The fact that no other Congress has passed a law that totally eliminates the federal courts' ability to review the constitutionality of a federal law should give all of the Members pause when considering this legislation.

This empirical assessment was most recently reviewed and confirmed by Georgetown University Law Center Professor Mark Tushnet:

> [T]he very fact that Congress has *never* attempted to bar access to *all* federal courts when a person claims that a federal statute violates the Constitution is itself a matter of more than minor significance.[55]

The Majority attempts in vain to find precedent for H.R. 3313, but at the end of the day, they are left with the reality that a bill this far reaching and degrading to the federal judiciary has never been enacted into law.

The Majority attempts to justify H.R. 3313 through several short-sighted appeals. First, it

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[52]United States v. Moscinski, 952 F. Supp. 167, 170 (S.D.N.Y. 1997).

[53]League of United Latin Americans Citizens v. Wilson, 908 F. Supp. 755 (C.D. CA, 1995), *remanded* 131 F.3d 1297 (1997), *aff'd* 1998 U.S. Dist. Lexis 3418, (March 13, 1998) (holding California Proposition 187 unconstitutional).

[54]Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480, *rev'd* 122 F.3d 718 (1997) (holding California Proposition 209).

[55]Letter from Mark Tushnet, Professor, Georgetown University Law Center, to the Honorable John Conyers, Jr., 2 (July 19, 2004) (some emphasis in original and emphasis added) [hereinafter *Tushnet Letter*].

asserts that total court stripping laws are supported by precedent enacted by the Congress. Second, they argue that such court stripping laws were envisioned by the founders. Neither of these assertions is correct.

The Majority points to several laws they believe to be precedents for H.R. 3313. As the following review indicates, in addition to being largely outdated, all of the precedents they cite are either misstated, constitute only partial restrictions on federal judicial review, or do not involve issues of constitutional review:

Daschle Brush Clearing Rider:[56] Most notably, the Majority claims that a rider to the 2002 Supplemental Appropriations Act authored by Senator Tom Daschle (D-SD) approving logging and clearance measures by the Forest Service in the Black Hills of South Dakota serves as a precedent for the enactment of H.R. 3313.[57]

The problem with this argument is that, while the rider restricted "judicial review" of "any [logging or clearance] action"[58] by the Forest Service, it did not restrict federal judicial review of the rider itself or its constitutionality. Indeed, the federal courts did review the validity of the rider,[59] and explicitly found that the "challenged legislation's jurisdictional bar did not apply to preclude Court of Appeals' review as to the legislation's validity."[60]

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[56]Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Acts on the United States, Pub. L. No. 107-206, § 706, 116 Stat. 820, 864 (2002) [hereinafter *706 Rider*].

[57]*See H.R. 3313 Markup* (statement of Rep. Sensenbrenner).

[58]*706 Rider* § 706(j). It must be noted that the express language of this bill is far broader than the language in the Daschle amendment. While the Daschle amendment precluded "judicial review" of any logging or clearance action, this bill would strip the federal courts of "jurisdiction" or "appellate jurisdiction . . . to hear or determine any question pertaining to" DOMA.

[59]Biodiversity Associates v. Cables, 357 F.3d 1152 (10th Cir. 2004).

[60]*Id.* at 1152. Furthermore, in that case, the Tenth Circuit Court of Appeals explicitly held that the legislation's restriction on judicial review was not absolute because it did not apply to the review of the "congressional act," but rather to review of "the Forest Service's acts authorized by the Rider." *Id.* at 1160. Notably, the court also held that Congress, in this

Judiciary Act of 1789:[61] The Majority also cites as precedent the fact that the Judiciary Act of 1789 did not permit the Supreme Court (or any other federal court) to review state supreme court decisions upholding constitutional challenges to federal laws.[62]

However, as Professor Tushnet points out, this does not prove the Majority's contention that federal judicial review can be ignored: "The underlying thought [at that time] was that the national interest was in ensuring that federal rights were adequately protected, and that interest was not impaired when a state court mistakenly *over*-protected federal rights. After a controversial decision in the early decades of the twentieth century, Congress came to the view that there was indeed a national interest in ensuring the *uniformity* in the interpretation of national law, and amended the statute regarding the Supreme Court's jurisdiction accordingly."[63] In any event, it is a far different thing to prevent individuals from having access to the federal courts in order to redeem their constitutional rights than it is to prevent states from appealing legal judgments that they lose against the federal government in their own state courts.

Cary v. Curtis:[64] The Majority also attempts to argue that a 19th century federal statute placing jurisdiction for *all claims* of illegally charged customs duties with the Secretary of the Treasury represents a precedent for federal court stripping. In upholding the statute, the Court stated that, under the statute, "it is the Secretary of the Treasury alone in whom the rights of the government and of the claimant are to be tested."[65] The Majority, however, misstates the decision.

In fact, the Court decided the case on the basis of sovereign immunity, not court stripping.

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instance, was acting pursuant to an express authorization under Article IV, §3, cl. 2, to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *Id.* at 1156.

[61]Act of Sept. 24, 1789, ch. 20, §§ 11, 12, 1 Stat. 73 (1789).

[62]*H.R. 3313 Markup* (statement of Rep. Sensenbrenner).

[63]*Tushnet Letter* at 1 n.2 (referring to Ives v. South Buffalo Railway Co., 94 N.E. 431 (N.Y. 1911) and New York Cent. R. Co. v. White, 243 U.S. 188 (1917)).

[64]Cary v. Curtis, 44 U.S. 236 (1845) (reviewing Act of 1839, ch. 82, § 2).

[65]*Id.* at 241.

The plaintiff was suing the government to recover allegedly improperly charged customs fees. The Court stated that: "the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions."[66] Thus, the language alluded to by the Majority regarding jurisdiction is mere *dicta*, and is not controlling. Additionally, *Cary* is distinguishable as a suit against the government for money, not a suit asserting that the law at issue violates an individual constitutional right.

The Francis Wright:[67] the Majority also points to another 19th century federal law restricting Supreme Court jurisdiction in admiralty cases to questions of law arising on the record.[68] The Court upheld the statute in *The Francis Wright* decision.

This case, however, in no way indicates that Congress may take a particular class of cases out of the Jurisdiction of *all* federal courts.[69] It merely deals with the uncontroversial claim that in cases involving admiralty jurisdiction, Congress may limit the appellate jurisdiction of the Supreme Court.[70]

Marathon Pipe Line:[71] the Majority also points to *dicta* from Justice Brennan's opinion in the Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* to the effect that matters that could be heard in Article III courts could also be heard in state courts.[72]

In point of fact, the actual holding in *Marathon Pipe Line* was that Congress, had invested unconstitutionally broad powers in the untenured judges who served in the newly created bankruptcy courts. The Supreme Court invalidated the entire statutory grant of

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[66]*Id.* at 245.

[67]The Francis Wright, 105 U.S. 381 (1881) (analyzing Act of Feb. 16, 1875 , ch. 77).

[68]*See Federal Court Jurisdiction Hearing* (statement of Phyllis Schlafly).

[69]*The Francis Wright*, 105 U.S. at 381.

[70]*Id.*

[71]Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[72]*See Federal Court Jurisdiction Hearing* (statement of Phyllis Schlafly).

jurisdiction to the new bankruptcy court system set up by the 1978 Act, holding that untenured judges could not, consistent with Article III, exercise the judicial power of the United States. Even in the *dicta* cited by the Majority, Justice Brennan was endorsing the possible constitutionality of partial restrictions on judicial review, rather than a complete bar on such review.[73] If anything, the *Marathon Pipe Line* decision stands for the sanctity of the federal judiciary, and the fact that Congress cannot easily give federal matters to judges who are not actual Article III judges appointed by the president and confirmed by the Senate.

Other federal statutes cited by the Majority, and its witness, Phyllis Schafly, all involve only partial limitations on federal court jurisdiction or do not implicate constitutional issues as H.R. 3313 does. These include the Norris-LaGuardia Act of 1932 (federal court actually found to have jurisdiction);[74] the Emergency Price Control Act of 1942 (appeals permitted to Supreme Court);[75] the Portal-to-Portal Pay Act of 1947 (deals with a restriction on liability, not a constitutional claim);[76] the 1965 Medicare Act (court stripping limited to administrative

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[73]*Marathon Pipe Line Co.*, 458 U.S. at 50.

[74]Although characterized in Ms. Schlafly's testimony as having "removed from federal courts the jurisdiction [in cases involving labor strikes] from the federal courts, and the Supreme Court had no difficulty in upholding it," *Federal Court Jurisdiction Hearing* (statement of Ms. Schlafly), the Norris-LaGuardia Act did nothing of the sort. As the Supreme Court observed in *Lauf v. E.G. Shinner*, 303 U.S. 323 (1938), the District Court had jurisdiction to hear the case "by the findings as to diversity of citizenship and the amount in controversy."

[75]This legislation also did not strip the federal courts, or the Supreme Court, of equity jurisdiction to hear cases involving price orders. Section 204(a) of the Act allowed an individual whose protest against a price control ruling had been denied at the administrative level, to take an appeal to an Emergency Court of Appeals set up by subsection (c), and take a direct appeal to the U.S. Supreme Court under subsections (b) and (d).

[76]The section in question states only that "No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding ... to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment *with respect to an activity which was not compensable under subsections (a) and (b) of this section*." It is, at best, tautological to state that a court does not have

determination regarding fee schedule, not constitutional issues);[77] the Voting Rights Act of 1965 (funnels cases into the district court for the District of Columbia);[78] and the 1996 Immigration Amendments (eliminates review of narrow set of discretionary actions by Attorney General, not constitutional issues).[79]

Second, the Majority asserts the founders would have expressed support for court stripping legislation.[80] In this regard, the Majority notes that authority such as Hamilton's Federalist No. 80 make clear that Congress has broad authority to rein in the federal courts. Properly read, Federalist No. 80 merely restates the Constitution's grant of authority with regard to the federal courts generally. It does not sanction efforts to eviscerate and degrade the federal courts themselves as H..R. 3313 does. In reality, as noted above, Hamilton was one of the principal supporters of a strong and independent federal judiciary of broad jurisdiction.

Conclusion

We oppose this unprecedented court stripping bill, which is nothing more than a modern day version of "court packing." Just as President Franklin Roosevelt's efforts to control the

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jurisdiction to impose liability on an employer with respect to an activity that is not compensable.

[77]The section Ms. Schlafly cites, 42 U.S.C. § 1395w-4(i)(1), does not permit judicial or administrative review of certain factors to be taken into account in the setting of a fee schedule for the payment of physicians under the Supplementary Medical Insurance Benefits for Aged and Disabled. It is only with respect to those particular factors that go into the calculation of the fee schedule, that the restriction applies. The restriction does not apply to the fee schedules themselves, much less to, as Ms. Schlafly put it, "administrative decisions about many aspects of the Medicare payment system."

[78]42 U.S.C. § 1973c places jurisdiction in the U.S. District Court for the District of Columbia, with a direct appeal to the Supreme Court. This was upheld by the Supreme Court in *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966).

[79]The limitation of jurisdiction in the 1996 immigration law is quite specific and circumscribed. It only bars judicial review of three discrete and discretionary actions – the Attorney General's decisions (1) to "commence proceedings," (2) to "adjudicate cases," or (3) to "execute removal orders." *See* Hatami v. Ridge, 270 F. Supp. 2d 763 (E.D. Va. 2003).

[80]*H.R. 3313 Markup* (statement of Rep. Tom Feeney).

outcome of the Supreme Court by packing it with loyalists was rejected by Congress in the 1930s, thereby preserving the independence of the federal judiciary, so too must this modern day effort to show the courts "who is boss" fail as well.

We agree with then-President George Washington's warning concerning efforts to undermine the judiciary, when he stated:

> Let there be no change [in court powers] by usurpation; for it is through this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield.[81]

Justice Jackson echoed these warnings in 1943 when he held in *West Virginia Board of Education v. Barnette*:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and official and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[82]

It is unfortunate that the Judiciary Committee would disparage these eloquent statements by passing legislation that is so totally inconsistent with judicial independence. We urge the Members to put principle above politics and reject this ill-advised and unconstitutional legislation.

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[81] PRESIDENT GEORGE WASHINGTON, FAREWELL ADDRESS TO THE NATION (1796).

[82] 319 U.S. 624, 638 (1943).

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.
ROBERT C. SCOTT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTIN T. MEEHAN.
WILLIAM D. DELAHUNT.
ROBERT WEXLER.
TAMMY BALDWIN.
ANTHONY D. WEINER.
ADAM B. SCHIFF.
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