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Congressional Control of Federal Court Jurisdiction: The Case Study of Abortion

CONGRESSIONAL CONTROL OF FEDERAL COURT JURISDICTION: THE CASE STUDY OF ABORTION

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I. INTRODUCTION

Should the United States Supreme Court be the final arbiter of abortion practice legality in the United States of America? When the Court is placed in such a position, whether through its own doing or through unique, combining, and compounding circumstances, can the

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Congress of the United States, in compliance with the Constitution, abrogate the appellate jurisdiction of the Court over the legal topic of abortion? Likewise, can Congress restrict the abortion subject matter jurisdiction of the lower federal courts? If Congress is constitutionally able to remove abortion jurisdiction from the Supreme Court and the lower federal courts, should it do so?

The legal topic of abortion is regularly and almost unilaterally bound and confused with the moral, ethical, and religious implications of abortion. However, in properly examining the questions posed above, personal and subjective considerations need not and should not enter the decision-making equation until it is time to resolve the "should" question. The "can" questions described above define the legal aspects of the topic. The legal aspects are, or should be, objective, analytical, devoid of emotion, and dependent upon appropriate proof and supporting authority.

"[C]ongressional control of [federal court] jurisdiction raises fundamental issues about the very nature of American constitutional government."[1] It raises issues that encompass governmental checks and balances, separation of powers, federalism, and the very structure and history of this democratic republic. The concepts of congressional control and removal of federal subject matter jurisdiction are not new or unique; rather, they have provided ample and voluminous academic discussion in the American legal community.[2]

This Comment applies the specific concept of jurisdiction removal to abortion. Beginning in Part II, it briefly reviews pertinent portions of the federal judiciary's history. Part II also reviews the history of concurrent federal and state court jurisdiction that encompasses constitutional issues and the laws of the United States, legally summarized as federal questions. It further reviews the tenets of our system of government that balance federal judicial power against legislative and executive power, as well as the system of checks and balances developed by our Constitution. Specifically, Part II shows that the composition, organization, and jurisdiction of the United States federal courts has never been static and that the legislative branch is empowered, through the process of congressional law-making and within constitutional parameters, to control and define the procedural functioning of the federal courts.

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1. Lloyd C. Anderson, *Congressional Control Over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise*, 39 BRANDEIS L.J. 417, 433 (2000-01).

2. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896 n.3 (1984) (listing journal articles that address the issues).

Part III expounds on the constitutional aspects of congressional authority to restrict the jurisdiction of the Supreme Court and the lower federal courts. It shows that Congress has the plenary power, except for the Supreme Court's few, express constitutional grants of original jurisdiction, to restrict and to ameliorate Supreme Court and lower federal court subject matter jurisdiction according to Congress's collective discretion. It reviews the definition of this power contained in Articles I and III of the Constitution and the relation of its exercise to the Supremacy, Due Process, and Equal Protection Clauses of the Constitution. Most importantly, Part III ultimately concludes that no constitutional obstacles exist to prevent Congress from removing all federal jurisdiction over the subject of abortion.

Lastly, Part IV summarizes several practical considerations for which congressional legislators drafting and supporting an abortion jurisdiction removal bill would have to plan, ranging from the Senate filibuster to judicial review of the abortion jurisdiction removal statute itself.

January 22, 2003 marked the thirtieth year since the Supreme Court's companion decisions legalizing abortion[3] practice in *Roe v. Wade*[4] and *Doe v. Bolton*.[5] Following the mid-term elections of 2002[6] and rumors that Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor may soon retire from the Supreme Court,[7] the legal and political topic of abortion is once again positioned for takeoff on the launching pad of public interest.[8] The thrust of this

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3. *See* BLACK'S LAW DICTIONARY 5 (7th ed. 1999) (defining abortion as "[t]he spontaneous or artificially induced expulsion of an embryo or fetus"); 1 AM. JUR. 2D *Abortion and Birth Control* § 1 (1994) (defining abortion as "the expulsion of the fetus at so early a period of uterogestation that it has not acquired the power of sustaining an independent life").

4. 410 U.S. 113 (1973).

5. 410 U.S. 179 (1973).

6. *See* David Jackson, *GOP to Lead Congress into 2003, Facing Tough Issues*, THE STATE (Columbia, S.C.), Jan. 6, 2003, at A8 (noting that "[t]he GOP increased its majority in the House and took back control of the Senate in the November [2002 mid-term] elections"); *U.S. Election Results*, THE STATE (Columbia, S.C.), Nov. 7, 2002, at A12.

7. Shannon McCaffrey, *GOP Win to Affect Judiciary*, THE STATE (Columbia, S.C.), Nov. 7, 2002, at A11.

8. *See, e.g.*, David Crary, *Women Who Had Abortions Long Ago Express Full Range of Attitudes Now*, THE STATE (Columbia, S.C.), Jan. 22, 2003, at A4 (asserting that "[f]or abortion rights advocates, the departure of Justice Sandra Day O'Connor would be most troublesome"); Jackson, *supra* note 6, at A8 (stating that "[President] Bush's opponents in the Senate say too many of the judges he has nominated take too narrow a view of . . . abortion rights. That sets the stage for what many see as the biggest political fight of the year—to fill an expected vacancy or two on the U.S. Supreme Court."); Jill Lawrence, *Democrats Differ at Abortion Rights Dinner*, USA

Comment strives to catalyze political, legal, and academic discourse and debate on the *legal* topic of abortion by asserting, with abundant proof, that Congress may constitutionally extract the subject from the federal court system and effectively return it to the state level. As a result, this Comment asserts that the legal debate over abortion is far from foreclosed.

II. HISTORY OF THE FEDERAL JUDICIARY

Any credible discussion of federal appellate subject matter jurisdiction removal requires, at minimum, a brief, foundational background on the creation of the federal court system. Since their outset, beginning in theory in 1787, the federal courts, including the Supreme Court, have been subject to the constitutional checks of Congress. The Constitution ensures an intricate balance of power among the three branches of the federal government, and it safeguards federalism, which is the balance between the concurrent governance of citizens simultaneously by fifty individual state governments and the federal government.[9] Specifically pertinent to this Comment, the Constitution ensures that "the judicial power is balanced against the House, the Senate, the executive power, and the state governments."[10]

The Constitution replaced the Articles of Confederation, which were proven ineffective in many areas, including the conduct of foreign affairs, the regulation of national commerce, issues of national currency, and appropriate responses to state factions and interests detrimental to the union as a whole.[11] Therefore, the Constitutional Convention embodied the task of creating a strong national

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TODAY, Jan. 23, 2003, at 10A (noting that "[t]he first appearance together of all six [2004] Democratic presidential candidates" took place at a fund-raising dinner held by NARAL Pro-Choice America, deemed by the President of the Family Research Council as "an 'unseemly celebration of a decision that resulted in 42 million dead babies'"); *Rallies Mark 30 Years Since 'Roe'*, USA TODAY, Jan. 23, 2003, at 2A (quoting President George W. Bush as stating that "'[t]he March for Life upholds the self-evident truth of [the Declaration of Independence]—that all are created equal and given the unalienable rights of life, liberty and the pursuit of happiness'" and quoting the President of the National Organization for Women as stating that "'[w]e will not be the generation that both won and lost reproductive rights in our lifetime'").

9. *See* BLACK'S LAW DICTIONARY 627 (7th ed. 1999) (defining federalism as "[t]he relationship and distribution of power between the national and regional governments within a federal system of government").

10. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 32 (Meridian 1956) (1885).

11. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1-3 (4th ed. 1996) [hereinafter HART AND WECHSLER].

government that would have the power to enforce its mandates upon both individuals and member states, while doing so through institutions that would not infringe upon state and individual rights to such an extent that they would preclude the adoption of the new form of government by the citizenry. No example of this difficult task is more demonstrative than the debates over the federal judiciary. The Randolph, or Virginia Plan, of the Constitutional Convention set forth a federal structure consisting of three branches: executive, legislative, and judicial.[12] The establishment of a national judiciary, though an entirely new and foreign concept outside of the areas of admiralty and disputes among states,[13] passed unanimously at the convention on June 4, 1787.[14] However, that is where unanimity regarding the structure, regulation, and reach of the federal court system ended.

The national judiciary was deemed originally to consist of "one supreme tribunal and one or more inferior tribunals."[15] The Committee of Detail, formed to prepare the "first definite draft of the Constitution,"[16] later solidified the Supreme Court's original and appellate jurisdictional mandates, now contained in Article III of the Constitution,[17] including the Exceptions Clause.[18] However, there was great dispute over the system of lower federal courts. On June 5, 1787, John Rutledge, a delegate from South Carolina, challenged the necessity of federal courts inferior to the Supreme Court.[19] Mr. Rutledge argued that the state courts provided the appropriate forum to decide cases "in the first instance" and that the availability of appeal "to the supreme national tribunal . . . [was] sufficient to secure . . . national rights and uniformity of Judgments."[20] He argued that the establishment of lower federal courts would constitute "an unnecessary encroachment on the jurisdiction of the States."[21] Despite protests from James Madison of Virginia and James Wilson of Pennsylvania that federal courts would be necessary to alleviate the undue multiplication of appeals, to solve the possibility of state court biases,

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12. *Id.* at 5.

13. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 1-2 (2d ed. 1994); HART AND WECHSLER, *supra* note 11, at 6-7 n.31.

14. 1 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 56 (Gaillard Hunt & James Brown Scott eds., 1987).

15. *Id.*

16. HART AND WECHSLER, *supra* note 11, at 6.

17. *See id.* at 18.

18. U.S. CONST. art. III, § 2, cl. 2.

19. 1 MADISON, *supra* note 14, at 60.

20. *Id.*

21. *Id.*

and to adjudicate admiralty claims, Mr. Rutledge's motion to strike "inferior tribunals" from the Constitution passed the convention.[22] Faced with the prospect of having no constitutional authority to establish lower federal courts, Madison and Wilson seized upon an idea earlier voiced by John Dickinson of Delaware.[23] Their motion in response, known commonly as the "Madisonian Compromise,"[24] provided that the "National Legislature [would] be empowered to institute inferior tribunals" according to its "discretion."[25] Madison's motion narrowly passed and its concepts became the Ordain and Establish Clause of the Constitution[26] after further word smiting by the convention's Committees of Detail and Style.[27]

The Madisonian Compromise was designed to "maintain [] a proper balance between the competing needs for *political control* over an *unelected* judiciary and for the rule of law by an *independent judiciary.*"[28] Therefore, Article III of the Constitution, often referred to as the Judiciary Article, strikes a balance between the federal judiciary and its coordinate branches of the federal government, and between the federal judiciary and the several states, through the Exceptions and the Ordain and Establish Clauses. This balance was further calibrated in the convention by four subsequent measures. First, the president was deemed, independent of the judiciary, to possess sole veto power over acts of Congress.[29] Second, the president was deemed, independent of the legislature, to possess sole pardoning power for criminal offenses.[30] Third, the president was given the power to appoint Supreme Court Justices and federal court judges, checked by the advice and consent of the Senate.[31] Fourth, all federal judges were granted life tenure "during good behavior" and non-diminishable salaries to ensure their independence from both the branches of the federal government and the political electorate.[32]

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22. *See* HART AND WECHSLER, *supra* note 11, at 8; 1 MADISON, *supra* note 14, at 61.

23. 1 MADISON, *supra* note 14, at 61.

24. HART AND WECHSLER, *supra* note 11, at 8.

25. *Id.*; *see* CHEMERINSKY, *supra* note 13, at 4.

26. U. S. CONST. art. III, § 1, cl. 1.

27. HART AND WECHSLER, *supra* note 11, at 9.

28. Anderson, *supra* note 1, at 420 (emphasis added).

29. U. S. CONST. art. I, § 7, cl. 3; HART AND WECHSLER, *supra* note 11, at 10, 10-11 n.59; 1 MADISON, *supra* note 14, at 69; 2 MADISON, *supra* note 14, at 405-06.

30. U. S. CONST. art. II, § 2, cl. 1; 2 MADISON, *supra* note 14, at 471.

31. U. S. CONST. art. II, § 2, cl. 2; HART AND WECHSLER, *supra* note 11, at 9-10, 10 n.52.

32. U. S. CONST. art. III, § 1; CHEMERINSKY, *supra* note 13, at 4.

Upon the ratification and adoption of the Constitution, the Supreme Court and, potentially, the lower federal courts, though alive in theory, had no tangible forms because the "judiciary article . . . was not self-executing."[33] The tangible creation and subsequent maintenance in form of our entire federal court system has since been established through judiciary acts that Congress has passed. The first Judiciary Act[34] provides valuable insight into the intended functions and parameters of the federal court system within our constitutional design. There was "considerable overlap among delegates to the Constitutional Convention and members of the First Congress"; thus, the first Congress's Judiciary Act of 1789 helps a reader, who is 214 years removed from its passage, understand the role and breadth of the federal judiciary envisioned by the citizens and the leaders of the United States at the birth of the Constitution.[35]

One key aspect of the first Judiciary Act is that it did not grant subject matter jurisdiction to the Supreme Court and the lower federal courts to the extent allowable under Article III of the Constitution,[36] and this is essential to properly framing the concept of Congressional control of federal court jurisdiction. Congress is vested with the constitutional power to expand and constrict federal courts' jurisdiction and even to eradicate such jurisdiction when the text of the Constitution does not expressly vest it in the federal courts. For example, the Act did not grant general federal question jurisdiction to lower federal courts, but, instead, limited such jurisdiction to specific constitutional controversies, as enumerated in the Act.[37] Additionally, the first Judiciary Act did not grant the Supreme Court appellate jurisdiction to review criminal cases[38] and did not give the Court appellate jurisdiction over federal constitutional law claims when state

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33. HART AND WECHSLER, *supra* note 11, at 28; *see* U.S. CONST. art. III.

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

35. CHEMERINSKY, *supra* note 13, at 9 ("[T]he [first] Judiciary Act is especially important in understanding the federal court system because . . . [it] 'was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.'") (citation omitted); Gunther, *supra* note 2, at 906; *see also* HART AND WECHSLER, *supra* note 11, at 28 ("[T]he first Judiciary Act is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress' constitutional obligations concerning the vesting of federal jurisdiction.").

36. HART AND WECHSLER, *supra* note 11, at 32.

37. *See* Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73; CHEMERINSKY, *supra* note 13, at 11; Paul M. Bator, *Congressional Power Over The Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031-32 (1981-82); Gunther, *supra* note 2, at 913.

38. *See* Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 73; CHEMERINSKY, *supra* note 13, at 10; HART AND WECHSLER, *supra* note 11, at 33.

courts had upheld such claims in favor of the claimant.[39] The Judiciary Act further established removal jurisdiction,[40] though this jurisdiction is nowhere referenced in the Constitution. It also set the number of Supreme Court Justices at six,[41] requiring the "justices [to] ride circuit rather than [authorizing the appointment of] permanent judges to the courts of appeals."[42]

Subsequent judiciary acts and other acts of Congress also provide examples of both "incremental adjustment[s] of federal jurisdiction to reflect shifting political currents"[43] and Congress's capacity to constitutionally mandate the federal court system's organization and structure. For example, the number of Justices comprising the Supreme Court bench fluctuated until 1869, beginning at six in 1789, rising to ten in 1864, lowering to seven in 1866, and settling at nine in 1869 where the number presently remains.[44] Also, the Judiciary Act of 1801, commonly termed the "Law of the Midnight Judges," created permanent judgeships on the circuit courts, allowing federalists to appoint and confirm numerous federal judges after losing control of "both Congress and the Presidency in the elections of 1800."[45] However, the new anti-federalist Congress and President Jefferson repealed the law through the Judiciary Act of 1802,[46] returning largely to the pre-existing circuit court structure and "abolish[ing] the [newly federalist-created] judgeships."[47]

Following the Civil War, from 1863-1875, "Reconstruction Congresses" repeatedly expanded the subject matter jurisdiction of the federal courts to protect against fragmented, inconsistent, and state-biased decisions.[48] In 1875, jurisdiction expansion was evident when Congress granted federal district courts general and original federal question jurisdiction to adjudicate cases and controversies arising

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39. *See* Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73; CHEMERINSKY, *supra* note 13, at 11; HART AND WECHSLER, *supra* note 11, at 33.

40. *See* Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 73; CHEMERINSKY, *supra* note 13, at 11.

41. *See* Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73; CHEMERINSKY, *supra* note 13, at 10.

42. CHEMERINSKY, *supra* note 13, at 10; *see also* Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73 (stating that circuit courts were to be held annually and "shall consist of any two justices of the supreme court, and the district judge of such districts, any two of whom shall constitute a quorum").

43. HART AND WECHSLER, *supra* note 11, at 34.

44. CHEMERINSKY, *supra* note 13, at 21.

45. HART AND WECHSLER, *supra* note 11, at 34.

46. Act of Mar. 8, 1802, ch. 268, 2 Stat. 132.

47. HART AND WECHSLER, *supra* note 11, at 34.

48. *See id.* at 35-36.

under the Constitution, laws, and treaties of the United States.[49] Subsequently, in 1914, "Congress expanded the Supreme Court's appellate jurisdiction to encompass for the first time cases in which a state court rendered a decision favorable to a claim of federal right."[50]

Additionally, Congress has shaped the evolution of the federal courts of appeals. The first Judiciary Act created circuit courts, possessing both original and appellate jurisdiction, as the second tier of the federal court system.[51] The Evarts Act of 1891[52] created the courts of appeals, giving them the appellate jurisdiction previously held by the circuit courts. However, the Act did not abolish the circuit courts.[53] The structure of the courts of appeals today is essentially the same as that set forth in the Evarts Act, except that the number of regional courts of appeals has risen to eleven.[54] Congress subsequently abolished the circuit courts in 1911, conferring upon the district courts the circuit courts' previous original jurisdiction.[55] Congress has also mandated that federal courts of appeals have sole jurisdiction over all appeals taken from final judgments of the district courts, except those controversies that are allowed to be directly appealed to the Supreme Court.[56]

As a final example of Congress's power over the structure of the federal court system, Congress has gradually shaped the method by which appeals are taken from state and lower federal courts to the Supreme Court. At its outset, the Supreme Court heard appeals that were brought by writ of error and were within the limits of its authorized jurisdiction.[57] Congress refined this process by using mandatory appeals and, finally, by giving the Supreme Court discretionary review of appeals through writs of certiorari.[58] Currently, almost all appeals heard by the Supreme Court are by writ of

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49. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470; HART AND WECHSLER, *supra* note 11, at 36.

50. HART AND WECHSLER, *supra* note 11, at 38 (citing Act of Dec. 23, 1914, 38 Stat. 790).

51. *See* Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78.

52. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

53. *Id.*

54. CHEMERINSKY, *supra* note 13, at 24. This number does not include the Federal Circuit Court of Appeals and the District of Columbia Circuit Court of Appeals, which raise the total number of federal courts of appeals to thirteen. *Id.*

55. *See* Act of Mar. 3, 1911, ch. 1, 36 Stat. 1807 (1911).

56. *See* 28 U.S.C. § 1291 (2000).

57. *See* CHEMERINSKY, *supra* note 13, at 22.

58. *See id.* at 21-22; *see also* HART AND WECHSLER, *supra* note 11, at 37 (discussing the Evarts Act and the introduction of appeals to the Supreme Court via writ of certiorari).

certiorari.[59] Through this gradual, structure-shaping process of congressional legislation, the federal court system "currently includes the Supreme Court, thirteen courts of appeals, ninety-four federal district courts, and several specialized federal courts."[60]

This brief and sweeping historical overview of our federal court system provides a factual backdrop for one purpose: to show that the composition, organization, and jurisdiction of the federal courts is not static. Through the mass proliferation of television, radio, and internet media, most Americans undoubtedly have some understanding or, at least, awareness of concurrent state and federal court systems. However, this necessary historical background cements the assertion that the legislative branch, through the process of lawmaking between Congress and the President, is empowered to effectively control the procedural functioning of the federal court system within the constitutional parameters placed upon Congress, the President, and the judiciary.[61] The concept of jurisdiction removal is simply a constitutional, congressional application of the Ordain and Establish[62] and Exceptions Clauses[63] of the Constitution that has been exercised repeatedly throughout our history. Jurisdiction *removal*, in actuality, is nothing more than a congressional statute's constriction or retraction of previously existing Supreme Court and federal court jurisdiction, according to the collective judgment and discretion of Congress and the President.

III. CONGRESSIONAL AUTHORITY TO RESTRICT SUPREME COURT AND LOWER FEDERAL COURT APPELLATE JURISDICTION

The Judiciary Article (Article III) of the Constitution reads, in part, as follows:

> 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 judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws

59. CHEMERINSKY, *supra* note 13, at 22.

60. *Id.* at 19.

61. *See generally id.* at 19 (stating that the current federal court structure and "current specification of jurisdiction of [federal] courts . . . are the product[s] of numerous changes adopted in many statutes adopted since the Judiciary Act of 1789").

62. U.S. CONST., art. III, § 1, cl. 1.

63. U.S. CONST., art. III, § 2, cl. 2.

> of the United States, and Treaties made, or which shall be made, under their Authority . . . .
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*[64]

In light of this language, may Congress relieve the Supreme Court of appellate subject matter jurisdiction over particular legal topics? Likewise, may Congress proscribe subject matter jurisdiction over the same legal topics in lower federal courts? Those who review the text of

> the [E]xceptions [C]lause . . . with respect to the Supreme Court and who accept the widely held view about broad congressional control of lower federal court jurisdiction find it hard to see anything in article III that would bar congressional action, as a matter of sheer constitutional power, to remand federal constitutional issues for final state court adjudication. Such a . . . [reading] seems consistent with the constitutional language and the Framers' intent, especially because state courts, at the outset and for decades after, were envisioned as not only the competent enforcers but indeed the primary enforcers of federal law.[65]

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64. U.S. Const. art. III, §§ 1-2 (emphasis added to the Ordain and Establish and the Exceptions Clauses).

65. Gunther, *supra* note 2, at 914; *see also* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). Wechsler comments:

> The first Congress did not face the problem of building a legal system . . . it started with the premise that the standing *corpus juris* of the country was provided by the states. As with the law, so with the courts. One federal Supreme Court was essential and the Constitution gave a mandate that it be established. But even the establishment of lower courts was left an open question by the Framers, as was the jurisdiction to be vested in any such courts as Congress might establish . . . . Congress was free to commit the administration of national law to national tribunals or to leave the task to the state courts . . . .

To avoid becoming mired in a cliché historical debate over what the members of the Constitutional Convention intended, the gauntlet must be thrown down at this early juncture. While Professor Gunther's quote above is accurate, the remainder of this Comment will show that if the text of the Constitution and the concepts of checks and balances, judicial review, stare decisis, separation of powers, federalism, and a republican form of representative government mean anything today, then there can be no doubt that Congress may constitutionally retract jurisdiction over specific subject matter cases and controversies from the Supreme Court and the lower federal courts. Such subject-matter cases unequivocally include controversies encompassing the legal topic of abortion. After applying the concepts listed above, the text of the Constitution, and the existing case law to abortion, the only remaining questions are whether Congress should do so and why. While ripe for debate, these questions must be answered by congressional legislators and their constituents; therefore, they will not be directly addressed in this Comment.

Throughout our history, congressional legislators have curtailed federal subject matter jurisdiction by introducing bills on the House and Senate floors.[66] In fact, the specific concept of removing federal court abortion jurisdiction is not new or unique.[67] Although Supreme Court case law on the topic of jurisdiction removal is limited,[68] the case law that does exist is overwhelmingly determinative and clear on the issue.

A. Authority to Restrict Supreme Court Appellate Jurisdiction

The Exceptions Clause of Article III states that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall

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> Even the appellate jurisdiction of the Supreme Court was subject to congressional control.

Id. at 544 (footnotes omitted).

66. *See, e.g.*, Anderson, *supra* note 1, at 418 n.6, 419 n.19 (listing bills); Gunther, *supra* note 2, at 895-96 n.2, 897 (listing hearings and discussing bills);James McClellan, *Congressional Retraction of Federal Court Jurisdiction to Protect the Reserved Powers of the States: The Helms Prayer Bill and a Return to First Principles*, 27 VILL. L. REV. 1019, 1019 (1981-82) (describing the number of introduced bills as "countless"); Scott Moss, An Appeal by Any Other Name: Congress's Empty Victory over Habeas Rights—Felker v. Turpin, 116 S. Ct. 2333 (1996), 32 HARV. C.R.-C.L. L. REV. 249, 251 n.11 (1997) (listing bills).

67. *See, e.g.*, H.R. 867, 97th Cong. (1981) ("A bill to limit the jurisdiction of the Supreme Court and the district courts in certain cases [abortion]" introduced by Representative Philip Crane of Illinois.).

68. Gunther, *supra* note 2, at 897; Moss, *supra* note 66, at 251.

make."[69] This mandate has enjoyed limited, but conclusive, consideration in Supreme Court jurisprudence.

In 1810, twenty-one years after the Judiciary Act of 1789 established the Supreme Court,[70] Chief Justice Marshall addressed the topic for the first time in *Durousseau v. United States*.[71] In *Durousseau* the Attorney General moved to dismiss "several writs of error" from various judgments that the U.S. District Court for the District of Orleans entered in favor of the United States.[72] The United States argued that the "act erecting Louisiana into two territories" and establishing a district court in the territory of Orleans, "consist[ing] of one judge . . . [exercising] *the same* jurisdiction . . . [as] the judge of the Kentucky District," did not grant the Supreme Court the same authority of appellate review over Orleans cases that the Court had over Kentucky cases.[73] In determining that it did have the same appellate jurisdiction in Orleans cases, the Court expounded upon its original and appellate jurisdiction as defined by the Constitution.[74]

Chief Justice Marshall elaborately set forth the following statements that shaped subsequent case law covering jurisdiction removal by Congress:

> The *appellate powers* of this court are not given by the judicial act. They are given by the constitution. But *they are limited and regulated* by the judicial act, and by such other *acts* as have been *passed on the subject.*
>
> When the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to *execute* the power *they possessed* of *making exceptions to the appellate jurisdiction of the supreme court* . . . . They have not *declared* that the appellate power of the court shall not extend to *certain cases*; but they have described affirmatively its jurisdiction . . . understood to imply a negative on the exercise of such appellate power as is not comprehended within it. [75]

69. U. S. CONST. art. III, § 2, cl. 2.
70. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (1789).
71. 10 U.S. (6 Cranch) 307 (1810).
72. *Id.* at 309.
73. *Id.* at 309-10.
74. *See id.* at 318.
75. *Id.* at 314 (emphasis added).

Clear conclusions may be drawn from the eloquent writing of Chief Justice Marshall. First, the appellate jurisdiction that the Constitution grants the Supreme Court may be limited, regulated, and excepted by Congress, in accordance with Congress's constitutionally vested legislative powers, through the passage of acts that encompass the topic of Supreme Court appellate jurisdiction. Second, not only may Congress declare that certain cases are excepted from Supreme Court appellate jurisdiction, but its affirmative description of the Court's appellate jurisdiction, alone, carries a negative inference that prohibits the Supreme Court from exercising appellate jurisdiction over controversies not within the intent of that affirmative description.

Marshall went on to explain that, should Congress specifically intend to except certain cases from the Supreme Court's appellate jurisdiction, such an intent "would require *plain words* to establish th[at] construction."[76] Marshall furthered this analysis by adding that "to imply an exception against the intent" of Congress, as evidenced by Congress's affirmative description in the Judiciary Act of the Supreme Court's appellate jurisdiction, "would be repugnant to every principle of sound construction."[77] This quotation supports the inference that Congress is fully and constitutionally empowered to except certain cases from the Supreme Court's appellate jurisdiction when it is done so in plain language. However, the Court should not glean such an exception if the exception is contrary to the intent evidenced by Congress through its decision to use an affirmative rather than a restrictive description of the Court's appellate jurisdiction.

Durousseau provided the foundation for the seminal case, *Ex Parte McCardle*,[78] which in 1868 defined the current legal landscape of the issue. In *McCardle* a man held in military custody appealed the U.S. Circuit Court for the Southern District of Mississippi judgment, which denied him the issuance of a writ of habeas corpus.[79] The amended Judiciary Act of 1867 created the U.S. circuit courts and authorized appeals of all judgments rendered by the circuit courts to be within the Supreme Court's appellate jurisdiction.[80] However, another act was passed in 1868 while *McCardle* was pending before the Supreme Court—after a presidential veto and after a super-majority vote of Congress overrode the veto.[81] The subsequent Act specifically repealed that portion of the 1867 Act which granted the

76. *Id.* at 316.
77. *Durousseau*, 10 U.S. (6 Cranch) at 318.
78. 74 U.S. (7 Wall.) 506 (1868).
79. *Id.* at 507.
80. *Id* at 506-07.
81. *Id.* at 580.

Supreme Court appellate jurisdiction over appeals encompassing writs of habeas corpus.[82] In dismissing the case for want of subject matter jurisdiction, Chief Justice Chase stated the following in the unanimous opinion of the Court:

> [T]he appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such *exceptions* and under such regulations *as Congress shall make.*"
>
> . . . .
>
> The source of that jurisdiction, and the limitations of it by the Constitution *and by statute*, have been on several occasions subjects of consideration here. . . .
>
> . . .[T]he affirmation [by Congressional statute] of [Supreme Court] appellate jurisdiction implies the negation of all such jurisdiction not affirmed . . . .
>
> The *exception* to appellate jurisdiction in the case before us . . . is not an inference from the affirmation of other appellate jurisdiction. *It is made in terms*. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is *expressly* repealed. It is hardly possible to imagine a plainer instance of *positive exception*.
>
> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the *power to make exceptions to the appellate jurisdiction of this [C]ourt is given by express words*.
>
> . . . 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.[83]

McCardle involved Congress's direct and express removal of specific types of cases from the appellate jurisdiction of the Supreme Court. The specific types of cases extracted from the Court's appellate jurisdiction involved a constitutional right guaranteed to individuals:

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82. *Id.*

83. *Id.* at 512-14 (emphasis added).

that of habeas corpus.[84] Therefore, *McCardle* established certain rules of law. First, the power to except Supreme Court appellate jurisdiction is vested in Congress by the Constitution. Second, Congress may relieve the Supreme Court of its appellate jurisdiction over specific types of cases by passing an act that expressly and clearly does so.[85] Third, Congress may relieve the Supreme Court of appellate jurisdiction in specific cases that encompass constitutionally guaranteed individual rights.

Because the Supreme Court has not overruled any of these rules of law, they presently continue to govern the Supreme Court in its decision-making regarding jurisdiction removal through the doctrine of stare decisis. They are thus currently unassailable from a strictly legal perspective.

> It is fashionable today to stress that *McCardle* is special and distinguishable; nevertheless, the language of the Court in *McCardle* plainly proceeded on the assumption that Congress's power [to restrict the subject matter appellate jurisdiction of the Supreme Court] is plenary; and this is the only Supreme Court opinion squarely on point.[86]

"The text of article III, the *McCardle* decision, the bulk of Supreme Court dicta, congressional practice, and the constitutional scheme of checks and balances all contribute to a compelling argument that there are no . . . internal limits on Congress' article III power to limit the Court's appellate jurisdiction."[87]

Since *McCardle*, the Supreme Court has deftly avoided the topic of congressional limitation of the Supreme Court's appellate jurisdiction. However, a closer look at the case law surrounding the statutory limitations on federal appellate jurisdiction[88] gives rise to two fair conclusions. First, no act of Congress has been followed by an appropriate set of circumstances since *McCardle* that has required the Supreme Court to revisit its conclusions in *Durousseau* and *McCardle*.

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84. *See* U. S. CONST. art. I, § 9, cl. 2.

85. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988) (stating that "where Congress intends to preclude judicial review of contitutional claims its intent to do so must be clear").

86. Bator, *supra* note 37, at 1040.

87. Gunther, *supra* note 2, at 908; *see also* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1511 (2000) (stating that "the Court itself has had little to say about the limits, if any, on the scope of legislative control over its appellate jurisdiction").

88. *See infra* Part III.B.

Second, nothing in the Supreme Court's abundant case law upholding congressional limitations on lower federal court subject matter jurisdiction[89] indicates that the same conclusion would not have resulted if different circumstances had caused such congressional limitations to also apply to the Supreme Court's appellate jurisdiction. The Exceptions Clause of Article III is clear on its face and in its terms, and Supreme Court case law is in clear agreement with those terms. Thus, Congress has the discretionary, plenary power to relieve the Supreme Court of appellate subject matter jurisdiction over particular legal topics encompassing individual constitutional rights, including abortion.

B. Authority to Restrict Lower Federal Court Jurisdiction

The Ordain and Establish Clause of Article III states, "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.*"[90] Little uncertainty and debate surround the concept of congressional removal of jurisdiction over a particular legal topic from the lower federal courts.

For example, in *Sheldon v. Sill*[91] the "Judiciary Act" proscribed otherwise allowable diversity jurisdiction of U.S. circuit courts in "any suit to recover the contents of any . . . chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court" by the original owner of the debt.[92] The plaintiff in *Sheldon*, a New York citizen and assignee of debt owed by Sheldon who was a citizen of Michigan, challenged the constitutionality of this restriction on federal court jurisdiction.[93] He claimed it violated the federal enumerated judicial power to determine "'controversies between citizens of different States.'"[94] Because the original owner of the debt, a citizen of Michigan, could not have satisfied the requirements for diversity jurisdiction, the Supreme Court held, in accordance with the Judiciary Act, that Sill, as assignee, could not prosecute the action in federal court.[95]

In upholding the jurisdictional restriction that Congress placed upon federal courts, the Court opined that

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89. *See id.*
90. U. S. CONST. art. III, § 1, cl. 1 (emphasis added).
91. 49 U.S. (8 How.) 441 (1850).
92. *Id.* at 448.
93. *Id.*
94. *Id.* (quoting U. S. CONST. art. III, § 2).
95. *See id.* at 450.

> 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 . . . .
>
> . . . .
>
> . . . The political truth is, that *the disposal of the judicial power (except in a few specified instances) belongs to Congress*; and Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant.
>
> . . ."[T]he same doctrine has been frequently asserted by this court . . . .[96]

Thus, *Sheldon* provides a helpful rule of law. Congress may constitutionally limit the jurisdiction of any federal court that was created by congressional statute because the statutory power that creates the court itself possesses the authority to create and define the court's jurisdiction. The emphasized portions of the Court's dicta above reiterate the concepts of *Durousseau v. United States*[97] and *Ex Parte McCardle*,[98] clearly evidencing the theory that, although the Supreme Court was created by Article III of the Constitution rather than by a congressional act, its jurisdiction is also subject to the formulation of Congress's discretion, when not expressly enumerated within the text of the Constitution.

There are numerous other examples of Congress's power to remove lower federal court jurisdiction. During the Great Depression, Congress passed the Norris-LaGuardia Act of 1932,[99] a pro-labor statute that greatly limited the jurisdiction of federal courts to enjoin labor protests.[100] In *Lauf v. E. G. Shinner & Co.*[101] the plaintiff sought to enjoin the picketing of its business by a labor union.[102] The Supreme Court reversed the decision of the district court that issued the injunction for want of jurisdiction.[103] The Court stated that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."[104] Therefore,

96. *Id.* at 449 (emphasis added).
97. 10 U.S. (6 Cranch) 307 (1810).
98. 74 U.S. (7 Wall.) 506 (1868).
99. Pub. L. No. 72-65, 47 Stat. 70 (1932).
100. CHEMERINSKY, *supra* note 13, at 189.
101. 303 U.S. 323 (1938).
102. *Id.* at 325.
103. *Id.* at 331.
104. *Id.* at 330.

Lauf exemplifies Congress's ability to specifically restrict otherwise available, jurisdictionally-based remedies of federal courts, such as the ability to issue injunctive relief, in cases involving particular legal issues.

During World War II, Congress passed the Emergency Price Control Act of 1942,[105] which was designed to allow the federal government to control and cap prices on food sales, other commodities, and rents.[106] The Act required any protests of the government-regulated prices to be filed with a Price Control Administrator, whose final determination could only be appealed to the Emergency Court of Appeals, which was created by the Act and consisted of three federal judges.[107] The Act also provided that only Emergency Court of Appeals and the Supreme Court "had authority to determine the [constitutional] validity of a [price] regulation or provide injunctive relief."[108] The Price Control Act thus denied entirely all jurisdiction of lower federal courts on the *issue* of price controls.

Cases involving the Price Control Act included *Lockerty v. Phillips*,[109] in which several meat wholesalers brought a cause of action in federal district court challenging the constitutionality of government price controls and seeking injunctive relief.[110] Affirming the district court's dismissal for want of jurisdiction, the Supreme Court held:

> There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court . . . . The Congressional power to ordain and establish inferior [federal] courts includes the power "of investing them with jurisdiction . . . and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."[111]

Yakus v. United States also adjudicated issues regarding the Price Control Act. In *Yakus* the defendants in a criminal prosecution that

105. Pub. L. No. 77-421, 56 Stat. 23.
106. Yakus v. United States, 321 U.S. 414, 419 (1944).
107. CHEMERINSKY, *supra* note 13, at 189.
108. *Id.*
109. 319 U.S. 182 (1943).
110. *Id.* at 184.
111. *Id.* at 187 (citations omitted).

was initiated in federal district court asserted as a defense to the charges against them that price regulations instituted by the administrator pursuant to the Price Control Act were unconstitutional.[112] *Yakus* is unique and extremely important to the argument in favor of congressional jurisdictional control for several reasons.

First, to reiterate, *Yakus* involved a criminal prosecution that was initiated in a United States district court, although the Price Control Act barred such courts from determining the constitutional validity of the regulations whose violation created the criminal offense.[113] Relying on *Lockerty*, the Supreme Court held that, by failing to utilize the statutorily mandated and specified administrative and judicial avenues (the Price Control administrator and the Emergency Court of Appeals) to challenge the constitutionality of the regulation, the defendant essentially "forfeited" the right to raise the issue before the Court.[114] Without further examination, this stance by the Court does not present a very unique holding. However, the second important point from *Yakus* lies in the Court's reasoning.

Yakus's argument was not allowed by the Supreme Court because *Lockerty* clearly mandated that the district court had no jurisdiction to hear such a challenge.[115] In affirming Congress's constitutional authority to relieve the federal courts of jurisdiction, the Court expanded this notion by disallowing a basic individual right to challenge the constitutionality of a federal regulation because the defendant did not use the appropriate remedial avenues identified by the statute.[116]

In 1973, the Supreme Court reiterated its consistent stance on the matter of congressional dictation of lower federal court jurisdiction in *Palmore v. United States*.[117] Quoting an 1845 Supreme Court case, the Court stated:

> "[T]he judicial power of the United States. . . 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

112. Yakus v. United States, 321 U.S. 414, 418-19 (1944).
113. *See* CHEMERINSKY, *supra* note 13, at 190.
114. *Yakus*, 321 U.S. at 444-46; CHEMERINSKY, *supra* note 13, at 190.
115. *Yakus*, 321 U.S. at 429-30.
116. *Id.*
117. 411 U.S. 389 (1973).

> (inferior to the Supreme Court) . . . 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."[118]

However, although this language shows the Court's continuing assertion of Congress's plenary power to assign and restrict the jurisdiction of lower federal courts, *Palmore* did not involve the removal of jurisdiction. Instead, it involved the congressional grant of jurisdiction to local District of Columbia courts.[119] In addition to the quote above, the importance of *Palmore* lies in the Court's discussion of due process considerations implicated by Congress's manipulation of federal and state court jurisdiction by statute.[120] As a result, *Palmore* will be revisited and discussed in detail in the due process section of this Comment.[121]

In 1999, the Supreme Court again indicated its deference to congressional limitations on lower federal court subject matter jurisdiction in *Reno v. American-Arab Anti-Discrimination Committee*.[122] In *Reno* the eight defendants were identified as members and fund raisers[123] of the Popular Front for the Liberation of Palestine, a group that the United States characterized "as an international terrorist and communist organization."[124] As a result, in 1987, the Immigration and Naturalization Service (INS) commenced deportation proceedings against six of the defendants as temporary residents for "routine status violations such as overstaying a visa and failure to maintain student status"[125] and against two of the defendants as permanent residents under the McCarran-Walter Act and, subsequently, the Immigration Act of 1990, which allowed permanent residents to be deported for "terrorist activity."[126]

In 1987, the defendants filed suit in the U.S. District Court for the Central District of California seeking injunctive relief from the initiation of deportation proceedings against them.[127] They alleged, *inter alia*, that the selective-enforcement of routine status requirements

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118. *Id.* at 401 (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)).
119. *See id.* at 407-08.
120. *See id.* at 409-10.
121. *See* discussion *infra* Part III.C.2.
122. 525 U.S. 471 (1999).
123. *Id.* at 475.
124. *Id.* at 473, 475.
125. *Id.*
126. *Id.* at 473-74, 474 n.2.
127. *Id.* at 473.

against them because they were members of a politically unpopular or disfavored terrorist organization violated their First and Fifth Amendment constitutional rights.[128] In various forms, the case "made four trips through the District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit" and arrived at the Supreme Court in 1999.[129] The district court had enjoined INS's deportation proceedings against all eight defendants, and the U.S. Attorney General had appealed the decision to the court of appeals.[130]

While the Attorney General's appeal was pending before the Ninth Circuit, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[131] Prior to the passage of the IIRIRA, judicial review of all *final* deportation orders was exclusively assigned to the courts of appeals by the "special statutory-review provision" of the Immigration and Nationality Act (INA).[132] The court of appeals had held that the district court could entertain the claim for proper factual development under either general federal question jurisdiction or the general jurisdiction provided by the INA.[133] The IIRIRA "repealed the old judicial-review scheme" regarding deportation proceedings and specified "significantly more restrictive" federal court subject matter jurisdiction parameters.[134] It established the general guideline "that the revised procedures for removing aliens, including the judicial-review procedures . . . [did] not apply to aliens who were already in either exclusion or deportation proceedings on IIRIRA's effective date."[135] However, § 306(c)(1) of the IIRIRA expressly mandated that the exclusive jurisdiction provision of the IIRIRA[136] applied "'without limitation to claims arising from all past, pending, or future . . . deportation . . . proceedings,'" regardless of their status on the effective date of the act.[137]

The exclusive jurisdiction provision of the IIRIRA states the following:

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128. *See Reno*, 525 U.S. at 472-73.
129. *Id.* at 474.
130. *Id.* at 475.
131. *Id.* at 473, 475.
132. *Id.* at 476.
133. *Id.* at 476-77.
134. *Reno*, 525 U.S. at 475.
135. *Id.* at 477 (referring to § 309(c)(1) of IIRIRA).
136. *See* 8 U.S.C. § 1252(g) (2000).
137. *Reno*, 525 U.S. at 477 (citation omitted).

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this [chapter].[138]

Applying this newly enacted statute, the Supreme Court held that neither it nor the federal courts below had jurisdiction any longer over a selective enforcement claim made by an alien challenging the constitutionality of the Attorney General's decision to *commence* deportation proceedings against him.[139] The Court explained that the executive branch, through its agents, the Attorney General, and the INS, had regularly engaged in the practice of "deferred action," which essentially consisted of the Attorney General's discretionary abandonment of deportation proceedings for humanitarian or convenience purposes.[140] Under the previous statutory judicial review scheme, federal courts had worked around the restriction that exclusively confined judicial review to final orders of deportation, finding that the restriction was "inapplicable to various decisions and actions leading up to or consequent upon final orders of deportation, and rel[ying] on other jurisdictional statutes to permit review."[141] Congress had reacted with the IIRIRA by specifically excluding particular discretionary decisions or actions of the executive branch during the process of deportation from judicial review, including decisions or actions to "*commence* proceedings."[142]

Upholding the jurisdictional constriction, the Court noted that "[s]ection 1252(g) was directed [by Congress] against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion"[143] and that Congress specifically made this jurisdiction restriction applicable to cases challenging the commencement of deportation proceedings which were pending as of the effective date of the Act.[144] The Court stated that "[i]t is entirely understandable . . . why Congress would want only the discretion-protecting provision of § 1252(g) applied even to pending cases: because that provision is

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138. § 1252(g).
139. *See Reno*, 525 U.S. at 487, 492.
140. *Id.* at 483-84.
141. *Id.* at 485.
142. *Id.* at 482.
143. *Id.* at 486 n.9.
144. *Id.* at 483, 485-87.

specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings."[145] As a result, the Court vacated the judgment of the Ninth Circuit that had affirmed the district court's injunction of deportation proceedings against the defendants, and the Court ordered the decision of the district court be vacated.[146] In doing so, the *Reno* Court again showed deference to express, congressional removal of federal subject matter jurisdiction that has defined Supreme Court jurisprudence on the subject for over 190 years.

The text of the Ordain and Establish Clause[147] is clear on its face and has been repeatedly interpreted by the Supreme Court as signifying Congress' discretionary, plenary power to restrict lower federal court jurisdiction. The power to restrict such jurisdiction includes the ability to retract previously authorized or allowed jurisdiction and includes the ability to remove previously existing jurisdiction of specific legal issues, rights, and claims, as well as individual rights guaranteed by the Constitution. In fact,

> not a single Supreme Court case can be cited casting . . . doubt on the validity of the hundreds of statutes premised on the notion that it is for Congress to decide which, if any, of the cases to which the federal judicial power extends should be litigated in the first instance in the lower federal courts.[148]

Applying the text of Article III with the abundant case law on the issue, there can be no doubt that an act of Congress proscribing lower federal court jurisdiction over the legal topic of abortion would be constitutional pursuant to the Judiciary Artile.

C. Other Constitutional Mandates and Considerations

Obviously, there are more constitutional considerations in removing federal court subject matter jurisdiction than those that lie solely in Article III. The issues addressed above are commonly referred to as internal restraints—those directly arising from the text of Article III.[149] External restraints upon Congress's power to retract federal jurisdiction may be inferred from other textual portions of the

145. *Reno*, 525 U.S. at 487.
146. *Id.* at 492.
147. U.S. CONST. art III, § 1.
148. Bator, *supra* note 37, at 1032.
149. Gunther, *supra* note 2, at 900.

Constitution.[150] In other words, "Congress' power to regulate the jurisdiction of the lower federal courts [and to except the appellate subject matter jurisdiction of the Supreme Court] cannot be exercised in a manner that violates some other Constitutional rule [outside of Article III]."[151]

1. The Supremacy Clause

The Supremacy Clause of the Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[152]

Some scholars have posited that an act removing all federal subject matter and appellate jurisdiction over a particular legal issue could result in frozen Supreme Court precedent that would continue to bind state courts through the Supremacy Clause, effectively rendering the act useless.[153] Any such argument is a fallacy for two reasons. First, the Constitution is the supreme law of the United States while constitutional law is only the interpretation of that law, binding temporally only until modified or altered through methods enumerated or properly inferred from the Constitution. Second, a law removing federal and Supreme Court jurisdiction over a particular legal area would simply relegate former binding, mandatory precedent to a new position of being only persuasive authority (albeit very persuasive

150. *Id.*

151. Bator, *supra* note 37, at 1034; *see also* Gunther, *supra* note 2, at 900 (asserting that the Due Process and Equal Protection Clauses can provide potential limitations to Congress's power under the Exceptions Clause).

152. U. S. CONST. art. VI, cl. 2.

153. *See, e.g.*, CHEMERINSKY, *supra* note 13, at 182 (summarizing arguments that former Supreme Court precedent on an issue would "remain the law" and that state court judges would still be bound to follow the precedent to "remain true to their oath of office"); *id.* at 186 (summarizing the argument that precluding federal review would effectively make state law "supreme" over federal law); Bator, *supra* note 37, at 1041 (describing possibility of law "frozen" "into the shape given it by the last Supreme Court precedents rendered before the enactment of the statute withdrawing jurisdiction").

through the historical and well-deserved prestige of the Supreme Court).

One does not need to look any further than Edwin Meese's 1987 address to a symposium at Tulane Law School, which encompassed the authoritativeness of Supreme Court decisions, for an inclusive tutorial on the first proposition. Meese, while serving as U.S. Attorney General, expounded:

> This is the necessary distinction between the Constitution and constitutional law. . . .
>
> . . . [The Constitution] creates the institutions of our government, it enumerates the powers those institutions may wield, and it cordons off certain areas into which government may not enter. . . .
>
> The Constitution is . . . the instrument by which the consent of the governed . . . is transformed into a government complete with the powers to act and a structure designed to make it act wisely or responsibly. . . . The Constitution . . . is . . . "the supreme Law of the Land."
>
> Constitutional law, on the other hand, is that body of law that has resulted from the Supreme Court's adjudications involving disputes over constitutional provisions or doctrines.[154]

To demonstrate this difference, consider how the enormous bulk of constitutional law in over 530 volumes of the *United States Reports* "stands in marked contrast to the few, slim paragraphs that have been added to the original Constitution as amendments."[155]

> The Supreme Court would face quite a dilemma if its own constitutional decisions really were the supreme law of the land, binding on all persons and governmental entities, including the Court itself, for then the Court would not be able to change its mind. It could not overrule itself in a constitutional case.

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154. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981-82 (1987); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (observing that the Constitution is the supreme law of the land first, followed by the laws of the United States made in accordance therewith).

155. Meese, *supra* note 154, at 982.

> Yet we know that the Court has done so on numerous occasions.[156]

Meese very effectively went on to discuss the issue of supremacy, using the Lincoln and Douglas debates that revolved around the *Dred Scott v. Sanford*[157] decision as an example of the theoretical difference between the Constitution and constitutional law.[158] Lincoln essentially espoused the same view that Meese asserted in 1987, a concept that is as applicable today as it was in 1861. Meese explained:

> [I]f the policy of government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties, in personal actions, the people will. . . cease[] to be their own rulers, having to that extent, practically resigned their government into the hands of that imminent tribunal.
>
> . . . [They will have] submit[ted] to government by the judiciary. But such a state could never be consistent with the principles of our Constitution.[159]

The first proposition—that the Constitution, not constitutional law, is the supreme law of the United States and thus enjoys the unilateral protection of the Supremacy Clause—renders the second proposition—that jurisdiction removal would convert former mandatory national authority to persuasive authority for future cases covering the legal topic involved—a common-sense formality. Prior Supreme Court and lower federal court opinions on the particular legal topic would not disappear from the official legal reporters. Simply stated, after jurisdiction over a particular topic was restricted or ameliorated, "disfavored rulings [of the Supreme Court] would remain on the books as influential precedents. State courts . . . in many instances would follow those prior rulings. Other courts no doubt would . . . follow their own constitutional interpretations [because]. . . the threat of [federal] appellate review and reversal were removed."[160]

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156. *Id.* at 983.

157. 60 U.S. (19 How.) 397 (1856).

158. *Id.* at 988-89.

159. *See* Meese, *supra* note 154, at 989 (asserting the proposition by paraphrasing portions of President Lincoln's first Inaugural Address).

160. Gunther, *supra* note 2, at 910-11.

No matter what the Supreme Court's temporal and historically fluctuating *interpretation* of constitutional provisions may be, the Constitution, not Supreme Court jurisprudence, is the law of this land.[161] All three branches of the government are responsible for continuously interpreting the Constitution.[162] As a result, the Supremacy Clause does not provide a legitimate obstacle to a properly drafted congressional statute relieving the Supreme Court and the lower federal courts of all subject matter jurisdiction over abortion. It would merely relegate former mandatory Supreme Court authority to persuasive authority.

2. *The Due Process Clause*

The Due Process Clause of the Fifth Amendment states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[163] The Fourteenth Amendment asserts that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[164] The legal topic of abortion encompasses theories of constitutional liberty.[165] The Fifth Amendment expressly protects such constitutional liberty from deprivation by the federal government without due process of law.[166] However, an abortion jurisdiction removal statute passed by Congress would not be hindered by the Due Process Clause of the Fifth Amendment for two reasons. First, the Constitution provides no guarantee that due process of law regarding the deprivation of constitutional liberty must consist of federal court adjudication or must involve potential appellate review by the Supreme Court. Second, state court systems, held accountable by the

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161. *See* Meese, *supra* note 154, at 983.

162. *Id.* at 985-86.

163. U. S. CONST. amend. V.

164. U. S. CONST. amend. XIV, § 1.

165. For example, in *Roe v. Wade*, the Supreme Court noted that it had recognized that [an inferred] right of personal privacy . . . does exist under the Constitution. . . . [O]nly personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," . . . are included in this guarantee of personal privacy. . . . [T]he right has some extension to activities relating to . . . procreation . . . .

> This right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

410 U.S. 113, 152-53 (1973). The Court held that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn. *Id.* at 158.

166. *See* U.S. CONST. amend. V.

Due Process Clause of the Fourteenth Amendment, are constitutionally empowered, as institutions with concurrent jurisdiction, to vindicate, protect, and adjudicate individual constitutional rights, constituting due process of law, without federal court participation.

As stated in the previous section, a congressional statute removing all jurisdiction from federal courts over the legal topic of abortion would, in effect, relegate the topic to state courts for all future legal determination. This fact raises two prongs that require discussion. First, the statute itself could not constitute a deprivation of liberty without due process of law. Second, the actual effects of the statute could not give rise to the deprivation of constitutional liberties without due process of law.

The first proposition is instantly dismissed because a congressional statute that relieved federal courts of *jurisdiction* over abortion, passed in accordance with Congress' constitutionally mandated legislative powers[167] and in clear compliance with the Judiciary Article's internal restraints,[168] would not constitute a deprivation of a constitutional liberty. The liberty right involved in such an argument is most succinctly described as a right to a federal legal forum for the vindication of individual constitutional rights. No such constitutional liberty right exists.

Alexander Hamilton correctly stated that "[l]aws are a dead letter, without courts to expound and define their true meaning."[169] The United States has historically relied upon and presently relies upon a concurrent system of federal and state courts to accomplish this process. "It is widely agreed that due process does assure access to some judicial forum in many circumstances. . . . [H]owever, due process . . . [does] not . . . require access to a *federal* judicial forum."[170]

Due process also provides a "barrier to wholly arbitrary legislation."[171] As a result, a congressional jurisdiction removal statute dependent upon arbitrary criteria like, for example, "a litigant's height, weight, or hair color" would not survive constitutional scrutiny.[172] Conversely, a legitimate exercise of express constitutional authority, such as the alignment of jurisdiction among federal and state courts, could never be viably attacked as arbitrary. Additionally, assuming

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167. *See* U.S. CONST. art. I, § 1.

168. *See* U.S. CONST. art. III, § 1, cl. 1 (Ordain and Establish Clause); U. S. CONST. art. III, § 2, cl. 2 (Exceptions Clause).

169. THE FEDERALIST NO. 22 (Alexander Hamilton).

170. Gunther, *supra* note 2, at 915.

171. *Id.* at 916.

172. *Id.*

against all history and existing case law that a constitutional liberty assuring access to federal courts did exist, there still could be no more complete and unassailable due process than Congress's exercise of its vested legislative powers checked by the President's executive power to sign a statute restricting such access into law.

The second proposition, that the *effects* of a congressional statute stripping abortion jurisdiction could not violate due process, provides a more worthy, but ineffective, challenge. If Congress relieved the federal courts of jurisdiction over abortion, numerous state legislatures would undoubtedly pass state statutes regulating abortion, including criminalizing the acts of performing or procuring an abortion. Such statutes would have previously violated the Supremacy Clause as a result of Supreme Court precedent and Congress's silence on the issue. These new statutes would surely raise constitutional challenges that would be adjudicated in, and confined to, state court systems without further federal review. Thus the highest court of a given state would be the final determinant of the constitutionality of its state's statutes regulating abortion. This predictable state of affairs would also not violate constitutional due process because state courts and state appellate review systems constitute due process of law under both the Fifth and Fourteenth Amendments.

Since the outset of the United States as a sovereign nation, state courts have served as acceptable and adequate forums for the determination of cases involving the Constitution and laws of the United States. During the debates surrounding the Constitution, Alexander Hamilton spoke prophetically on this subject:

> [S]tate courts will be divested of no part of their primitive [common law, pre-constitutional] jurisdiction . . . and . . . in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. . . . When . . . we consider the state governments and the national government, as they truly are . . . as parts of ONE WHOLE, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.[173]

173. THE FEDERALIST NO. 82 (Alexander Hamilton).

Further, the Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[174]

The due process considerations involved in relieving the Supreme Court and lower federal courts of jurisdiction over abortion is a puzzle simplified by an ordered breakdown that applies the provisions of the Constitution discussed above. First, the Constitution assigns legislative mandates to Congress in Article I. Second, the Constitution assigns executive mandates to the President in Article II. Third, the Constitution assigns and defines federal judicial mandates and requirements in Article III. Fourth, the Fifth Amendment modifies all previous constitutional text and requires that any federal legislative, executive, or judicial action that deprives a constitutional liberty may do so only through due process of law. Sixth, the Tenth Amendment also modifies previous constitutional text and solidifies the historically recognized concept of concurrent federal and state court systems by asserting that all powers, which are not exclusively and expressly assigned to the federal judiciary and not prohibited by the Constitution (i.e., the power to hear and decide legal claims arising under the Constitution and laws of the United States), can be exercised by the states. Seventh, the Fourteenth Amendment ensures the same protection of individual rights against state government infringement that the Fifth Amendment ensures against federal infringement. Eighth, Congress has passed judiciary acts and other statutes containing affirmative grants of federal subject matter jurisdiction to the Supreme Court and lower federal courts. Finally, Congress passes an act that specifically constricts previously exercised federal jurisdiction in compliance with Articles I and III, which does not violate the Fifth Amendment—as a result of the Tenth Amendment's mandate and the protection of the Fourteenth Amendment. Then, that act is signed into law by the President in compliance with Article II.

Many of the issues discussed in this Section were definitively elaborated by the Supreme Court in *Palmore v. United States*.[175] In *Palmore* the defendant was convicted of a felony in the Superior Court of the District of Columbia for "carrying an unregistered pistol in the District of Columbia after having been [previously] convicted of a felony."[176] Palmore's conviction was upheld by the District of

174. U. S. CONST. amend. X.
175. 411 U.S. 389 (1973).
176. *Id.* at 391.

Columbia Court of Appeals and he then appealed his conviction to the Supreme Court.[177]

Congress passed the statute under which Palmore was convicted in accordance with its plenary power to "exercise all the police and regulatory powers [within the District of Columbia] which a state legislature or municipal government would have in legislating for state or local purposes."[178] Through its previous exercise of this power, Congress established the Superior Court of the District of Columbia "with jurisdiction equivalent to that exercised by state courts"[179] and composed its bench of judges "appointed by the President and serv[ing] for terms of 15 years."[180] Additionally, Congress established that the District of Columbia Court of Appeals was "the 'highest court of the District of Columbia' for purposes of . . . [appellate] review by [the Supreme Court]" and established that the decisions of the District's court of appeals were "not . . . subject to review by the United States Court of Appeals."[181]

Palmore argued that his conviction was not valid because it rested on a statute passed by Congress which constituted a law of the United States and invoked the judicial power of Article III. Therefore, he asserted that he was improperly tried before a non-Article III judge.[182] Palmore asserted that the Constitution vested the United States judicial power "in courts with judges holding office during good behavior and whose salar[ies] cannot be diminished."[183] He essentially argued that "an [Article] III judge must preside over every proceeding in which a charge, claim, or defense is based on an Act of Congress or a law made under its authority."[184]

Upholding the conviction, the Supreme Court first discussed Congress's Article III plenary power, "except in enumerated instances," to distribute and organize the judicial power of the United States.[185] The Court stated,

> Congress plainly understood this [power], for until 1875 Congress refrained from providing the lower federal courts with general federal-question jurisdiction. Until that time, the state courts provided

177. *Id.* at 389.
178. *Id.* at 397 (referring to U. S. CONST. art. I § 8, cl. 17).
179. *Id.* at 392 n.2.
180. *Id.* at 392-93.
181. *Palmore*, 411 U.S. at 392 n.2.
182. *Id.* at 393-94.
183. *Id.* at 400.
184. *Id.*
185. *Id.* at 401.

> the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part *retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts.*
> It was neither the legislative nor judicial view, therefore, that trial and decision of all federal questions were reserved for Art[icle] III judges.[186]

This statement speaks directly to the first prong discussed in the beginning of this section.[187] Applying the reasoning of the *Palmore* Court to the concept of an abortion jurisdiction removal statute elicits the following conclusion: a congressional statute that restricts federal jurisdiction encompassing "[c]ases . . . arising under . . . [the] Constitution . . . [and] the Laws of the United States"[188] or federal question cases, does not, on its face, violate due process because it is within the discretion authorized Congress by the Constitution. The Court noted their conclusion by stating,

> It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question . . . to be tried in an Art[icle] III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions . . . may at times be tried; and that the requirements of Art[icle] III . . . must in proper circumstances give way to accomodate plenary grants of power to Congress to legislate . . . .[189]

The Court in *Palmore* also touched upon the characteristics of the second prong previously identified in this section.[190] Although the context of *Palmore* involves the affirmative assignment of jurisdiction to local District of Columbia courts that Congress established and not the removal of previously allowable jurisdiction, the Court's reasoning

186. *Id.* at 401-02 (emphasis added).
187. *See supra* notes 167-72 and accompanying text.
188. U. S. CONST. art. III, § 2, cl. 1.
189. *Palmore*, 389 U.S. at 407-08.
190. *See supra* notes 172-74 and accompanying text.

on the topic of due process is not distinguishable and is equally pertinent to jurisdiction removal. The Court concluded that

> Palmore was no more disadvantaged and no more entitled to an Art[icle] III judge than any other citizen of any of the 50 States who is tried for a strictly local crime. Nor did his trial by a nontenured judge deprive him of due process of law under the Fifth Amendment any more than the trial of citizens of the various States for local crimes by judges without protection as to tenure deprives them of due process of law under the Fourteenth Amendment.[191]

As noted previously, if Congress passes an act eradicating all federal court jurisdiction over abortion cases, at least some state legislatures would likely pass statutes criminalizing abortion. The *Palmore* Court precisely summarized the concepts of concurrent jurisdiction that would preclude the *effects* of a congressional abortion jurisdiction removal act from violating due process.

The Constitution, as evidenced by "the Madisonian Compromise that Congress is not obligated to establish inferior federal courts," has never questioned "that state courts . . . [are] an adequate forum for the protection of constitutional rights."[192]

> [D]ue process does in some cases mean judicial process. Consequently, Congress is *not* free to control the jurisdiction of the *state* courts so as to foreclose the vindication of the constitutional right to [all] judicial review. But the Constitution is indifferent whether that access is to a federal or a state court.[193]

The Constitution provides no guarantee of a federal judicial forum for constitutional claims. State court systems, held accountable by the Fourteenth Amendment, provide due process of law to adjudicate constitutional claims. As a result, if Congress exercised its plenary powers to except Supreme Court and lower federal court jurisdiction over abortion, the statute, on its face, would not violate the Due

191. *Palmore*, 389 U.S. at 410.

192. *See* Anderson, *supra* note 1, at 429; *see also* Gunther, *supra* note 2, at 915-16 (summarizing academic commentary and concluding that state courts satisfy due process for the adjudication of constitutional rights).

193. Bator, *supra* note 37, at 1033-34 (footnote omitted).

Process Clause of the Fifth Amendment. The statute's predictable effects, the adjudication of abortion-centered constitutional claims in state courts without federal appellate review, would also not violate the Due Process Clause of the Fifth Amendment.

3. *The Equal Protection Clause*

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[194] Because the Fifth Amendment is interpreted "to include an equal protection guarantee,"[195] any congressional jurisdiction removal statute that barred access to federal courts and the Supreme Court's appellate review based on race or ethnicity would not survive constitutional scrutiny.[196] However, a jurisdiction removal statute covering a specific *legal* topic would cut evenly, affecting no identifiable class of individuals differently, because the statute would address the assignment of *subject matter jurisdiction* rather than individual legal rights.

> Neither the equal protection clause nor any other clause of the Constitution requires *equal jurisdictional treatment* for different *subject-matters* of litigation. If it is asserted that this "discriminates" against a certain category of federal right, the answer must be that such discriminations—that is, the power to pick and choose among different categories and subject matters of federal cases—is precisely the power that article III sought to grant. Ultimately the assertion must rest on the notion that there is a constitutional right as such to litigate certain categories of cases in the lower federal courts [with Supreme Court appellate review]—a notion which seems . . . to be plainly erroneous.[197]

It is wholly possible to envision an equal protection argument that asserts that abortion jurisdiction removal prejudices women as a collective class. However, because

194. U. S. CONST. amend. XIV, § 1.
195. Gunther, *supra* note 2, at 916.
196. *See id.*
197. Bator, *supra* note 37, at 1036 (emphasis added).

> [A]rticle III . . . gave Congress the power [and discretion] to decide how to channel federal issues as between federal and state courts, assigning some classes of cases to the state courts does not "discriminate against," or "burden," or "prejudice" the [individual] rights involved in those cases. On their face at least, properly drafted jurisdiction-channelling bills do not distinguish between litigants or on the basis of particular outcomes but rather on the *basis of the types of issues raised.*[198]

Furthermore, the predictable *effects* of a statute stripping abortion jurisdiction would not violate equal protection for the same reasons that the statute would not be unconstitutional on its face and for the same reasons expounded in the due process section of this Comment[199]—the assignment of jurisdiction among state and federal courts is within the express and plenary constitutional powers of Congress under Article III. Therefore, the inferred equal protection guarantee of the Fifth Amendment would not provide a viable barrier to a congressional statute relieving the Supreme Court and lower federal courts of jurisdiction over the legal topic of abortion.

IV. PRACTICAL APPLICATION OF JURISDICTION REMOVAL TO ABORTION

To apply the preceding constitutional discussion in real life, congressional legislators should attack the issue of abortion jurisdiction removal with three necessary goals in mind. First, the statute must be introduced as a bill in both houses of Congress and must pass both houses of Congress. Second, the bill, as passed by Congress, must be signed into law by the President. Third, the statute must be constitutionally sound to ensure that it is judicially upheld upon predictable challenge.

In light of the information provided in Part III of this Comment, it is realistic to borrow the words of Professor Bator and assert that

> a correctly drafted [congressional] statute that does nothing more than provide that a given *category* of case or controversy [such as abortion] arising under the Federal Constitution [through the Bill of Rights]

198. Gunther, *supra* note 2, at 918 (emphasis added).

199. *See supra* Part III. C. 2.

> or laws shall revert to the exclusive original jurisdiction of the state courts is valid, so long as it does not create discriminations which the Constitution independently prohibits and is not wholly irrational and arbitrary.[200]

The details of legislative drafting, debate, and voting tactics are best left to the experts—congressmen and their staffs; therefore, they are not within the scope of this Comment. However, there are two aspects of congressional legislation that would relieve the Supreme Court and lower federal courts of abortion jurisdiction that require brief highlighting and elaboration.

First, an abortion jurisdiction removal statute will require *simple majority* passage (fifty percent plus one) of both houses of Congress and the President's signature in order to become a law.[201] "The Constitution's procedures for adopting laws [in Article I] assume that a majority vote in each house . . . [is] sufficient to enact a law, and the Constitution expressly outlines those situations where supermajority votes are required."[202] While this may seem obvious to the casual observer, the potential bill's treatment in the Senate requires special consideration because "a bill must pass both the House and Senate in identical form and be signed by the President during a single two-year Congress to become a law."[203]

Because the Senate allows "unlimited debate on any measure," Senate Rule XXII enables a single senator to block a Senate vote on any bill by requiring a supermajority vote of sixty senators to invoke cloture ("an end of debate") and allow a Senate vote on the bill.[204] "[A] cloture petition may be made at any time if signed by sixteen senators."[205] For cloture to be invoked, the petition must be carried by a three-fifths vote of the entire Senate, or sixty votes.[206] The modern "stealth filibuster," made possible by "two-track" Senate floor management, does not require a senator to hold the floor to filibuster and "permits the Senate to consider anything but [the] objectionable legislation."[207] As a result, "[a] credible threat that forty-one senators will refuse to vote for cloture on a bill is enough to keep that bill off

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200. Bator, *supra* note 37, at 1037 (emphasis added).

201. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 239 (1997).

202. *Id.* at 224.

203. *Id.* at 184.

204. *Id.*

205. *Id.* at 198.

206. *Id.* at 198 n. 91.

207. Fisk & Chemerinsky, *supra* note 201, at 203.

the floor . . . until it has the sixty votes necessary for cloture."[208] Boldly assuming that an abortion jurisdiction removal bill would pass the House of Representatives, there are three possible avenues by which to overcome the predictable filibuster that would follow the introduction and committee survival of such a bill in the Senate.

First, senators sponsoring or supporting such legislation should ensure the reliability of sixty votes necessary to invoke cloture. After accomplishing this monumental task, the senators should have previously prepared cloture petitions, immediately invoke cloture, and proceed to vote on the matter.[209] Second, if the assurance of sixty votes proves impossible or very unlikely, the Senate majority leadership could ignore any hold request on the legislation, force filibustering senators to actively hold the Senate floor, and require around-the-clock sessions until the issue was resolved.[210] Third, an abortion jurisdiction removal bill could be drafted originally as, or incorporated into, a budget or reconciliation bill, upon which filibustering is not allowed.[211] To be considered a reconciliation bill, the potential jurisdiction removal statute would have to be "germane" to the federal budget, which, although unlikely, is by no means unimaginable.[212]

In summary, the first practical application aspect of federal abortion jurisdiction removal legislation is that a great deal of planning, work, strategy, professional diplomacy, and teamwork will be required of the bill's sponsors. In addition to preparing realistic Senate filibuster defenses, congressional legislators that introduce such legislation must lay the necessary groundwork in order to ensure committee support and floor scheduling, a majority of votes in both the House and the Senate, and presidential support of the Act.

The second key aspect of abortion jurisdiction removal legislation lays in the wording of the statute. "Jurisdictional statutes are . . . construed [by the Supreme Court] 'with precision and with fidelity to the terms by which Congress has expressed its wishes.'"[213] As a result, an abortion jurisdiction removal statute must use clear, plain, and express terms excepting otherwise permissible federal jurisdiction over the legal issue of abortion.[214] Because of the history and political landscape surrounding abortion, the language of the statute should

208. *Id.*

209. *See id.* at 205.

210. *See id.* at 204-06.

211. *See id.* at 215.

212. *Id.* at 216.

213. Palmore v. United States, 411 U.S. 389, 396 (1973) (quoting Cheng Fan Kwok v. INS, 392 U.S. 206, 212 (1968)).

214. *See* Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 513-14 (1868); Durousseau v. United States, 10 U.S. (6 Cranch) 307, 316 (1810).

give rise to no other inferences and should be designed to avoid any possible narrow construction or application by the Supreme Court. The statute also must be worded in a manner that offends neither Articles I and III, nor the Supremacy, Due Process, and Equal Protection Clauses of the Constitution. The statute's drafters may also wish to word the statute in a manner that precludes the Supreme Court from exercising original jurisdiction over a petition for a writ of habeas corpus that encompasses abortion-related subject matter.[215]

Additionally, the statute must specifically except Supreme Court federal question appellate jurisdiction over decisions issued by the states' highest courts in cases involving abortion. The state court certiorari provision of the United States Code states that

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the . . . validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any . . . right, privilege, or immunity is specially set up or claimed under the Constitution.[216]

Abortion cases implicate this general federal question appellate jurisdiction because they hinge on constitutional claims pertaining to individual rights.[217] As a result, in order to confine the legal issue of abortion to state adjudication, the jurisdiction removal statute must specifically except the affirmative grant of appellate jurisdiction contained in 28 U.S.C. § 1257.

While the concept of jurisdiction removal itself is bold, an attempt at federal abortion jurisdiction removal without proper preparation would be ill-advised and potentially embarrassing. In order to secure the goals of majority passage in both houses of Congress, the signing of the statute into law by the President, and the statute's judicial validation, members of Congress should apply the practical information listed above. To do otherwise would risk potential failure

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215. *See generally* Moss, *supra* note 66, at 255-58 (discussing the Supreme Court's narrow interpretation of a congressional jurisdiction removal statute in *Felker v. Turpin*, 518 U.S. 651 (1996), as not repealing the Court's "'authority to entertain original habeas petitions' because [the statute] did not do so explicitly").

216. 28 U.S.C. § 1257(c) (2000).

217. *See supra* note 165.

in attempts to accomplish all of these necessary goals and the resulting failure of the legislation as a whole.

It is crucial to note that, in 1803, the Supreme Court and Chief Justice John Marshall established the enduring concept of judicial review with the decision of *Marbury v. Madison*.[218] In short, judicial review is the absolute surety in the American polity that legal determination of the constitutionality of an existing law of the United States lies, when exercised, within the "province and duty" of the judicial branch.[219] The Supreme Court thus may make a temporally binding determination as to whether a particular law is constitutional.[220]

As a result, this entire discussion of jurisdiction removal assumes that any statute restricting federal and Supreme Court jurisdiction over abortion would be quickly challenged on the basis of its constitutionality in a justiciable case by a party with standing to prosecute the action in a federal court. It assumes that the case would make its way through the federal court system and could be finally heard in the Supreme Court in a decision regarding its constitutionality. However, despite the understandable, knee-jerk assumption that the Supreme Court would grant certiorari to hear such a constitutional challenge as a result of the extensive history of Supreme Court jurisprudence on the topic of abortion and the great public attention that such a jurisdiction removal statute would garner, there are at least two reasons why the Supreme Court would not *rule* on such a case. Both are rooted in the definition of the legal issue.

The issue that an abortion jurisdiction removal statute would present to any federal court is one of congressional control of federal subject matter jurisdiction rather than an issue of abortion rights or legality. This clarification places the issue squarely within the express, textual provisions of the Constitution—provisions that are clear on their face and have been open to no other *interpretation*.[221] As a result, there are at least two ways by which the Supreme Court could refuse to hear such a case. First, a federal district court or court of appeals could uphold the constitutionality of an abortion jurisdiction removal statute, dismiss the case for want of jurisdiction, and the Supreme Court could deny the subsequent request for certiorari. Second, the Supreme Court could abstain from hearing such a case, classifying it

218. 5 U.S. (1 Cranch) 137 (1803).
219. *Id.* at 177-78.
220. *Id.*
221. *See supra* Parts III.A., III.B.

as a political question,[222] and, thereby, effectively endorsing the statute as a valid exercise of constitutionally enumerated congressional power.

Additionally, in light of the abundant proof that an act of Congress removing all subject matter jurisdiction over the topic of abortion from federal courts would be wholly constitutional, there is another paramount reason why the Supreme Court, *if* it heard the merits of a constitutional challenge to the statute, would uphold its constitutionality. The Supreme Court would undoubtedly uphold such a statute because any Justice joining a majority opinion deeming an abortion removal statute unconstitutional could likely and justifiably be subject to impeachment.[223] Remembering that the legal issue would be whether the exercise of express, enumerated and discretionary, congressional prerogative was constitutional, any decision striking down such a properly drafted statute would amount to usurpation.[224] "[T]he Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and . . . have broadly acquiesced in sanctioning the challenged Act of Congress."[225] Contrarily, legislators will stand on very firm ground, the firmest ground known to the law and the citizens of the United States—the Constitution—if and when they remove abortion jurisdiction from federal courts and such removal is constitutionally challenged in federal court.

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222. *See* BLACK'S LAW DICTIONARY 1179 (7th ed. 1999) (defining a political question as "[a] question that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of government").

223. *See* U.S. CONST. art. III, § 1 ("The [federal] Judges . . . shall hold their Offices during good Behavior."); U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present."). Note that this two thirds vote requirement is identical to the amount of votes necessary to invoke cloture and vote on a filibustered federal abortion jurisdiction removal statute. *See also* U.S. CONST. art. I, § 3, cl. 6 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.").

224. *See* BLACK'S LAW DICTIONARY 1543 (7th ed. 1999) (defining usurpation as "[t]he unlawful seizure and assumption of another's position, office, or authority"); *see also* Robert H. Bork, *American Conservatism: The Soul of the Law*, WALL ST. J., Jan. 20, 2003, at A14 (arguing that the separation of powers must be restored from usurpation by the state and federal courts continuing trend away from the text of the Constitution).

225. *See* Wechsler, *supra* note 65, at 559.

V. CONCLUSION

The express powers delegated in the Ordain and Establish and Exceptions Clauses of the Constitution grant Congress plenary, discretionary power to statutorily remove abortion subject matter jurisdiction from all federal courts and the Supreme Court. Supreme Court jurisprudence on the topic of congressional jurisdiction removal has consistently supported this conclusion. The Supremacy, Due Process, and Equal Protection Clauses of the Constitution provide no legal barriers to Congress's exercise of this plenary power. In fact, the plenary power of Congress to define and restrict federal court jurisdiction and to make exceptions to Supreme Court appellate subject matter jurisdiction makes the concept of judicial review, amplified by stare decisis, tolerable in a democratic republic.[226] While the exercise of this jurisdiction removal power could be politically complicated, congressional sponsors and supporters of such legislation can accomplish its successful implementation through careful legislative and political planning and meticulous drafting. The legal credibility of such an effort lies firmly planted in the strongest legal authority—the express provisions of Articles I and III of the Constitution.

> Blessed is the man who finds wisdom, the man who gains understanding, for she is more profitable than silver and yields better returns than gold . . . . Long life is in her right hand; in her left hand are riches and honor. Her ways are pleasant ways, and all her paths are peace. She is a tree of life to those who embrace her; those who lay hold of her will be blessed[227]

In 1984, while addressing the subject of congressional jurisdiction removal, Professor Gunther cautioned that one must appreciate the distinction "between constitutionality and *wisdom*" and that what the

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226. *See* Bator, *supra* note 37, at 1032 (stating the argument that the author of this Comment accepts); CHEMERINSKY, *supra* note 13, at 181, 183 (summarizing scholarly arguments "that such congressional power is an essential democratic check on the power of an unelected judiciary"); Gunther, *supra* note 2, at 911 (stating that "the existence of congressional power over federal jurisdiction . . . is 'the rock on which rests the legitimacy of the judicial work in a democracy'") (citation omitted); Pfander, *supra* note 87, at 1437-38 (describing the argument as that of "a majoritarian check on what [Congress] sees as an unwarranted line of Supreme Court decisional law").

227. *Proverbs* 3:13-18 (New Int'l Version).

"Constitution authorizes" should not "be confused with what sound constitutional statesmanship admonishes."[228] However, the circumstances surrounding federal abortion jurisprudence may have proceeded to a point at which otherwise appropriate conservatism in refraining from exercising congressional power over federal jurisdiction has begun to tend against greater wisdom and "sound constitutional statesmanship." Throughout the illustrious history of our nation, wisdom and constitutional statesmanship have never been, and they are not now, achieved through conditioned, inside-the-box thinking. At this point in our history, true wisdom, necessity, and realism may favor the drastic measure of total removal of abortion jurisdiction from the federal courts and the Supreme Court.

Justice Scalia, in his *Stenberg v. Carhart*[229] dissent, while clearly not recommending jurisdiction removal and only referring specifically to partial-birth abortions, most eloquently expressed the sentiment that this Comment applies to the legal topic of abortion:

> I cannot understand why those who *acknowledge* that, in the opening words of Justice O'Connor's concurrence, "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society" . . . persist in the belief that [the Supreme Court], armed with neither constitutional text nor accepted tradition, can resolve that contention and controversy rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed.[230]

This sentiment was voiced before the birth of the Constitution by James Madison who stated, "[T]he powers reserved to the several states will extend to all objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state."[231]

Considering the preceding discussion of the Supremacy Clause and the differences between the Constitution and constitutional law,[232]

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228. Gunther, *supra* note 2, at 898 (emphasis added).
229. 530 U.S. 914 (2000).
230. *Id.* at 956 (alteration in original) (citations omitted).
231. THE FEDERALIST NO. 45 (James Madison).
232. *See supra* Part III.C.1.

and the concepts of separation of powers and federalism,[233] consider the following quotation from Justice Breyer, which discusses the divergent views on the topic of abortion: "Taking account of these virtually irreconcilable points of view [on abortion] . . . *constitutional law* must govern a society whose different members sincerely hold directly opposing views . . . ."[234] Is this a correct assertion? Have we collectively descended to a level at which truly divisive issues are incapable of constitutional political resolution through representative self-government that moves with the will of the majority while not at the expense of the minority's individual rights? As evidenced by the constitutional provisions discussed in this Comment, the answer to these questions sounds unequivocally in the negative. Thus, the next questions that must be answered are: "Should Congress, as the voice of the electorate, relieve the federal courts of jurisdiction over abortion?" and "Why?"

Whether Congress should remove all abortion jurisdiction from federal courts and why it should do so are questions that must be answered by congressional legislators and their constituents. The fact-finding and investigational capabilities of Congress dwarf those of the lower federal courts, the Supreme Court, any existing lobby or organization, and, frankly, those of this author. However, two conclusions *are* abundantly clear. First, abortion is not foreclosed as a legal or political topic merely because the Supreme Court has repeatedly upheld and expanded its legal practice. Second, Congress may, at its collective discretion, remove all abortion subject matter jurisdiction from all federal courts and the Supreme Court, in accordance with the plenary powers delegated to Congress by the United States Constitution—*the* supreme law of this land.

233. *See supra* Part II.

234. *Stenberg*, 530 U.S. at 920-21 (emphasis added).