

# SAME-SEX MARRIAGE, THE CONSTITUTION, AND CONGRESSIONAL POWER TO CONTROL FEDERAL JURISDICTION: BE CAREFUL WHAT YOU WISH FOR

by  
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*This Article is part of a colloquy between Professor Michael J. Gerhardt and Professor Martin Redish about the constitutionality of court-stripping measures. Court-stripping measures are laws restricting federal court jurisdiction of particular subject matters. In particular, Professor Redish discusses the “outer limits of congressional power” to restrict federal courts’ power to hear suits relating to the constitutionality of government prohibition or regulation of same-sex marriage. Professor Redish argues that there are constitutional limits on congressional power in three circumstances: (1) when Congress uses its power to attempt to resolve substantive constitutional questions; (2) when Congress targets its authority at minorities seeking access to the federal courts; and (3) when Congress attempts to remove particular constitutional questions from adjudication in both federal and state courts. Finally, he concludes that Congress may remove adjudication of an asserted constitutional right to same-sex marriage from the purview of the federal courts. However, he suggests that this result may have very mixed political consequences for those who support adoption of such restrictions.*

I.	INTRODUCTION.....	364
II.	CONGRESSIONAL POWER TO CONTROL FEDERAL JURISDICTION: THE THREE LEVELS OF ANALYSIS .....	366
III.	THE CONSTITUTIONALITY OF CONGRESSIONAL REGULATION OF FEDERAL JURISDICTION: AN OVERVIEW.....	368
	A. Congressional Power to Control the Jurisdiction of the Lower Federal Courts.....	369
	B. Congressional Power to Control the Appellate Jurisdiction of the Supreme Court.....	371
	C. Suggested Scholarly Limitations on Congressional Power to Control Federal Jurisdiction .....	371
	1. Henry Hart’s “Essential Functions” Thesis .....	371
	2. Professor Amar’s Theory .....	372
	3. Professor Sager’s Theory.....	373

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D.	<i>Relevance of Other Constitutional Protections</i> .....	373
1.	<i>Due Process</i> .....	373
2.	<i>Separation of Powers</i> .....	374
3.	<i>Equal Protection</i> .....	374
E.	<i>Political Process Considerations</i> .....	376
IV.	APPLYING THE CONGRESSIONAL POWER ANALYSIS TO THE CASE OF SAME-SEX MARRIAGE.....	377
V.	CONCLUSION .....	379

## I. INTRODUCTION

It would be difficult to find a more controversial domestic issue in the nation today than the propriety and morality of same-sex marriage. At first glance it might be hard to see a clear connection between this controversial moral and political issue and the seemingly more obscure and arcane area of federal jurisdiction law. At most, one could reasonably believe, the issue of same-sex marriage would have legal relevance purely as a matter of substantive constitutional law, implicating either the constitutionally protected rights of equal protection<sup>1</sup> or privacy and autonomy.<sup>2</sup> Even a brief examination of American history, however, reveals that virtually any time a controversial political issue arises that may implicate a constitutional challenge, congressional efforts to manipulate the judicial outcome of those challenges through the regulation of federal jurisdiction is probably not far behind.

During many of the nation's most turbulent constitutional crises, Congress has seriously considered a strategy that involved the restriction of federal court power to adjudicate those constitutional issues. For example, in the midst of the chaotic post-Civil War period, on a number of occasions the Radical Republican Congress sought—with varying degrees of success—to insulate significant portions of its oppressive program of Reconstruction from Supreme Court review.<sup>3</sup> While in later times of political tension Congress has ultimately declined to exercise its arguably broad powers to regulate federal jurisdiction<sup>4</sup> to prevent or manipulate judicial review of politically controversial activity, measures to do so have been proposed and considered. This is true in situations involving national security and the Communist threat during the 1950s, school prayer, busing designed to achieve racial integration, and—naturally—abortion rights recognized in *Roe v. Wade*.<sup>5</sup> From this broad historical perspective, then, it should not be all that surprising that an issue as morally and politically controversial as same-sex marriage should eventually implicate the questions

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<sup>1</sup> *E.g.*, *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

<sup>2</sup> *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>3</sup> *See Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514–15 (1869); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145–46 (1872); *infra* Part III.B.

<sup>4</sup> U.S. CONST. art. III, §§ 1–2; *see infra* Part III.B.

<sup>5</sup> 410 U.S. 113 (1973). For a description of the efforts in Congress to restrict federal court jurisdiction in these areas, see JEROME A. BARRON, C. THOMAS DIENES, WAYNE MCCORMACK & MARTIN H. REDISH, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 1440–41 (6th ed. 2002).

surrounding the scope of Congress's constitutional power to restrict federal jurisdiction.

In this Article, I explore the outer limits of the congressional power to restrict federal court jurisdiction to adjudicate suits challenging the constitutionality of governmental prohibition or regulation of same-sex marriage. Such suits, presumably, would raise challenges on either equal protection<sup>6</sup> or substantive due process grounds.<sup>7</sup> I ultimately conclude that certain outer constitutional limits on congressional power do exist: (1) when Congress seeks to use its power as a means of resolving substantive constitutional questions; (2) when Congress attempts to use its authority to directly discriminate against minorities in accessing federal courts; and (3) when Congress closes off access to *all* independent judicial forums, state and federal, for the adjudication of constitutional rights. Other than those situations, I conclude, there are no constitutional limits on congressional authority to regulate the jurisdiction of the federal courts, with the relatively narrow exception of the Supreme Court's original jurisdiction.<sup>8</sup>

Specifically in the area of same-sex marriage, I find that Congress has broad power to limit or exclude federal court jurisdiction, including the appellate jurisdiction of the Supreme Court.<sup>9</sup> This is true, even if we assume—as appears likely—that those restrictions would be imposed out of a strategic desire on the part of Congress ultimately to affect the substantive scope of the constitutional protection given to same-sex marriage. I reach this conclusion, even though, on a purely socio-political level, I am by no means enamored of this goal.<sup>10</sup> Moreover, I reach this conclusion despite my serious normative concerns about the process-based implications of such an exercise of congressional authority for the delicate balance of governmental authority between the judicial and legislative branches of the federal government.<sup>11</sup> I reach this conclusion for the simple reason that I find no other plausible means of construing the constitutional text, history, and structure.<sup>12</sup> And in construing the Constitution, I am not permitted simply to superimpose my own personal socio-political agenda on the document. My moral or political distaste for the results of my constitutional analysis cannot, standing alone, properly influence that analysis.

It is important that in acknowledging the tremendous breadth and scope of congressional power over federal jurisdiction, one not overstate the implications of that power. Whatever its motivation, Congress may not constitutionally employ its broad authority over federal jurisdiction either to dictate the outcome of substantive constitutional disputes or to completely

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<sup>6</sup> U.S. CONST. amend. XIV, § 1.

<sup>7</sup> U.S. CONST. amend. V.

<sup>8</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> In this Article I take no position on a constitutional challenge to legislative restrictions on same-sex marriage. I merely acknowledge that at the very least, such a challenge is plausible.

<sup>11</sup> See *infra* Part III.E.

<sup>12</sup> See *infra* Part III.E.

exclude the independent judiciary as a whole from the protection of constitutional rights.<sup>13</sup> This is as true of potential constitutional challenges to restrictions on same-sex marriage as it is to the assertion of any other potentially valid constitutional right. Even if federal courts are closed, state courts remain as constitutionally viable forums for the adjudication of such constitutional claims, and if Congress closes off the federal courts completely, it is required by precepts of due process and separation of powers to leave the state courts open to such challenges. To be sure, as a political matter this result may not be considered a politically ideal solution by those seeking to urge their constitutional claims. It is, however, all that the Constitution gives us.

From the perspective of those who support such legislative restrictions on federal jurisdiction, the results are no more ideal. Where Congress closes off the federal courts from the review of specified assertions of constitutional right, the inexorable consequence, under the Due Process Clause, is that the state supreme courts will sit as the final arbiters of the Constitution, free from congressional interference. Whether Congress would prefer fifty state supreme court interpretations of its power to restrict or prohibit same-sex marriage over one definitive ruling by the United States Supreme Court is surely open to serious doubt. The goal in exploring congressional authority to restrict federal jurisdiction in the same-sex marriage area, then, should be to make Congress as aware of the constitutional limits on its authority as it is of its power.

The first Part of this Article provides the theoretical framework necessary to explore the issues of congressional power in general and in the same-sex marriage context in particular. It describes the three levels of normative analysis on which congressional efforts to restrict federal jurisdiction in same-sex marriage cases may be examined, and explains why two of them fail to implicate constitutional inquiry, regardless of how important they are thought to be on moral or political levels.<sup>14</sup> In the following Part, the Article explores in some detail the constitutional scope of congressional power to regulate federal court jurisdiction in general.<sup>15</sup> The final Part considers the constitutionality of two political permutations of potential congressional restrictions on federal court jurisdiction in the specific context of same-sex marriage.<sup>16</sup> When viewed together, the latter two Parts explore the implications of a principled and disciplined constitutional analysis for these politically sensitive questions.

## II. CONGRESSIONAL POWER TO CONTROL FEDERAL JURISDICTION: THE THREE LEVELS OF ANALYSIS

In other than relatively mundane and content-neutral housekeeping contexts—for example, the imposition of a jurisdictional minimum in diversity cases<sup>17</sup>—virtually any attempt by Congress to restrict the jurisdiction of either

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<sup>13</sup> See *infra* Part IV.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *infra* Part IV.

<sup>17</sup> See 28 U.S.C. § 1332 (2000) (imposing a \$75,000 jurisdictional minimum in diversity of citizenship cases).

the lower federal courts or the Supreme Court is ultimately motivated by a political objective. In such situations it is usually obvious that advocates of one side of the political debate are seeking to employ congressional power over federal jurisdiction as little more than a strategic device, designed to achieve their political goals. It is therefore tempting for those on the other side of the debate to reflexively challenge such efforts, if only to prevent implementation of the opposition's political agenda. It is important, however, to distinguish among several conceivable grounds for opposition to a particular congressional effort to regulate federal court jurisdiction.

On the most basic moral or political level, one may choose to oppose such regulatory efforts simply because one is opposed to attainment of the political goal sought to be achieved by the jurisdictional restriction. In doing so, opponents are saying nothing about either the constitutionality of such legislative efforts or the broader implications of such regulation for precepts of normative American political theory. Indeed, opponents themselves might consider resort to a similar strategy in other contexts. When viewed from this perspective, then, opposition is not to congressional restriction on federal jurisdiction in the abstract, but rather solely to the underlying political goal sought to be accomplished by that restriction. By way of analogy, one political group might oppose particular spending legislation, not because it opposes congressional spending in the abstract, but because it opposes the purpose and effect of the expenditure in question.

On a second analytical level, one could oppose congressional efforts to regulate federal court jurisdiction, not because of opposition to the regulation's intended political impact, but rather because of a broader process-based concern with the resulting alteration in the nature of the relationship between Congress and the federal judiciary. It is arguable that the delicate balance between the two branches could be upset by sweeping, substantive-based congressional restrictions on the power of the lower federal courts, the Supreme Court, or (in a worst case scenario) both. The faith that the electorate has in government could well be threatened by such a jarring disruption in the allocation of governing power. While such opposition—much like that on the first analytical level—would derive from purely sub-constitutional concerns, it differs significantly from the narrower, strategic-based normative rationale. Here, opposition is presumptively agnostic as to the specific political consequences of the congressional restriction. Its focus, rather, is on the broader process-based political concerns about maintenance of the balance of power between the legislative and judicial branches.

On yet a third level, one might oppose congressional regulatory efforts for no reason other than that they are unconstitutional. This concern focuses neither on immediate political impact, nor on normative considerations of American political theory. Its focus, rather, is solely on the dictates of the Constitution.

Often lost in the heat of intense political debate is one simple but vital fact: The conclusions of these three analytical levels are neither mutually exclusive nor necessarily interdependent. One could reasonably oppose a regulation on one level, yet have no concerns under one or both of the other analytical inquiries. For example, one could quite conceivably oppose a proposed limitation on federal court power on moral or political grounds, but

simultaneously care not at all about potential problems of process-based political theory and recognize no constitutional difficulties with the exercise of congressional power in the abstract. Similarly, one could even be sympathetic to the political goals sought to be achieved by the regulation, yet nevertheless believe Congress lacks the constitutional authority to impose it. In most cases, it is essential that the constitutional inquiry be divorced from concern with immediate political impact, lest the judicial function of constitutional review degenerate into nothing more than a tool of political strategy. Absent this separation, judicial review collapses into the fight for political power.

There is, however, one category of cases that might be deemed an exception to this precept of constitutional interpretation: Cases in which the normative political concern has simultaneously been constitutionalized. For example, one may oppose a congressional attempt to exclude African Americans or Jews from federal court on moral grounds, but that moral view has also been embodied in the Constitution's guarantee of equal protection.<sup>18</sup> The point to be emphasized, however, is that the mere fact that one opposes the political impact of the jurisdictional regulation does not automatically imply the unconstitutionality of that regulation.

### III. THE CONSTITUTIONALITY OF CONGRESSIONAL REGULATION OF FEDERAL JURISDICTION: AN OVERVIEW

On certain levels, at least, the issue of congressional power to control federal jurisdiction is far simpler than many other scholars believe it to be. The text and internal logic of Article III of the Constitution make clear that congressional power to control both the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court is extremely broad. There is nothing on the face of the provision's text that in any significant way confines congressional authority in either area. It is highly likely, however, that the federal courts would construe substantively based restrictions on their jurisdiction in a highly grudging manner.<sup>19</sup> Thus, if Congress wishes to exercise its vast authority, it would be advised to state its intent explicitly in the text of the relevant statutes.

To be sure, several other provisions of the Constitution—due process, separation of powers, and equal protection—potentially impose external limitations on the scope of congressional power. The Due Process Clause of the Fifth Amendment requires that a neutral, independent, and competent judicial forum remain available in cases in which the liberty or property interests of an individual or entity are at stake.<sup>20</sup> But as long as the state courts remain available and adequate forums to adjudicate federal law and protect federal

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<sup>18</sup> U.S. CONST. amend. XIV, § 1. While the Fourteenth Amendment imposes an equal protection limitation only on state governments, the Supreme Court has found a parallel restriction on the federal government in the terms of the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>19</sup> See, e.g., *Felker v. Turpin*, 518 U.S. 651, 660 (1996).

<sup>20</sup> See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 456–57 (1986).

rights, it is difficult to see how the Due Process Clause would restrict congressional power to exclude federal judicial authority to adjudicate a category of cases. Separation of powers prevents Congress from: (1) itself adjudicating individual litigations; (2) directing a federal court how to decide a particular case; (3) employing the federal courts for purposes of enforcement without simultaneously allowing them to interpret the law being enforced or consider its constitutionality; or (4) overturning individual decisions or classes of decisions already handed down by a federal court. However, it is difficult to see how any of those constitutional guarantees would restrict congressional authority completely to exclude substantively based categories of future or presently undecided cases from either the jurisdiction of the lower federal courts or the appellate jurisdiction of the Supreme Court.

That Congress possesses such broad constitutional power in no way implies that it would be either wise or appropriate for Congress to exercise its authority to remove specific categories of substantive cases from federal jurisdiction. Purely as a matter of policy, I believe Congress should begin with a very strong presumption against seeking to manipulate judicial decisions indirectly by selectively restricting federal judicial authority. I also firmly believe that were Congress to take such action it would risk undermining public faith in both Congress and the federal courts. Due to its constitutionally granted independence and insulation from the majoritarian branches of the federal government, the judiciary possesses a unique ability to provide legitimacy to governmental action in the eyes of the populace. Congressional manipulation of federal judicial authority therefore threatens the legitimacy of federal political actions. Moreover, to exclude federal judicial power to interpret or enforce substantive federal law undermines the salutary function performed by the federal judiciary in the American political system. The expertise and uniformity in interpretation of federal law that is provided by the federal judiciary should generally not be undermined.

*A. Congressional Power to Control the Jurisdiction of the Lower Federal Courts*

Article III, Section 1 of the Constitution provides that “[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” On its face, this language vests in Congress complete discretion whether or not to create the lower federal courts, and the established historical understanding of the so-called “Madisonian Compromise” makes clear that this view is accurate.<sup>21</sup> The framers’ assumption appears to have been that were Congress to have chosen not to create the lower federal courts, the state courts—who are explicitly bound to enforce federal law under the Constitution’s Supremacy Clause<sup>22</sup>—would be available to serve as the trial forums for the adjudication of

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<sup>21</sup> For an extended discussion of the Madisonian Compromise, see Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52–55 (1975).

<sup>22</sup> U.S. CONST. art. VI, cl. 2.

claims arising under federal law.<sup>23</sup> The Supreme Court has proceeded on the logical assumption that if Congress possessed discretion not to create lower federal courts in the first place, it also has the power to abolish the lower federal courts.<sup>24</sup> Since it has been assumed that Congress possesses the authority to abolish the lower federal courts completely, the Court has assumed that it has the logically lesser power to “abolish” them as to only certain cases by limiting their jurisdiction.

Scholars have on occasion raised questions about the validity of the assumption that the power to create the lower courts logically dictates a corresponding power to abolish them.<sup>25</sup> Nevertheless, since the text provides Congress with the power to “from time to time” ordain and establish the lower courts, it is reasonable to infer from this language the power periodically to alter what Congress has already created. And if one accepts congressional power to abolish the lower courts, the power to leave them in existence but restrict their jurisdiction seems to flow inexorably. If Congress possesses such authority, it is difficult to see how Article III itself, at least, implicitly imposes any restrictions on how that authority is to be employed. Thus, Article III would seem to provide no constitutional bar to the congressional exclusion of substantively based categories of cases from the jurisdiction of the lower federal courts.

Over the years, certain scholars and jurists have suggested that Article III does not establish congressional authority to limit lower federal court jurisdiction. For example, Justice Joseph Story long ago argued that the words “shall be vested” in Article III dictate that the lower federal courts must exist to exercise judicial power in those cases constitutionally excluded from both the highly limited original jurisdiction of the Supreme Court and the jurisdiction of the state courts. Were the jurisdiction of the lower federal courts not to exist in such cases, the command of Article III that some federal court be available to adjudicate the case—either a lower court or the Supreme Court—would be violated. However, even if the words “shall be vested” were construed to be a command—by no means an obviously correct construction—Story ignored the fact that, given the nature of the Madisonian Compromise, there are absolutely no federal cases constitutionally excluded from state court jurisdictional authority. Thus, the entire logic of Story’s theory breaks down. It is therefore not surprising that, while the theory has acquired some modern scholarly support, it has been virtually ignored by the courts.<sup>26</sup>

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<sup>23</sup> See generally 15 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 100.20 (Supp. 2004).

<sup>24</sup> See, e.g., *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850).

<sup>25</sup> See, e.g., Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839, 842–43 (1976).

<sup>26</sup> LINDA MULLENIX, MARTIN REDISH & GEORGENE VAIRO, UNDERSTANDING FEDERAL COURTS AND JURISDICTION 9 (1998).



*B. Congressional Power to Control the Appellate Jurisdiction of the Supreme Court*

Article III, Section 2 of the Constitution extends extremely limited original jurisdiction to the United States Supreme Court. In all other cases to which the federal judicial power is extended, the Court is given appellate jurisdiction, “both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” On its face, this provision provides seemingly unrestrained congressional authority to exclude categories of cases from the Supreme Court’s appellate jurisdiction. In *Ex parte McCordle*,<sup>27</sup> the post-Civil War Supreme Court appeared to recognize the unlimited authority explicitly authorized in the text.<sup>28</sup> However, in a subsequent decision the same year, the Court construed *McCordle* narrowly, leaving open the possibility that the Exceptions Clause is not to be construed as broadly as its text suggests.<sup>29</sup> Nevertheless, I fail to comprehend how a textually unlimited power to make exceptions to the Supreme Court’s appellate jurisdiction can be construed to be restrained in any way. While it is at least conceivable that other constitutional provisions might confine this congressional power, the text of the Exceptions Clause itself does not do so.<sup>30</sup>

*C. Suggested Scholarly Limitations on Congressional Power to Control Federal Jurisdiction*

As already indicated, I believe that the textual directives of Article III make reasonably clear, on their face, that Congress possesses broad constitutional authority to control the jurisdiction of both the lower federal courts and the United States Supreme Court. Nevertheless, several respected scholars have questioned the text’s seemingly clear directives. However, none of these scholarly theories can withstand careful critical analysis. Ultimately, all of them amount to what I have described as a form of “constitutional wishful thinking.”<sup>31</sup> My prior work has provided detailed critiques of each of these theories. Here I will briefly describe the fundamental problems with each.

*1. Henry Hart’s “Essential Functions” Thesis*

Many years ago, Henry Hart cryptically suggested that the Exceptions Clause is somehow restrained by a textually nonexistent limitation that prevents Congress from interfering with the “essential functions” of the Supreme

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<sup>27</sup> 74 U.S. (7 Wall.) 506, 514 (1869).

<sup>28</sup> See MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 25–27 (2d ed. 1990).

<sup>29</sup> *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 106 (1869); see also *Felker v. Turpin*, 518 U.S. 651, 660–62 (1996).

<sup>30</sup> On a purely linguistic level, I suppose, one could reason that the term “exception” implies that the majority of cases that fall within the Supreme Court’s appellate jurisdiction remain unaffected. Even if one were to accept this argument, however, it would seem to have little relevance to any of the proposed congressional regulations over the years.

<sup>31</sup> REDISH, *supra* note 28, at 28.

Court.<sup>32</sup> Though Hart never explained either what those supposedly essential functions actually are or from where in the Constitution he derived them, it appears from the later work of supporters that he intended to include the unifying function of federal law interpretation and the policing of state court interpretations of federal law.<sup>33</sup> As I have previously argued, however, the historical evidence relied upon to support the “essential functions” thesis is “[a]t best . . . speculative and at worst . . . simply useless.”<sup>34</sup> In any event, as already noted, the text provides absolutely no suggestion of such a limitation, regardless of what the legislative history might suggest.

## 2. Professor Amar's Theory

Professor Akhil Amar has suggested an alternative theory that dictates that for certain categories of cases to which the federal judicial power is extended in Article III, Section 2, Congress may not revoke the jurisdiction of *all* Article III federal courts. Unlike Professor Hart (who confined his constitutional restriction on congressional power to the Supreme Court's appellate jurisdiction), Professor Amar asserts that at least one level—the lower federal courts or the Supreme Court—must remain open to adjudicate all categories of cases delineated in Article III, Section 2 that are preceded by the word “all.” He reasons that the selective use of that word, combined with the mandatory “shall be vested” language at the start of Section 1, provides a textual basis for his conclusion.<sup>35</sup>

If Professor Amar's theory were accepted (and I am unaware of any support for it in the modern case law), it would severely restrict congressional power to remove simultaneously from the jurisdiction of *both* the lower federal courts *and* the Supreme Court those cases arising under federal law, since that is one of the categories in Article III preceded by the “all” qualifier. However, it is difficult to imagine that the drafters of Article III would have attempted to reach the result Amar advocates simply by the cryptic and selective use of the word “all.” This is especially true when at the very same time they explicitly provided Congress with unlimited discretion not to create the lower federal courts in the first place and to make exceptions to the Supreme Court's appellate jurisdiction. In any event, purely as a matter of textual construction, Amar's theory makes no sense: If the words “shall be vested” are, in fact, intended to be mandatory, *all* of the categories of cases enumerated in Article III, Section 2, are modified by it. Thus, if we are to take seriously Amar's out-of-context focus on the words “shall be vested,” his textual argument must logically lead to the conclusion that *every* category of cases must be heard by

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<sup>32</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

<sup>33</sup> See Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201–02 (1960).

<sup>34</sup> Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 908 (1982).

<sup>35</sup> See generally Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

an Article III court, regardless of whether or not it is preceded by the word “all.”<sup>36</sup>

### 3. Professor Sager’s Theory

Professor Lawrence Sager has argued that Congress may not use its authority to revoke jurisdiction from both the Supreme Court and the lower federal courts in a substantively selective manner.<sup>37</sup> For the most part, however, Professor Sager’s focus appears to be on jurisdictional exclusions for *state* behavior when *constitutional rights* are at stake.<sup>38</sup> Thus, were Congress to exclude the jurisdiction of all Article III federal courts in cases involving purely questions of sub-constitutional law not involving state action, Sager’s theory is at best of diluted force. In any event, I have argued that Sager’s theory ignores the clear textual directives of Article III.<sup>39</sup>

## D. Relevance of Other Constitutional Protections

### 1. Due Process

While the outer reaches of the right remain somewhat unclear, it is established that the Due Process Clause requires a neutral, independent forum before protected liberty or property interests may be taken away.<sup>40</sup> Thus, where constitutional rights are at stake, Congress may not revoke all forms of access to an independent judicial forum.<sup>41</sup> But even the exclusion of both lower federal court and Supreme Court jurisdiction would not bring about such a result, as long as the state courts remain a viable alternative. I have long expressed concern about exactly how viable the state court remedy is in certain situations,<sup>42</sup> but the case law is quite clear that the state courts are deemed to

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<sup>36</sup> For my detailed critique of Professor Amar’s theory, see Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990); see also John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997). For a defense of Amar’s theory, however, see Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847.

<sup>37</sup> Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 68 (1981).

<sup>38</sup> See *id.* at 69.

<sup>39</sup> See Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 151 (1982). For criticism of Sager’s theory, see Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 915 (1984).

<sup>40</sup> See, e.g., *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 821 (1986); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). See generally Redish & Marshall, *supra* note 20.

<sup>41</sup> *Bartlett v. Bowen*, 816 F.2d 695, 706 (D.C. Cir. 1987).

<sup>42</sup> Redish, *supra* note 39, at 161–62; Redish & Marshall, *supra* note 20, at 496–98. My concern is that when state courts adjudicate constitutional claims against state action, the fact that the state courts are not constitutionally insulated from control of their salary and tenure renders them suspect as a sufficiently neutral and independent judicial forum. The Supreme

satisfy the due process requirement of a neutral judicial forum. Thus, as long as state courts remain open, congressional exclusion of federal jurisdiction raises no issue of due process.

### 2. *Separation of Powers*

The separation-of-powers limitations on congressional power to control federal jurisdiction are somewhat more complex than the due process limitation. Derived from the text and structure of Article III, the separation-of-powers doctrine imposes significant restrictions on congressional authority. Before exploring those restrictions, however, it is important to note that as long as Congress completely excludes federal court jurisdiction over a particular category of cases, separation-of-powers problems are unlikely to arise. The difficulties occur primarily when Congress vests jurisdiction while simultaneously imposing restrictions on federal court ability to interpret the law being enforced or to review its constitutionality.<sup>43</sup> This limitation flows from the notion that where Congress wishes to invoke the unique legitimacy of the federal judiciary, it must allow the judiciary full authority to interpret and review the law that it is asked to enforce. Moreover, the Supreme Court has made clear that while Congress may alter the general substantive sub-constitutional law to be applied by the federal courts, it may not reverse specific judgments already entered by the federal courts.<sup>44</sup>

### 3. *Equal Protection*

The equal protection directive, found by the Court to be implicit in the Due Process Clause of the Fifth Amendment,<sup>45</sup> can conceivably also play a role in limiting congressional power to control federal jurisdiction. Despite its seemingly unlimited authority under Article III, Congress quite clearly may not revoke or confine federal jurisdiction in a discriminatory manner. For example, Congress could not successfully argue that its greater constitutional power to exclude federal judicial power completely and logically subsumes the lesser power of excluding federal judicial power in cases brought by African Americans, Jews, or women. In such cases, the supposedly “greater” power has been restrained by subsequent constitutional amendment. As a general matter, however, the mere fact that Congress is selectively limiting its jurisdictional restrictions to specific substantive constitutional challenges does not automatically implicate equal protection difficulties. As I suggested many years ago, rights don’t have rights; people have rights.<sup>46</sup>

On the surface, the point seems to be relatively uncontroversial. The issue becomes considerably more complicated, however, when one examines the equal protection implications of what can best be described as “hybrid” jurisdictional restrictions. By this I mean the imposition of limitations on

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Court, however, appears unmoved by such concerns. *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975).

<sup>43</sup> See generally *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). For a more detailed description of the case and its implications, see REDISH, *supra* note 28, at 48–49.

<sup>44</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995).

<sup>45</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>46</sup> See Redish, *supra* note 34, at 917.

federal jurisdiction that on its face turns on the substantive nature of the constitutional claim to be raised, but in practical terms can be thought to discriminatorily restrict judicial access on the part of discrete or insular minorities. Hybrid situations include any substantively selective restriction on federal jurisdiction (lower courts, Supreme Court, or both) affecting those equal protection challenges that, as a practical matter, can only be brought by protected minorities. For example, a legislative prohibition on federal court authority to adjudicate equal protection claims attacking the absence of racially based school busing on the one hand appears to affect a specific set of substantive claims, but on the other hand also appears to discriminate against African Americans, since as a practical matter they are the only ones who would bring such claims. One could argue that to characterize such claims as merely a substantively defined limit on federal court power would place form over substance, since in everything but name it is a restriction on the access rights of only a particular discrete and insular minority. By way of analogy, a federal law prohibiting medical insurance claims for sickle cell anemia as a technical matter inhibits the rights of all, but since only African Americans are exposed to the disease as a practical matter the restriction discriminates against them.

This hybrid category presents a dilemma in interpreting the outer reaches of congressional power under Article III to restrict federal court jurisdiction. If one were to view all substantively based restrictions on federal court power to adjudicate particular equal protection claims as nothing more than thinly veiled discriminations against those who would bring such claims, then we would effectively exclude most equal protection claims from congressional regulatory power. To those of us who are not particularly sympathetic to the existence of such power in the first place, of course, this would not seem to be such a disastrous result. The fact remains, however, that as a general matter implied repeals are not favored.<sup>47</sup> To the extent reasonably possible, the integrity of the body of the Constitution should presumptively be preserved. Only where the full exercise of power authorized in the Constitution cannot possibly coexist with subsequent amendments should those amendments be deemed to supersede constitutionally authorized congressional power.

In the case of the equal protection limit on congressional power to restrict federal jurisdiction, I believe a fine but nevertheless legitimate line may be drawn to separate those restrictions which unconstitutionally violate equal protection from those that merely exclude particular substantive categories of cases from federal judicial reach. Where Congress is targeting the minority, untied to the underlying substantive constitutional challenge, the restriction violates equal protection. Where, however, the restriction seeks to exclude the federal courts from a substantively defined class of cases, the restriction is constitutional.<sup>48</sup> In such situations, because as a matter of due process at least

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<sup>47</sup> See, e.g., *Allen v. McCurry*, 449 U.S. 90, 99 (1980) (holding that civil rights law 42 U.S.C. § 1983 not an implied repeal of the Full Faith and Credit Act).

<sup>48</sup> One might see an ambiguity, from the perspective of my suggested dichotomy, in a law that, for example, excluded federal jurisdiction from all equal protection claims brought by Jews. It is true that, in a certain technical sense, such a law is necessarily tied to a

some independent judicial forum must remain open to adjudicate an assertion of a constitutional right,<sup>49</sup> those seeking to assert that right have not been treated in an unconstitutional manner: To the extent their equal protection rights have been violated, they will obtain adequate relief in the forum or forums that remain open. It is, then, only when Congress has denied to the discrete and insular minority the same access it has made available to others that equal protection is violated. In this situation, the fact that a forum remains open for the adjudication of their substantive constitutional claim is beside the point; they have been treated in a discriminatory manner.

On first reading, this distinction may seem difficult to comprehend. It becomes more understandable, however, by applying it to concrete examples. Example 1: Congress has excluded federal court jurisdiction to adjudicate all equal protection claims brought by Jews. Here, the limitation must be held unconstitutional. Non-Jews have the option to seek relief in federal court that has been denied to Jews. That Jews may obtain relief in state court matters not at all, since their options are fewer for no reason other than their religion. Example 2: Congress has restricted federal jurisdiction to adjudicate equal protection challenges to a state's failure to employ busing to achieve integration. Here, the fact that state courts remain open to adjudicate the challenge prevents a constitutional violation. Since the state court is assumed to provide an adequate forum for the adjudication and enforcement of federal constitutional rights,<sup>50</sup> the litigants' equal protection right will not be denied if that court finds the state's failure to order busing unconstitutional.

#### *E. Political Process Considerations*

The result of the foregoing analysis is that Article III of the Constitution vests broad power in Congress to exclude the jurisdiction of both the Supreme Court and the lower federal courts. While externally derived constitutional doctrines impose distinct limits on that power, I can see absolutely no textual or structural basis for denying Congress power to completely exclude substantively defined categories of cases from the jurisdiction of the federal courts. This is true, even in cases in which constitutional rights are at stake, as long as an alternative adequate judicial forum remains available.

It does not follow, however, that Congress should choose to exercise this power, at least when it is to be used in a substantively selective manner. There has long existed a delicate balance between the authority of the federal judiciary and Congress, and the exclusion of substantively selective authority from all federal courts seriously threatens that balance. I firmly believe,

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category of substantive claims—i.e., equal protection claims. However, its substantive nature is defined exclusively, expressly and pervasively by reference to a particular minority group. In such a situation, the law should be treated as an unconstitutional categorical exclusion of a particular minority group from the federal courts, rather than as a jurisdictional limitation on a particular substantive category of cases.

<sup>49</sup> See *supra* Part III.D.1.

<sup>50</sup> See *id.*

therefore, that whatever the scope of its constitutional power, Congress should be extremely reluctant to exercise that power.

#### IV. APPLYING THE CONGRESSIONAL POWER ANALYSIS TO THE CASE OF SAME-SEX MARRIAGE

Congress could conceivably seek to regulate judicial jurisdiction in the same-sex marriage context in a variety of ways. The alternatives turn on three possible variables: (1) the level of governmental actor insulated; (2) the court whose jurisdiction is limited; and (3) the nature of limitation imposed. Initially, Congress could vary the jurisdictional limitations on the basis of the level of governmental actor whose behavior is being constitutionally challenged. It could limit judicial authority to review state, local, or federal restrictions on same-sex marriage rights. Secondly, it could vary the limitations on the basis of the court or courts being restricted. Congress could exclude only lower federal court jurisdiction in cases challenging the constitutionality of restrictions on same-sex marriage. Alternatively, it could seek to restrict only the Supreme Court's appellate jurisdiction in such cases. Third, it could restrict the jurisdiction of all federal courts. Alternatively, it could seek to restrict the jurisdiction of *all* courts, state and federal, in cases challenging same-sex marriage restrictions. Finally, Congress could vary the nature of its restriction on judicial jurisdiction. It could completely exclude judicial authority to adjudicate such claims, or it could instead seek to direct the courts to decide the constitutional issue in a particular manner. In this section, I plan to apply the general analysis contained in Section III to these variables in order to determine the extent to which Congress's jurisdiction-stripping authority may be constitutionally employed to insulate constitutional challenges to same-sex marriage restrictions.

If one were to apply the analysis described in the previous section to the various permutations of potential congressional restrictions of federal jurisdiction in the same-sex marriage area, for the most part the conclusions flow inexorably. For example, were Congress to exclude Supreme Court appellate jurisdiction in any case either raising a constitutional issue concerning same-sex marriage or involving the definition of marriage, the restriction would be constitutional. Of course, this in no way means the restriction would be wise, either as a matter of political process or civil liberty. But as Professor Hart once asked rhetorically, "Whose Constitution are you talking about—Utopia's or ours?"<sup>51</sup> I did not choose to structure Article III in this manner, nor would I have, had I been given the opportunity. The fact remains, however, that the document's text is unambiguous that Congress's power to make exceptions to the Supreme Court's appellate jurisdiction is plenary. While such power is naturally confined by restrictions imposed in the amendments, for reasons already described, neither due process nor equal protection would be violated by such a restriction.

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<sup>51</sup> See Hart, *supra* note 32, at 1372.

No more constitutionally problematic would be a congressional exclusion of lower federal court power in the same categories of cases. Because Congress has the constitutional authority to abolish the lower federal courts, it may take the lesser step of leaving them in existence but restricting their jurisdiction.<sup>52</sup> This is true, even if it does so in a substantively selective manner. This is true, even if Congress has restricted federal judicial authority to review claims of constitutional right. This is true, even if Congress has simultaneously restricted the appellate jurisdiction of the Supreme Court.

Nor would equal protection present an insurmountable problem. While a law excluding all gays and lesbians from access to the federal courts would undoubtedly be constitutionally problematic, a law focused solely on limiting federal jurisdiction in a particular category of substantive claims brought by gays and lesbians would not.

There are, however, a number of actions that Congress may not constitutionally take, and it is vitally important that, in imposing restrictions on federal court power to adjudicate constitutional claims concerning same-sex marriage restrictions, Congress be made fully aware of the limits on its authority. Congress may not exclude the jurisdiction of *all* independent judicial forums to adjudicate such claims. If it closes the lower courts and the Supreme Court, it must leave open the state courts. It is easy for politicians to engage in hyperbolic rhetoric about the need to prevent “the courts” from invading the sanctity of marriage.<sup>53</sup> But due process would not allow such a result. Thus, if Congress excludes the federal courts, it must know that in doing so it is necessarily leaving open the state courts, both empowered and bound by the Supremacy Clause<sup>54</sup> to interpret and enforce federal law—without any possibility of unifying review in the Supreme Court or any other federal court. In what seems to this untrained observer to be the height of political irony, by excluding federal court authority and locking in state court authority as the final arbiter of the constitutional protections of same-sex marriage, a Republican Congress will have assured that every “blue state” supreme court—much like the one in Massachusetts—will be in a position to definitively construe the federal Constitution to insulate same-sex marriage from state regulation. This hardly would seem to be the political result that those behind the efforts to control federal jurisdiction seek to bring about.

Moreover, Congress has no power either to resolve the substantive merits of the constitutional claims itself, or dictate to the courts—state or federal—how to decide the constitutional claims. It is for the countermajoritarian judiciary to sit as the final arbiter of the countermajoritarian Constitution.<sup>55</sup>

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<sup>52</sup> See *supra* Part III.A.

<sup>53</sup> *Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong. 9–10 (2004) (testimony of Phyllis Schlafly, Founder and President, Eagle Forum).

<sup>54</sup> U.S. CONST. art. VI, cl. 2. The Supreme Court has held that state courts are constitutionally bound to enforce federal law. *Testa v. Katt*, 330 U.S. 386, 389, 391 (1947).

<sup>55</sup> See, e.g., *Crowell v. Benson*, 285 U.S. 22, 60 (1932). This is not the place to respond definitively to the theory of “departmentalism,” which proposes that each branch sit as the final arbiter of the constitutional limitations placed upon it. Suffice it to say, at this point,



The harm is significantly aggravated when Congress, instead of itself pronouncing the meaning of the Constitution, directs the federal judiciary to resolve a particular constitutional issue in a specified manner. In these cases, Congress would abuse the special status of the federal judiciary, derived from its constitutionally dictated independence from the political branches.<sup>56</sup> Thus, while Congress possesses broad power to exclude federal judicial authority to adjudicate cases raising constitutional issues concerning same-sex marriage, it may not employ that authority either to usurp the task of constitutional interpretation for itself or to force the federal courts to act as the equivalent of a ventriloquist's dummy on questions of constitutional interpretation.

## V. CONCLUSION

Congress should surely view my analysis of congressional power to restrict judicial authority to resolve constitutional issues surrounding same-sex marriage as something of a mixed bag. On the one hand, there can be no doubt that, under my analysis, Congress may impose sweeping restrictions on federal judicial power, both in the lower courts and the Supreme Court, to decide such issues. On the other hand, before congressional supporters of such measures become too heady, it is of vital importance that they realize the significant constitutional strings attached, and the political consequences that will inexorably flow as a result. Congress may not, through resort to its Article III authority over federal court jurisdiction, exclude all judicial power to adjudicate and protect constitutional rights. This is as true of constitutional challenges to the restriction of same-sex marriage as it is to any other constitutional challenge. The state courts are simultaneously constitutionally empowered and obligated to interpret and enforce supreme federal law, including the United States Constitution. With the federal courts (in particular, the Supreme Court) closed, it is the fifty state supreme courts who will stand as the final arbiter of the constitutionality of *any* legislative restriction of same-sex marriage, both state and federal, under not only their respective state constitutions but under the United States Constitution, as well.

Thus, Congress's exercise of its Article III authority may well open a Pandora's box on the same-sex marriage issue that would lead to constitutional chaos throughout the nation and leave to the more liberal state supreme courts final say as to the meaning of the United States Constitution within the borders of their respective states. A federal law prohibiting same-sex marriage, then, could be ruled constitutional in half the states and unconstitutional in the other half. To be sure, if this is a result Congress wishes to bring about, it is constitutionally authorized to do so. However, it is difficult to imagine that a

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that such a theory ignores the obvious fact that when the very majoritarian branches limited by a countermajoritarian constitution sit as the final interpreter of those countermajoritarian limits, those limits are effectively rendered meaningless. In any event, there can be no question that the departmentalism theory, whatever its puzzling appeal may be to some scholars, has never been accepted as controlling constitutional doctrine.

<sup>56</sup> U.S. CONST. art. III, § 1 (protecting the salary and tenure of federal judges).

Congress fully informed of the potential consequences of its actions would seriously consider such an option.

For the most part, the advice I provide to Congress on this issue concerns matters of constitutional interpretation. I will be so presumptuous, however, as to render one small piece of political advice, as well: Be careful what you wish for.