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Analysis of Article V Jurisdiction-Stripping Legislation

Introduction

This memorandum considers the possibility of Congress enacting legislation to strip the federal courts and the Supreme Court of jurisdiction over cases or controversies involving Article V of the Constitution of the United States. Such legislation could govern disputes about the meaning or requirements of Article V, the amendment process set forth under Article V, or whether the requirements of Article V have been met with respect to a particular proposed amendment. It is the position of the ERA Project that the imposition of these limits on federal court jurisdiction is well within Congress's powers under Article III. Congressional action to strip federal courts of jurisdiction is advisable as a matter of both constitutional law and policy. Jurisdiction-stripping legislation would ensure that Congress retains exclusive power to resolve disputes related to Article V and preserves the "essential function" of Congress in the democratic project of constitutional amendment.

Background: The Power of Congress to Limit Federal Court Jurisdiction

Article III of the Constitution provides a textual foundation for Congress's broad power to shape, limit, or even eliminate the jurisdiction of lower federal courts: "[t]he judicial Power . . . shall be vested in … such inferior Courts as the Congress may from time to time ordain and establish." A majority of the Supreme Court has never directly ruled on a specific jurisdiction-stripping measure, but it has done so indirectly. In *Ex Parte McCardle*, the Court gave effect to a jurisdiction-stripping provision, holding that "[w]ithout jurisdiction the court cannot proceed at all in any cause," thus signaling deference to a measure stripping the Court of jurisdiction in that matter.[1] And in *Boumediene*

[1] 74 U.S. (7 Wall.) 506 (1869).

v. Bush, the Supreme Court recognized that Congress could "suspend" federal jurisdiction over petitions for the writ of habeas corpus.[2] Congress has considered scores of measures that would limit federal courts' jurisdiction over a wide range of legal questions. In the early 1980s, Congress considered over 30 proposals to strip the federal courts or the Supreme Court of jurisdiction.[3]

During his tenure at the Justice Department in the 1980s, John Roberts, now Chief Justice of the Supreme Court, wrote a legal memo strongly supporting congressional power to strip the federal courts of jurisdiction.[4] At the confirmation hearings of Chief Justice of the Supreme Court, Roberts declined to reaffirm that position given that the issue might one day come before the Court.[5]

Legal scholars have long debated the constitutionality of jurisdiction-stripping legislation.[6] In 2021, the Presidential Commission on the Supreme Court of the United States, a blue-ribbon committee composed of leading constitutional scholars and advocates, considered a range of measures to reform the Supreme Court, including stripping the Court of jurisdiction over select

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[2] 553 U.S. 723, 798 (2008).

[3] Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895 (1984)("In 1981 and 1982 alone, thirty jurisdiction-stripping bills were introduced in Congress,' some eliciting extensive committee hearings.").

[4] John Roberts, Special Assistant to the Attorney General, *Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments*, DEPARTMENT OF JUSTICE.

[5] Senate Judiciary Committee, 109th Congress, *Confirmation Hearing on The Nomination of John G. Roberts, Jr. To Be Chief Justice of The United States*, September 12-15, 2005, Serial No. J–109–37. When asked about this memorandum, he noted that it had been his view at the time he wrote the document that stripping the Supreme Court of jurisdiction was "a bad idea … bad policy." *Id.* at 210. See, Mark Agrast, *Judge Roberts and the Court-Stripping Movement*, CTR. FOR AM. PROGRESS (Sept. 2, 2005).

[6] *See, e.g.,* CHARLES L. BLACK JR., DECISION ACCORDING TO LAW, 18 (1981) ("My own position is . . . that Congress does have very significant power over the courts' jurisdiction."); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL L. REV. 1030, 1038 (1982) (urging that the Exceptions Clause "plainly seems to indicate that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the [Supreme Court's] appellate jurisdiction, it has the authority to do so"); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611, 614 (1983) ("Congressional control of the courts' jurisdiction under article III has the sanction of the First Congress, draftsmen of the Judiciary Act of 1789, and of an unbroken string of decisions stretching from the beginning of the Republic." (footnote omitted)); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990) (arguing that "the inescapable implication of the text is that Congress possesses broad power to curb the jurisdiction of both the lower courts and the Supreme Court"); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 920 (1984) ("[A]rticle III grants a very broad discretion to Congress in assigning federal question litigation to state or federal courts."); 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, 204 (1997) (defending "the traditional view that Congress's authority is substantial" when it comes to Congress's power to limit the jurisdiction of federal courts); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965)(finding "no basis" for the view that Congress lacks broad power to limit federal jurisdiction); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1065 (2010); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011).

matters. The Commission concluded that "Congress undoubtedly has some capacity to disempower the Supreme Court by restricting its jurisdiction if Congress should choose to do so."[7]

Scholars who have voiced reservations about the legitimacy of congressional efforts to limit the jurisdiction of the federal courts generally, or the Supreme Court specifically, have almost uniformly rested their concerns on three principal objections to the idea of congressional jurisdiction stripping, none of which apply in the case of stripping the federal courts of jurisdiction over Article V disputes.[8] Several prominent scholars have recently renewed the call for Congress to exercise its power to deny federal courts jurisdiction over discrete matters.[9]

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[7] Presidential Commission on the Supreme Court of the United States, *Final Report* at 163-169 (Dec. 2021).

[8] The first form of objection focuses on a concern that jurisdiction-stripping risks "destroy[ing] the essential role of the Supreme Court in the constitutional plan." 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). *See e.g.,* Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 201 (1960) (congressional restrictions on the Supreme Court's appellate jurisdiction must preserve its "essential constitutional functions of maintaining the uniformity and supremacy of federal law"); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 Duke L.J. 1, 23 (2019); *see also* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Tex L. Rev. 1433, 1435 (2000) (accepting Congress has significant authority to strip the Supreme Court of jurisdiction but arguing that the Court's "supreme" status requires that it be able to exercise at least minimal oversight in all cases). Hart's "essential function" objection does not apply with respect to disputes involving Article V which centers Congress—and anticipates no role for the federal courts—in the constitutional amendment process. The second kind of objection is that Congress may selectively strip the federal courts of jurisdiction over a matter that implicates rights enumerated in the constitution. This concern is raised when Congress considers measures stripping the federal courts of jurisdiction over issues like same-sex marriage, school prayer, abortion, and other matters that implicate fundamental constitutional rights. A plurality of the Supreme Court embraced this concern in *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality opinion) ("So long as Congress does not violate other constitutional provisions, its 'control over the jurisdiction of the federal courts' is 'plenary.'" (quoting *Trainmen v. Toledo*, P & W.R. Co., 321 U.S. 50, 63–64 (1944))), and in *United States v. Klein*, when the Court stated that jurisdiction-stripping legislation that is enacted "as a means to an end" that is not constitutionally valid "is not an exercise of the acknowledged power of Congress to make exceptions . . . to the appellate power.". *See also* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 271-72 (1985); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L.REV. 1778, 1828 (2020). This second objection is not implicated in the Article V jurisdiction-stripping context insofar as no other constitutional rights would be undermined or denied by virtue of denying federal court jurisdiction over Article V disputes. The third form of objection to jurisdiction stripping measures is that denying federal courts jurisdiction over an important matter of federal law would result in a shift of power to state courts, resulting in a multiplicity of views on what the constitution means. Gerald Gunther described the problem as "choking on redundancy." Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 897 n.9 (1984)(quoting a letter from William W. Van Alstyne, Professor of Law, Duke Law School, to Gerald Gunther, Professor of Law, Stanford Law School (Feb. 28, 1983)).

[9] See, Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 . N.Y.U. L. Rev. 1778, 1828 (2020); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 Cal. L. Rev. 1703 (2021).

The Essential Political Nature of the Constitutional Amendment Process Under Article V

Article V of the Constitution sets forth the procedures for amending the Constitution and specifically anticipates no role for courts or the Executive Branch in this process. The authority to propose and ratify amendments lies entirely in the political process, in Congress, state legislatures, and/or constitutional conventions. As such, the project of constitutional amendment is among the most quintessentially democratic exercises of self-government anticipated by the Constitution, and the amendment process should be left to the most representative bodies—Congress, state legislatures, and constitutional conventions. So, too, questions relating to the procedures for proposing and successfully ratifying proposed amendments are essentially political questions, properly left to the authority of political bodies to resolve.

Article V requires that any amendment be proposed by two-thirds of both Houses of Congress and ratified by three-quarters of the state legislatures.[10]

Examples of legal uncertainties in previous amendments include:

- The 12th Amendment (which provides separate Electoral College votes for President and Vice President) was approved in the Senate by two-thirds of a quorum, not the full body.
- The 13th, 14th, and 15th Amendments were ratified in the immediate aftermath of the Civil War. They were accomplished through legal maneuvers that were highly unusual in violation of Article V—yet are widely and justly regarded as foundational elements of our modern democracy.
- The text of the 16th Amendment (which authorizes the federal income tax) varied between state ratifications yet now forms the basis for the ubiquitous federal income tax.
- The 17th Amendment (which establishes the direct election of U.S. Senators) was approved by the House and Senate in different legislative sessions.
- The 27th Amendment (sometimes called the "Madison Amendment," which governs Congressional pay raises) was proposed by the First Congress and then took more than 200

[10] U.S. CONST., art. 5 ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress .. .").

> years to be ratified by 38 state legislatures, and is now accepted as a part of the Constitution.[11]

It is worth noting that none of the disputes related to the 12th, 13th, 14th, 15th, 16th, 17th, or 27th Amendments were resolved by submitting them to the jurisdiction of the federal courts or the U.S. Supreme Court. Instead, each amendment took effect as a political, not legal, matter.

Conclusion

The questions that remain with respect to the status of the ERA are not unusual but instead are quite typical of the amendment process related to earlier proposed amendments. Those open questions are ones best addressed by Congress rather than through litigation in the federal courts. Disagreements related to proposed amendments should be addressed in ways that reflect and reinforce the underlying democratic structure and values of the amendment process itself. As between possible resolutions to a dispute relating to the ratification of a proposed amendment, the most democracy-enhancing answer should be favored. And that answer is for Congress to retain exclusive jurisdiction over disputes related to the Article V amendment process. Legislation stripping the federal courts of jurisdiction over these disputes would be both constitutional and democracy-enhancing.

[11] David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2317-2395 (2021).

Appendix: Sample Language for Legislation Stripping Federal Courts of Jurisdiction Over Article V Disputes

Sec. 1. Neither the Supreme Court nor any inferior court ordained and established by the Congress under Article III of the Constitution of the United States shall have jurisdiction to review or to reverse, vacate, modify, or disturb in any way, cases or controversies involving Article V of the Constitution of the United States, including disputes as to the meaning or requirements of Article V, the amendment process set forth under Article V, or whether, with respect to a particular proposed amendment, the requirements of Article V have or have not been met.