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The Case for Jurisdiction-Stripping Legislation

Restoring Popular Control of the Constitution

Executive Summary

- The American people must have a remedy when they believe that federal courts have overreached and interpreted the Constitution in ways that are fundamentally at odds with the people's common constitutional understandings and expectations.
- The Constitution provides the people just such a remedy. They can convince their representatives in Congress to enact legislation that eliminates federal court jurisdiction over specific issues.
- There is nothing new about Congress limiting federal court jurisdiction. It has been defining the jurisdiction of the federal courts, including the Supreme Court, literally since 1789.
- By stripping federal courts of jurisdiction over specific issues, Congress protects the people against a nationwide judicial decision that is adverse to their interests, while the Constitution still ensures that state courts can decide constitutional questions for their own states' citizens.
- A good example that demonstrates the need for jurisdiction-stripping legislation is the decision of the U.S. Court of Appeals for the Ninth Circuit to prohibit schoolchildren from voluntarily reciting the Pledge of Allegiance because it includes the words, "under God."
- Only 6 or 7 percent of Americans support taking "under God" out of the Pledge of Allegiance, yet the Supreme Court was unable to muster a majority to support the people's traditional understanding of their Constitution. It reversed the Ninth Circuit's decision on technical legal grounds — lack of standing — but did not reaffirm the Pledge of Allegiance.
- It is erroneous to suggest that the people's only recourse is to meekly stand by while the courts remake the Constitution contrary to nearly unanimous popular will.
- Congress should enact legislation that protects the voluntary recital of the Pledge of Allegiance in our public schools from federal court challenges.
- Enacting this jurisdiction-stripping legislation will not only protect parents' rights to have their children voluntarily recite the Pledge of Allegiance as it is today, but it will send a long-needed signal to the judicial branch that the people will not tolerate the undermining of their Constitution.

Introduction

Since the heyday of the Warren Court in the 1950s and 1960s, the federal courts have taken an increasingly prominent role in American political life. Americans may disagree about the particulars of each decision, but there can be little dispute that the courts have been expanding their role and increasing their influence over the scope of the peoples' rights and liberties. The question is what the people can do when they believe the courts have plainly overreached — when unelected judges reinterpret the Constitution in ways that are fundamentally at odds with the American people's common constitutional understanding and expectations.

As legal scholars and leading legal treatises recognize, the Constitution provides remedies to the people when federal judges make unpopular constitutional rules that have little basis in the Constitution or our nation's history.[1] Congress can eliminate federal court jurisdiction over specific issues. The Constitution expressly provides this power, including the authority to strip the Supreme Court's jurisdiction over an issue. The practical effect of such jurisdiction-stripping legislation would be to allow disputes to be handled by state courts, where judges do not serve for life and tend to be closer to the people. But by enacting this legislation, the risk of a national decision adverse to the interests of the people can be eliminated.

A recent example that demonstrates the need for jurisdiction-stripping legislation is the decision by the U.S. Court of Appeals for the Ninth Circuit to prohibit schoolchildren from voluntarily reciting the Pledge of Allegiance because it includes the words, "under God." Polls show that only 6 or 7 percent of Americans support removing "under God" from the Pledge, and both Houses of Congress have nearly unanimously condemned any attempt by the courts to rewrite it.[2] It is historically and legally wrong to suggest that the people's only recourse in such a situation is to meekly stand by while the courts remake the Constitution contrary to nearly unanimous popular will. The elimination of federal jurisdiction for cases dealing with the voluntary recital of the Pledge of Allegiance, for example, would not only eliminate the risk of an unwise and unpopular Supreme Court ruling, but it would send a long-needed signal to the judicial branch: confine yourself to the role that the Constitution intends — the interpretation and application of the law, and leave the core meaning of the Constitution to the people.

This paper will (1) explain why there is need for congressional action to address abuses in the judiciary, (2) identify the constitutional basis for Congress's power to define and limit federal jurisdiction, and (3) provide principles that Congress should consider when deciding when to take this step. Finally, it recommends that Congress pass jurisdiction-stripping legislation to preserve the Pledge of Allegiance's place in American life.

The Need to Restore Popular Control of the Constitution

There is an ongoing disagreement in our nation's political system over the proper role of the judiciary. Both sides in this dispute agree that the constitutional role of the courts is to adjudicate

[1] See Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, *Hart & Weschler's The Federal Courts and the Federal System* (4th ed. 1996), at p. 348; Martin H. Redish and Curtis Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PENN. L. REV. 45 (1975); Testimony of Professor Martin Redish before the House Judiciary Subcommittee on the Constitution, June 24, 2004.

[2] See polling at footnote 4; see the 99-0 Senate Vote (Record Vote #166) and 401-5 House Vote (Roll no. 445) on S. 2690 (107th Cong., 2nd Sess.); see also 94-0 Senate Vote (Record Vote #39) on S. Res. 71 (108th Cong., 1st Sess.).

disputes between parties and, where necessary, to interpret the meaning of statutes and the Constitution itself. And both sides agree that, in most cases, the statute or constitutional provision yields a clear rule of law that the court can apply.

Conflict arises where there is ambiguity in the Constitution or in a statute. Under the traditional view, when ambiguity exists, the proper role of the judge is to put aside his or her personal policy preferences — i.e., how he personally wants the case to be decided — and resolve the ambiguity with close adherence to the original meaning of the text and the intent of its drafters. The traditionalist urges the judge to eschew any temptation to be a "legal pioneer" and thus ignore 200-plus years of constitutional understanding. Under this view, the judge should recognize that his role is a limited one, and that any attempt to stretch his power and begin making new constitutional rules is beyond the scope of his authority. The traditional judge recognizes that it is simply not the province of the judiciary to take on the role of *changing* the law to suit a judge's policy preferences — or even to suit what the judge believes the public might want. The judge must instead be temperamentally and professionally conservative — judicious — and leave fundamental questions of social organization to the people, who may in turn address those questions through the democratic process. The traditional judge recognizes that state and federal legislators are closer to the people, are accountable at the ballot box, and have the ability to craft compromises that serve the interests of all.

All judges and legal scholars do not agree with this traditional judicial role. Some believe that the power to apply the law and interpret the Constitution is extremely broad and only tangentially related to the text of the document or the intent of its framers. They dismiss the notion that the Constitution's text has objective meaning, and instead, for the most extreme, treat the Constitution as a mere stepping-off point from which the judge can craft public policy. Such judicial pronouncements — whether it be the creation of a right to abortion that was not contemplated at the Founding, the elimination of prayer in public schools after nearly two centuries of contrary understanding, the announcement of an exclusionary rule in criminal law, or the recent attempt to remove "under God" from the Pledge of Allegiance — are, to the judicial activist, perfectly acceptable exercises of judicial power. From their perspective, a "living Constitution" is one that is to be altered as judges see fit, with the core meaning of the document changing as elite opinions "evolve."

Reasonable people will not always agree when a court has engaged in judicial activism, but it is hard to deny that, in retrospect, a line of jurisprudence has deviated far from the Constitution's text and history. Court rulings such as the recent Ninth Circuit decision to bar schoolchildren from voluntarily reciting the full text of the Pledge of Allegiance[3] are wildly unpopular; indeed, *only 6 or 7 percent* of Americans support removing "under God" from the Pledge.[4] This unpopularity arises not only because of disagreement with the policy result, but because the decision represents such a *fundamental change* in the way that the Constitution is being interpreted. It focuses the people's attention on the way that the courts have taken it upon themselves to define the role of religion in public life — not with reference to the Constitution's text, nor to the intent of the Founders, nor to the practice of the Founding generation that illuminates the original meaning, nor even to the

[3] *Newdow v. United States Congress*, 313 F.3d 500 (9th Cir. 2002).

[4] See Ayres McHenry & Assoc. poll, May 2004, showing only *7 percent* oppose "keeling the phrase 'under God' in the Pledge of Allegiance;" and Quinnipiac University poll, June 2003, showing only *6 percent* believe those words should be removed from the Pledge. Both polls available at http://nationaljournal.com.

accepted practices of the American people in modern times. Instead, the courts' reference points have become little more than their own past decisions — decisions that have inched the Constitution off its moorings so that now, decades into this activist process, the resulting interpretation is unrecognizable to the American people. The courts' willingness to indulge seriously the lawsuit about the recitation of the Pledge of Allegiance over the past few years signals the profound disconnect that has developed between the judicial process and popular opinion as to what our Constitution means.

The American people are not obligated to passively accept judicial decisions that are contrary to their longstanding expectations of constitutional freedom. The Constitution belongs to the people, not to the judiciary, but the people will not have any control over their Constitution if they do not exercise the checks available to them.

One Solution: Legislation to Limit Federal Courts' Jurisdiction

The best check available to the people is for their representatives to eliminate the jurisdiction of the federal courts over particular issues. The alternatives are too cumbersome for all but the most fundamental matters. For example, it is very difficult to remove judges from office, and the constitutional amendment process is inadequate to address all ill-advised judicial pronouncements. And the President has no power to check the courts beyond the initial appointment power. That leaves the legislative power to strip the courts of jurisdiction — a power that is constitutional, proper, and will enable the people to reassert their authority over the Constitution's meaning.

The Source of Congress's Power to Limit Jurisdiction: the United States Constitution

The Constitution's text provides Congress with the power to pass legislation that defines and limits the jurisdiction of the federal courts, including the appellate jurisdiction of the Supreme Court itself.

Lower Federal Court Jurisdiction. Lower federal courts — federal appeals courts and district courts — are not mandated by the Constitution; they exist at Congress's discretion. Specifically, the Constitution provides that the "judicial power of the United States shall be vested in one supreme court, and in such inferior courts *as the Congress may from time to time ordain and establish*." Art. III, § 1 (emphasis added). Thus, it is at Congress's discretion whether to create lower federal courts *at all*.[5] It is generally conceded by the legal academy that the power to "from time to time ordain and establish" lower courts entails a power to *abolish* lower federal courts as well.[6] The tenuous nature of lower courts — should they even exist? — is rooted in the Framers' belief that state courts would be adequate to manage legal disputes arising out of federal law or the Constitution, at least at the trial court level. Thus, the Constitution expressly requires that all *state* courts exercise jurisdiction over questions federal constitutional law.[7]

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[5] See Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, *Hart & Weschler's The Federal Courts and the Federal System* (4th ed. 1996), at p. 348; Martin H. Redish and Curtis Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PENN. L. REV. 45 (1975), cited in Testimony of Martin Redish before the House Judiciary Subcommittee on the Constitution, June 24, 2004.

[6] Redish Testimony, June 24, 2004.

[7] U.S. Constitution, art. VI, § 2.

Legal scholars agree that Congress's power to create and abolish lower federal courts necessarily includes the power to limit the jurisdiction of those courts.[8] In other words, the greater power (abolition of the lower court altogether) includes the lesser power (abolishing the court's jurisdiction as to a particular class of case). This means that it is for Congress to decide what classes of cases those lower federal courts can hear, whether on a trial or appellate basis. Congress has, since the very first Congress in 1789, exercised its power to define and limit the jurisdiction of these courts, as is discussed in detail below at pp. 6-8.

The Supreme Court's Jurisdiction. Congress also determines the appellate jurisdiction of the Supreme Court. The Constitution does grant "original" jurisdiction to the Supreme Court in a narrow set of cases (such as disputes between two States),[9] but it does *not* give it unfettered appellate jurisdiction to review lower courts' decisions. Instead, the Constitution specifies that the Supreme Court's appellate jurisdiction shall be subject to "*such exceptions, and under such regulations as the Congress shall make*." Article III, § 2, cl. 3 (emphasis added). It is for Congress to determine the nature and scope of the cases that the Supreme Court shall have the jurisdiction to hear on appeal.[10]

Two Kinds of Jurisdiction-Stripping Legislation Should Be Considered

A bill to limit the jurisdiction of the federal courts could take two basic forms:

In one form, a jurisdiction-stripping statute could limit the jurisdiction of lower federal courts to hear a certain class of dispute, but leave untouched the appellate jurisdiction of the Supreme Court. In that circumstance, a litigant with a claim based on a federal statute or constitutional provision would bring his case in state court, and after exhausting all appeals in the state court system, seek review from the U.S. Supreme Court. This approach would prevent judges in the lower federal courts from announcing unpopular and unwise constitutional rulings that impact several states' citizens. (Nearly 20 percent of the nation's population, for example, lives within the Ninth Circuit.[11]) At the same time, the Supreme Court could still hear the case if it chose. Maintaining Supreme Court appellate jurisdiction may be appropriate in those cases where a nationwide uniform rule is necessary as a practical or cultural matter. (See discussion of uniformity below at p. 10.)

The other option is to craft a statute that would abolish *both* lower court *and* Supreme Court jurisdiction over a particular issue or class of cases. Thus, the litigant would bring his claim to the state courts, and the final decision would rest with the highest court in that state to review the

[8] See Fallon et al., at p. 348 (noting that this conclusion has "generally been understood"); Redish Testimony, June 24, 2004 (stating that this conclusion "flow[s] inexorably" from Congress's ability to create or abolish lower federal courts). This conclusion has not been seriously contested in the legal literature. Indeed, as discussed herein, Congress has since 1789 operated under this understanding of its constitutional authority.

[9] Article III, § 2, grants original jurisdiction to the Supreme Court *only* in those cases "affecting Ambassadors, other public Ministers and Consults, and those in which a State shall be a Party."

[10] Redish Testimony, June 24, 2004; see also Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. CIVIL RIGHTS – CIVIL LIBERTIES LAW REV. 129, 134-35 (1981-1982) (acknowledging Congressional right to create exceptions to Supreme Court appellate jurisdiction). Even the U.S. Supreme Court has expressly affirmed Congress's authority to remove certain classes of cases from the appellate jurisdiction of that court. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

[11] The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Oregon, and Washington.

dispute. Because state courts do not have "extraterritorial" jurisdiction, the effect of those decisions should be confined to that state alone. Thus, different states could have different interpretations of federal constitutional or statutory questions. This is the full scope of Congress's constitutionally authorized jurisdiction-stripping power and, in appropriate cases discussed below, Congress should not hesitate to use it.

Congress Regularly Exercises its General Authority to Define and Limit Federal Jurisdiction

It is important to recognize two things about Congress's general power to limit and define the jurisdiction of the federal courts. ***First***, this is a power that Congress exercises in various ways on a regular basis. As explained below (and as confirmed by the leading treatises on federal court jurisdiction),[12] there is nothing new about Congress limiting jurisdiction, redirecting jurisdiction, and even denying the federal courts jurisdiction over certain classes of cases altogether. Congress has been passing such legislation quite literally since 1789. ***But second,*** the form of jurisdiction-stripping legislation advocated here — rifle-shot statutes that deny federal jurisdiction over particular classes of constitutional cases, and, therefore, sending those disputes into state courts (perhaps without recourse to the Supreme Court) — *would* be somewhat different from those other precedents. Nevertheless, while Congress should proceed deliberately and carefully, it should also do so with full confidence that it has the authority to act.

Historical Context: Congress Has Always Placed Limits on Federal Court Jurisdiction

Congress has never been bashful about tailoring the jurisdiction of the federal courts. Indeed, Congress has always recognized that automatic access to the federal courts is wholly unnecessary to the administration of justice given the availability of the state courts. As early as the 1789, Congress has regularly exercised its right to deny the federal courts jurisdiction over some cases. As the leading treatise on federal court jurisdiction makes clear, *Congress has **never** taken the position that federal courts should have the jurisdiction to hear all the case that the Constitution permits them to entertain.* [13]

Two major examples of congressionally imposed limits on federal court jurisdiction include the following:

No Federal Question Jurisdiction until 1875. From 1789 until 1875, Congress did not grant lower federal courts the general jurisdiction to review questions of federal law. Thus, unless a federal statute created a special exception, questions of federal law were reviewed in state courts, subject to discretionary review by the Supreme Court.[14] If two litigants had a dispute about the meaning of a federal statute, they could not file a lawsuit in a federal district court — despite the fact that the dispute involved nothing but the interpretation of an Act of Congress. Even after Congress granted federal question jurisdiction, it made that jurisdiction contingent upon there being a sufficient "amount in controversy." This requirement was not removed until 1980.[15]

[12] See, e.g., Fallon et al., at p. 348-54.
[13] Fallon et al., at p. 348-49.
[14] Fallon et al., at p. 349.
[15] Fallon et al., at p. 349.

Special Restrictions on Supreme Court Jurisdiction until 1914. Congress has also placed direct limits on the Supreme Court's appellate jurisdiction. From 1789 until 1914, no state court judgment *upholding* the constitutionality of a federal law could be reviewed in *any* federal court, including the Supreme Court. Congress only granted appellate jurisdiction to the Supreme Court to review a lower court decision regarding a federal statute if the lower court had denied a right, privilege, or exemption under that statute.[16] Thus, for more than 100 years, Congress exercised its constitutional power to define jurisdiction by making Supreme Court jurisdiction *depend upon* the outcome of the case below.[17]

Recent Means of Shaping and Redirecting Jurisdiction

Congress often denies all jurisdiction to federal courts in the statutory context. For example, in the 107th Congress, Minority Leader Tom Daschle inserted statutory language into an appropriations bill during a House-Senate conference that would strip all federal courts of jurisdiction over procedures governing certain timber projects.[18] Those provisions became part of P.L. 107-206, which included the following language: "Any action authorized under this section shall not be subject to judicial review by any court of the United States."[19] The same kind of jurisdiction-stripping provision can be found in the Terrorism Risk Insurance Act of 2002, which prevents judicial review of certifications made by the Secretary of the Treasury that terrorist acts have occurred.[20] And in yet another law from the 107th Congress, the 2003 defense authorization bill provides that, when the Secretary of Defense makes a determination that a reward should be paid to foreigners who provide information that helps prevent terrorism, the determination is not subject to judicial review of any kind.[21]

Thus, Congress has shown no hesitancy to strip federal courts, including the Supreme Court, of jurisdiction over questions of federal law. Beyond these examples, it is helpful to consider the many other ways that Congress regularly limits and defines the jurisdiction of the federal courts. For example:

- Congress has authorized many administrative agencies to perform the judicial "fact finding" function of the courts. This is a presumptively judicial function, but Congress has denied jurisdiction to the federal courts to perform that function and has instead placed the function in "expert agencies" such as the Social Security Administration, the Bureau of Immigration Appeals, the Federal Election Commission, and many other agencies. While litigants with disputes before these agencies can appeal into the federal courts, the courts employ varying degrees of deference vis-à-vis the agency's past decision. In these circumstances, Congress has taken part of the judicial function away from Article III courts.

[16] Fallon et al., at p. 349; see also Judiciary Act of 1789, 1 Stat. 73, § 25 (1789).
[17] Fallon et al., at p. 349.
[18] See Audrey Hudson, "Daschle Seeks to Exempt His State; Wants Logging to Prevent Fires," *The Washington Times* (July 24, 2004), at A1; see also Michelle Munn, "Plan to Curb Forest Fires Wins Support," *Los Angeles Times* (August 2, 2002), at A16 ("Daschle's amendment authorizes a forest management program in Black Hills National Forest without resort to a typically lengthy judicial review and appeals process").
[19] See P.L. 107-206, § 706(j).
[20] See P.L. 107-297, § 102(1)(C).
[21] See P.L. 107-114, § 1065.

- Congress also creates specialized Article III courts that which have the effect of limiting the jurisdiction of other federal courts. For example, the U.S. Court of Appeals for the Federal Circuit exists wholly to hear specialized cases, in particular patent cases and appeals from the U.S. Court of Claims (another specialized court). When Congress creates these courts and gives them specialized jurisdiction, it simultaneously limits the jurisdiction of the other federal courts that previously handled those types of cases.
- Congress sometimes defines jurisdiction very narrowly, placing certain classes of cases under particular statutes in special *ad hoc* courts. The most prominent example of this is the 2002 Bipartisan Campaign Reform Act ("McCain-Feingold"), which gave exclusive original jurisdiction over disputes relating to that law to a special three-judge panel made up of district and appellate judges in Washington, D.C. The law further denied the D.C. Circuit appellate jurisdiction and provided for direct appeal to the U.S. Supreme Court.

These historical and modern-day examples demonstrate that Congress regularly defines and limits the jurisdiction of the federal courts.

Jurisdiction-Stripping Legislation for Constitutional Issues

The kind of jurisdiction-stripping legislation advocated in this paper — legislation that would reach constitutional questions — has been considered seriously over the past 30 years. Indeed, more than 50 bills have been introduced in the House and Senate since the mid-1970s to deny or limit federal jurisdiction over constitutional questions relating to voluntary prayer in public buildings, abortion, religious liberty, and the protection of traditional marriage.

A prominent example of this earlier push for jurisdiction-stripping legislation is that posed by Senator Robert C. Byrd with his efforts in 1979 to protect prayer in public buildings. In fact, then Majority Leader Byrd even persuaded the Senate to adopt (51-40) an amendment to deny all federal courts (including the Supreme Court) the jurisdiction to review any case arising out of state laws relating to voluntary prayers in public buildings.[22] The underlying bill was sponsored by Democrat Senator Dennis DeConcini, who joined 25 other Democrats (including eventual Democrat Vice Presidential Nominee Lloyd Bentsen) in supporting the school prayer amendment. While that provision did not become law, it does demonstrate that jurisdiction-stripping legislation that reaches constitutional issues is not unprecedented in the Senate.

Jurisdiction-stripping for certain constitutional issues has been embraced by the House during this Congress. In July, the House passed the Marriage Protection Act (H.R. 3313) by a vote of 233-194, a bill that denies federal courts the jurisdiction to hear constitutional challenges related to the Full Faith & Credit aspect of the Defense of Marriage Act. And on September 23, the House passed the Pledge Protection Act (H.R. 2028) by a vote of 247-173. That bill denies jurisdiction to federal courts to hear challenges to the voluntary recitation of the Pledge of Allegiance in public schools. These two bills put the House on the record in favor of the principle of jurisdiction-stripping for constitutional questions.

[22] See S.Up.Amdt. 70 to S. 450, 96th Congress.

Reviewing the Objections to Jurisdiction-Stripping Legislation

There are three main objections to jurisdiction-stripping legislation, each of which is discussed below.

Objection #1 — The People Should Not Challenge the Courts

The main argument that is lodged against jurisdiction-stripping legislation is simply that it is inappropriate for the people to attempt to place any checks on the judicial branch. The conventional wisdom among educational and journalistic elites is that the last word on constitutional interpretation belongs not to the American people but to the federal courts and especially the U.S. Supreme Court. This viewpoint minimizes the role of the people — through their elected representatives in the White House and Congress — to interpret the meaning of the document. Under this view, the federal courts have ultimate custody of the Constitution, and, on their own initiative, may even use that custody to establish legal rules that would never have the support of the people, who are urged to acquiesce in the Supreme Court's "ultimate authority" over our Constitution. And for the most part, the people do just that.

It is crucial to understand that this claim of unquestioned judicial supremacy is not supported by our nation's history. Stanford Law School Dean Larry Kramer recently published an illuminating new book, *The People Themselves*: *Popular Constitutionalism and Judicial Review*, which traces the history of the efforts by legal elites through the 19th and 20th centuries to aggrandize power in the courts. Dean Kramer writes that the persistent trend throughout U.S. history is not one of popular acquiescence in unpopular rulings by the Supreme Court, but of popular outrage followed by political pressures to prevent the courts from denying the people control of their Constitution. Indeed, Andrew Jackson openly battled with the Supreme Court over the constitutionality of the Bank of the United States. The *Dred Scott* decision in 1856 was met by President Lincoln's open rebuke (followed, of course, by war), and the refusal of the pre-1937 Supreme Court to endorse the constitutionality of the New Deal was met by President Roosevelt's threat to stack the court with additional justices. That court-stacking effort became unnecessary when the Supreme Court bowed to public pressure and accepted the expansion of federal government power so favored by the American people.[23] Recognizing its subordinate role vis-à-vis the people, the Supreme Court historically avoided these kinds of confrontations, or as Dean Kramer explains, "What is certain is that popular constitutionalism was the clear victor each time matters came to a head."[24]

The history that Dean Kramer explores may be unfamiliar to many because our more recent experience with the courts has been so different. Since the civil rights movement in particular, the people have come to believe that to question courts is to question civil rights and civil liberties themselves. Forgotten is the intent of those Founders who drafted and implemented the Constitution and who would be surprised by the outsized deference to Supreme Court rule today. Americans may have forgotten that they have always had the power to guarantee civil rights and liberties themselves simply by convincing their elected leaders to pass appropriate laws that do so.

[23] See, e.g., Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: 2004), pp. 217-18.

[24] Kramer, at p. 207.

Yet as Dean Kramer explains, it is the people's Constitution — not the judges'. And the people's checks and balances over the courts are several. The Constitution gives the people, through their elected representatives in Congress, significant authority over the courts — including the power to create and eliminate lower federal courts, to determine the pay of federal judges, and to impeach and remove judges for bad behavior. And the Constitution grants Congress the authority to define, limit, and eliminate the jurisdiction of the federal courts. The exercise of these powers on the people's behalf is, as Dean Kramer argues, simply an expression of the "popular constitutionalism" strand that has been present since the Founding. To deny the legitimacy of popular attempts to reclaim the Constitution and restore balance would be destructive of basic principles of representative self-government because, if the people lack any effective means to control their own Constitution, then the Constitution becomes little more than the rule of a few judges, unchecked by any elected representatives.

Objection #2: All Laws Must Be Interpreted Uniformly Nationwide

One effect of jurisdiction-stripping legislation of all federal courts is that it allows contradictory legal rules to develop among the states on questions of federal law. Even jurisdiction-stripping legislation of only lower federal courts' jurisdiction would likely result in less uniformity among the states on some questions of federal law. The state supreme courts would, as was typical at the beginning of our republic, become the final arbiter in their states if the U.S. Supreme Court could not review lower court decisions. Even if the Supreme Court jurisdiction were preserved, because the Supreme Court takes only a small percentage of cases decided by lower courts, some disparity would persist.

Lack of uniformity in the interpretation of federal laws, including the Constitution, is nothing new. State supreme courts rule on federal questions of law on a regular basis. Lower federal courts likewise come to different conclusions on questions of law. Sometimes the U.S. Supreme Court grants review of those cases, but in far more cases every year the Supreme Court simply refuses to review the decision. Contradictory constitutional and statutory interpretations are allowed to persist, side-by-side, in the state and federal courts.

This lack of uniformity is allowed to persist because it is simply not always important that all of the nation's laws — even its Constitution — be interpreted precisely the same in all parts of the country. The need for uniformity can only evaluated issue-by-issue, evaluating whether it is necessary that there be a single legal rule. If uniform constitutional interpretation were the only value at stake, the Supreme Court would recognize that fact and accept review of *every* federal appeals court or state supreme court decision that contradicted another lower court in the nation, and it would resolve the discrepancy immediately. But the Supreme Court recognizes that there is not necessarily any cognizable injury to the citizenry if different states implement particular constitutional provisions somewhat differently. Thus, just as the Supreme Court exercises discretion when it decides whether to allow inconsistent constitutional judgments in state courts and lower federal courts to stand, so too can Congress exercise the same discretion when deciding whether to limit federal jurisdiction.

Objection #3 —Due Process and Equal Protection Concerns

Some critics can be expected to argue that the Constitution's due process and equal protection guarantees prohibit any effort to limit the jurisdiction of the federal courts.[25] It is certainly the case that Congress cannot constitutionally exercise its power to limit jurisdiction in any way that *does in fact* violate the due process or equal protection clauses. It does not follow, however, that the mere act of limiting federal jurisdiction runs afoul of either provision. In fact, jurisdiction-stripping legislation can be crafted to satisfy both concerns.

Consider due process first. The general constitutional requirement of due process is that aggrieved parties have a forum for the adjudication of their grievances, whether based in federal statute or the Constitution itself.[26] Some will argue that the Constitution requires access to a *federal* court to enforce federal constitutional rights, but the Constitution contains no such requirement, nor has the U.S. Supreme Court ever recognized such a right. Due process requires an independent forum, and state courts provide precisely that forum. Indeed, the Constitution *requires* that state courts remain open to hear all claims arising under the Constitution. As noted above, this was the Framers' original design: they anticipated that state courts would be the primary place for resolution of controversies. Thus, limiting the jurisdiction of the federal courts does not run afoul of due process concerns as long as state courts remain open.

Nor is the equal protection clause inherently offended by jurisdiction-stripping legislation. Jurisdiction-stripping legislation does not deny any class of citizens the ability to adjudicate any grievance, nor does it preordain the result in state court adjudications. It is true that jurisdiction-stripping legislation *could* be crafted that *would* violate the equal protection clause — for example, legislation that denied federal court jurisdiction to all cases brought by women, or by blacks, or by the disabled. Such a statute plainly should be rejected if proposed. As long as the proposed legislation treats litigants equally, equal protection concerns are satisfied.[27]

When is Jurisdiction-Stripping Legislation Appropriate?

Congress should consider two primary factors when deciding whether to enact jurisdiction-stripping legislation: (1) whether judicial activism affecting the issue area signals a need to limit federal court jurisdiction, and (2) whether this is an issue that can tolerate lack of uniform interpretation among the states. Only if both questions are answered in the affirmative should Congress enact this type of legislation.

There Must Be a Genuine Risk of Judicial Overreaching

Congress should only consider jurisdiction-stripping legislation when it is apparent that courts are likely to overreach and craft unpopular laws. Have courts been reinterpreting the Constitution in a manner inconsistent with its text and history? Are judges inserting their policy

[25] See, for example, floor statement of Representative Jerrold Nadler, *Congressional Record*, at H6585 (July 22, 2004) (discussing due process considerations of H.R. 3313, the Marriage Protection Act).

[26] See *Tunney v. Ohio*, 274 U.S. 510 (1927) (holding that the due process clause requires adjudication by a neutral, independent forum before government can revoke protected liberty or property interests); *Bartlett v. Brown*, 816 F.2d 695 (D.C. Cir. 1987) (holding that where constitutional rights are at stake, Congress may not revoke all forms of access to an independent judicial forum); Redish Testimony, June 24, 2004.

[27] See Redish Testimony, June 24, 2004.

preferences into their decisions on a given subject, rather than following settled understandings of the law? Is the resulting decision dramatically out of the mainstream of American public opinion?

Many would argue that the courts have engaged in unacceptable activism on issues ranging from privacy rights to abortion to church-state issues to racial preferences and to a host of other areas. But it is not the purpose of this paper to examine each example of judicial activism of the federal courts over the past few decades. The point of this paper is to show the remedy that exists for any specific case of excessive court action. An example of an issue that plainly makes the case for legislative intervention is the ongoing threat to the Pledge of Allegiance's recitation in our public schools and during public ceremonies.

The judicial undermining of the Pledge of Allegiance began in earnest a few years ago when a California man sued to prevent its recitation in his daughter's public school because the pledge includes the words, "under God." In 2002, the Ninth Circuit ruled that a teacher-led recitation of the Pledge violates the First Amendment even though student participation is voluntary because it would be "coercive" to have it recited in the classroom.[28] This past spring, the U.S. Supreme Court refused to reverse the Ninth Circuit on the core constitutional question. Instead, it reversed the Ninth Circuit on technical legal grounds — whether the father had standing to sue — and avoided ruling on the constitutional question.[29] A close reading of the several opinions in the case suggests that there was no Supreme Court majority to reverse the lower court on the substantive constitutional question. The Supreme Court's unwillingness to address this question means that there remains a real threat that a later court will once again attempt to remove "under God" from the Pledge. Indeed, such a result would be unsurprising as a legal matter, given the Supreme Court's repeated efforts to undo the nation's historic affirmation of religion in public life.[30]

This effort to strip "under God" from the Pledge has been soundly opposed by the American people without regard to political party. Our nation has a longstanding national commitment to the voluntary recitation of the Pledge of Allegiance in our public schools, and the federal courts' effort to destroy that civic ritual offends the basic understanding that Americans have of their Constitution. As Senator Hillary Clinton said when the Ninth Circuit issued its decision striking down the Pledge in June 2002:

> I am surprised and offended by the decision. … I believe that the Court has misinterpreted the intent of the framers of the Constitution and has sought to undermine one of the bedrock values of our democracy —- that we are indeed "one nation under God[.]" … It is a wrong decision, and it is an unfair decision — especially unfair to those who defend our nation, and to the young people who will inherit our nation's future. … [O]urs is the most faith-filled nation on Earth, and there is no moral or Constitutional argument why our pledge of allegiance cannot

[28] *Newdow v. United States Congress*, 292 F.3d 597, 609-10 (9th Cir. 2002).

[29] *Elk Grove School District v. Newdow*, 124 S. Ct. 2301 (2004).

[30] For a discussion of the Supreme Court's more recent transformation of the First Amendment's Establishment Clause, see, e.g., Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992). The debate regarding religion in public life is a rich one, but it is undisputed that a belief in God animated the nation's civic leaders and public institutions at the Founding. See, e.g., Philip Hamburger, *Separation of Church and State* (Harvard: 2003).

> acknowledge our commonly held belief that ours is one nation, under God, indivisible, with liberty and justice for all.[31]

The inclusion of "under God" in that Pledge has been accepted for half a century as part of our nation's heritage and our shared civic respect for religion, a respect which has been present since the Founders invoked God in the nation's formative documents. Minority Leader Tom Daschle explained his opposition to the Ninth Circuit's ruling succinctly: "This decision is just nuts."[32]

Where the public so emphatically rejects a constitutional decision of a court, then that alone provides a strong presumption that the court has engaged in unacceptable judicial activism. And if the public is to be denied the power to check the courts in such extreme cases, then it is difficult to imagine how one can meaningfully treat the Constitution as theirs.

Lack of Nationwide Uniformity Must be Tolerable

As discussed above, if Congress denies all federal courts jurisdiction over an issue, each state supreme court will become the final arbiter of a federal statutory or constitutional issue. Congress must, therefore, evaluate, *on a case-by-case basis*, whether a uniform interpretation of federal law is necessary. In doing so, Congress should consider both the (1) practical, interstate effects of a non-uniform interpretation, and (2) the broader cultural effects of fundamentally different decisions state-to-state on federal legal or constitutional questions.

Practical, Interstate Effects. In evaluating the practical effects of non-uniformity, Congress must ask whether each state supreme court's final decision will impact *only* that state, or if a single state supreme court decision is likely to have substantial interstate effects. Even though a state supreme court cannot formally adjudicate matters beyond its borders, in practice some decisions will end up having large effects on other states. If that is the case, then stripping the federal courts of jurisdiction may make matters worse.

A good example of an issue ill suited to jurisdiction-stripping legislation due to practical interstate effects is that of same-sex marriage. In this regard, the House recently passed H.R. 3313 the Marriage Protection Act. The bill attempts to limit federal court jurisdiction over the Defense of Marriage Act and to allow same-sex marriage to be handled on a state-by-state basis without federal court intervention.[33] However, the practical effects of a non-uniform understanding of marriage weigh heavily against adopting jurisdiction-stripping legislation. Same-sex marriage will never be "isolated" in the states that wish to recognize the proposed institution because same-sex couples will travel and relocate throughout the United States on a regular basis. Other states will be forced to adopt laws and regulations to deal with out-of-state same-sex marriages, or they will find their own state courts doing it for them. The practical problems of reserving same-sex marriage questions to state supreme courts weigh heavily against jurisdiction-stripping legislation that would

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[31] See Statement of Senator Hillary Rodham Clinton, June 26, 2002, available at http://clinton.senate.gov/~clinton/news/2002/06/2002627605.html. See also press releases of Senator Patrick Leahy, June 26, 2002 ("I disagree with this decision"), available at http://leahy.senate.gov/press/200206/062602a.html, and Senator Tom Harkin, June 26, 2002, available at http://harkin.senate.gov/news.cfm?=184056 ("I've said it, my daughters said it, and I hope my grandchildren will say it.").

[32] Senator Tom Daschle, *Congressional Record*, June 26, 2002, at p. S6102.

[33] See *Congressional Record*, July 22, 2004, at pp. H6580-6612.

lead to that end. This is a strong argument for the Senate *not* to pass H.R. 3313 or any legislation seeking to limit federal jurisdiction over same-sex marriage.

Broader Cultural Effects. Congress should also ask whether it would be injurious to the nation's common culture to allow state supreme courts to create a "patchwork" of constitutional rulings. Does the issue so impact our core values that we would harm essential national cohesion if Congress allowed an area of American law — especially constitutional law — to become fragmented nationwide? Some constitutional issues can be handled on a state-by-state basis and the non-uniformity does the culture no injury, but others require a nationwide, common understanding.

The issue of same-sex marriage is illustrative in this context as well. Marriage is a longstanding and foundational institution that ought to be a common institution throughout the nation. This is not a minor aspect of marriage law, such as the age of majority or the potential grounds for divorce. It is the core definition of the institution — one man and one woman. And the core definition should be consistent throughout the nation in order to preserve our common culture.

The Pledge of Allegiance: A Good Fit for Jurisdiction-Stripping Legislation

In contrast to same-sex marriage, an issue ideally suited to jurisdiction-stripping legislation is protection of the Pledge of Allegiance. It provides an appropriate opportunity for the people, through Congress, to send the message to the courts that judicial overreaching will not be tolerated and that the people, not the courts, are in fact the last word on constitutional interpretation.

As already discussed above at pp. 12-13, that there is a genuine risk of wildly unpopular judicial decisions on this subject is not in question. The courts are not committed to preserving the longstanding national consensus that the phrase "under God" can remain in the Pledge of Allegiance without violating the Constitution. As a result, the only effective way to preserve the Pledge is to limit both lower court *and* Supreme Court jurisdiction. The Ninth Circuit is already on record in opposition to allowing schoolchildren to recite the Pledge in school on a voluntary basis, and the Supreme Court appears to lack the votes to preserve the Pledge intact.

So the question is whether a uniform interpretation of the First Amendment is indispensable in the Pledge of Allegiance context. From a practical standpoint, it seems clear that a single state's judgment that the Pledge must be rewritten will not have any legal effects in other states. If, hypothetically, the California Supreme Court were to issue a decision like the Ninth Circuit did, there would be no effect on other states. Children in California would cease to say the Pledge (or the state court might force it to be rewritten), but other states' children would be unaffected. Nor is this issue one that necessarily requires uniformity due to questions of national cohesion and basic self-definition as a people. While reasonable people may disagree, the nation's civic culture could survive a few states having slightly different practices for recitation of the Pledge of Allegiance. Certainly, most Americans would prefer that the same Pledge be recited nationwide, as a show of civic unity and pride. But if federal jurisdiction is not eliminated, the ongoing risk is that of a Supreme Court ruling that denies all parents the right to have their children say the Pledge as it is today. The perfect should not become the enemy of the good. Elimination of federal jurisdiction is crucial to ensure that the federal courts do not have the power to create a nationwide rule that harms us all.

The House has passed H.R. 2028, a bill that eliminates all federal court jurisdiction — including Supreme Court appellate jurisdiction — over cases challenging the Pledge of Allegiance. That bill, which passed September 23, 2004, by a vote of 247-173, makes the strong statement to the federal courts that the Pledge is off-limits to judicial activism, and that regardless of any other church-state jurisprudence developed by the Supreme Court, the text of the Pledge will be preserved. Jurisdiction-stripping legislation of this kind deserves the Senate's full support.

Conclusion

Jurisdiction-stripping legislation is not only good policy, but it sends all the right messages to the public and to the courts. It tells the people that they need not sit by while unelected judges change the culture in which they live, and that instead they have a means to preserve their right to legislate through their representatives. It tells the courts that overreaching will not go unnoticed, and that if they insist upon reaching into the legislative realm or remaking the Constitution to suit their personal preferences, then they may well lose the jurisdiction upon which their power depends.