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Power To Define the Constitutional Rights of Defendants: Congress and the Federal Courts

Cover Page Footnote
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POWER TO DEFINE THE CONSTITUTIONAL RIGHTS OF DEFENDANTS: CONGRESS AND THE FEDERAL COURTS

RICHARD A. GIVENS

I. INTRODUCTION

In an open society, there is continual tension between the desire to control and punish crimes and abuses, and the desire to protect the rights of the accused. We want to detect and prevent crime, but feel that if we allow too much freedom to law enforcement officers, the innocent may be punished along with the guilty.

Our system of criminal justice has been willing, in some cases, to let some of the obviously guilty go free, rather than permit them to be apprehended in a manner violating rights which all persons in our society possess. Both fairness and effectiveness in law enforcement are vital to the protection of the citizen. Any decision altering this balance necessarily results in strong dissent from the protagonists of one or both sides of the dialogue, frequently leading to proposed legislation attacking judicial interpretations.

Substantial attention has been given to revision of the federal criminal laws as a result of recommendations by the National Commission on Reform of Federal Criminal Laws appointed in 1966, congressional hearings, bar reports, a controversial Senate subcommittee version of the Federal Criminal Code, and a compromise version of the Code now before the Senate. Questions of criminal procedure, whose significance may be as great as that of the substantive laws themselves when dealing with the practicalities of obtaining convictions, have also come under examination by Congress.

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What happens when Congress and the Supreme Court disagree on the proper scope of a particular constitutional right? The Court can, of course, strike down a congressional enactment as unconstitutional. What can Congress do, in turn, to affect the Court’s interpretation? Since the power to interpret constitutional rights rests primarily in the Court, the power of Congress in this area is necessarily limited. Congress or its members have attempted to use congressional authority under article III of the Constitution and under section 5 of the fourteenth amendment to influence the manner in which constitutional rights are defined—without much success. In some cases, however, the Court has invited legislative setting of standards in conformity with judicially defined constitutional rights. This illustrates that there is a role which Congress can play in the formulation of criminal procedure, so as to affect the way in which constitutional rights are implemented, within certain judicially determined bounds. This Article will examine some of the interplay between Congress and the courts in the area of constitutional rights, and the extent of congressional power to control judicial action with a view to shaping rights of defendants.

II. USE OF CONGRESSIONAL POWER OVER FEDERAL COURTS’ JURISDICTION

A. Congressional Power over Federal Courts Under the Constitution

1. Power over Lower Court Jurisdiction

Under article I, section 8, of the Constitution, Congress has power “[t]o constitute Tribunals inferior to the supreme Court.” Article III, section 1, 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.”

Congress’ power to create inferior courts has been repeatedly said to include plenary power to regulate the jurisdiction of those courts so as to

10. See pts. II and III infra.
12. See id. at 467, 490.
include or exclude certain classes of cases.\textsuperscript{15} This does not include, however, the power to give a lower federal court jurisdiction over a type of case under compulsion that it decide the case in a manner conflicting with other constitutional provisions.\textsuperscript{16} Nor does it appear that this power would permit jurisdiction to be granted with the stipulation that it would be withdrawn if the exercise of such jurisdiction would lead to the decision of the case in a way not desired by the drafters of the legislation.\textsuperscript{17} Early assertions that the entire constitutionally permissible jurisdictional power of the United States must be vested in some federal court were, nevertheless, repudiated.\textsuperscript{18} Furthermore, a number of cases have sustained limitations on the jurisdiction of federal courts to consider various defenses to judicial action by stressing that other judicial remedies were available.\textsuperscript{19}

If a particular statute were to deprive a lower federal court of jurisdiction, reasoning sustaining that jurisdiction on constitutional grounds despite its withdrawal might run as follows: (1) The court has general jurisdiction under statutes which are applicable in broad categories of cases that would normally encompass the one before the court;\textsuperscript{20} (2) The exception to the general jurisdiction which has been attempted would, considered alone, violate the due process clause or otherwise offend the

\begin{footnotes}
\item[15] See Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938); Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Sheldon v. Sill, 49 U.S. (8 How.) 441, 447-48 (1850). Article III, section 2, provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1.
\item[17] Id. (invalidating ch. 251, 16 Stat. 235 (1870)).
\end{footnotes}
Constitution; (3) Since the general jurisdiction remains and the objection to it is not sustainable, the court retains jurisdiction and can proceed to the merits.

2. Power over Supreme Court Jurisdiction

In the case of the Supreme Court, the context is changed, and the argument against withdrawal of jurisdiction is strengthened because that Court has been created by the Constitution.\(^{21}\) Here, the argument that Congress can choose to create or not to create the tribunal, and therefore is not required to provide any jurisdiction, is clearly inapplicable. However, article III, section 2, provides that in most cases subject to federal jurisdiction "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."\(^{22}\) Much discussion has centered on the meaning of the terms "Exceptions" and "Regulations." Scholars have questioned whether in theory these terms permit Congress to eliminate all jurisdiction from the Supreme Court—hence, in practice, to remove entire areas from its jurisdiction—or whether they permit Congress to withdraw jurisdiction if a case were to be decided in a particular way.\(^{23}\) Such possibilities may be affected, however, by the due process clause of the fifth amendment.

3. Limitations Imposed by the Fifth Amendment Due Process Clause

Possible changes which Congress could make in the jurisdiction of the Supreme Court (as well as other federal courts), consistent with article III, are limited in their scope by the fifth amendment due process clause.\(^{24}\) This clause was enacted subsequent to the original Constitution and is a limitation on the powers granted to Congress in the original Constitution.\(^{25}\) Any "Exception" or "Regulation" under

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22. Id. § 2, cl. 2. The power of Congress to include or exclude certain classes of cases has been held to apply to the Supreme Court's appellate jurisdiction. "Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not." The Francis Wright, 105 U.S. 381, 386 (1882).


article III limiting petitions to the Supreme Court which would violate due process would, therefore, be unconstitutional.

Of course, appeals are not necessarily required by due process in all cases. However, at least where the first amendment rights of freedom of speech and press are involved, the Court has held procedural safeguards and judicial review mandatory under the due process clause of the fourteenth amendment. In addition, affirmative exceptions to otherwise generally available appellate process which have the effect of carving out entire areas of jurisdiction without justification might be attacked on due process grounds as unreasonable, being detrimental to constitutionally protected rights. Even if in certain areas due process does not prohibit withdrawals of existing general Supreme Court appellate jurisdiction, it may violate due process to take away effective judicial protection of individuals who allege violations of due process, at least if alternative protection is inadequate. If such an argument were accepted, withdrawal of Supreme Court appellate jurisdiction over matters involving fifth or fourteenth amendment due process would in turn violate due process, and could not be sustained.

Given the historical importance of the life tenure requisite at the summit of the United States judicial system, it is arguable that for a judicial remedy to be adequate, it must include ultimate review by a body composed of judges having life tenure. Obviously, not all judges passing on federal constitutional questions must have life tenure. However, where violations of due process are alleged, an ultimate appeal to a tribunal having the stability guaranteed by life tenure may be found implicit in American due process as it has developed through history. To consider such a question we would, according to Justice Stone, "turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes."

Thus, at the very least, it appears quite likely that judicial review by

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27. U.S. Const. art. III; cf. The Federalist No. 78 (A. Hamilton) 431-34 (Colonial Press ed. 1901) (discussing the interrelationship between life tenure and independence of federal judges); Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, 36 U. Chi. L. Rev. 665 (1969) (suggesting that legislation providing alternate means of removal will not solve problems of judicial tenure). In upholding lesser tenure for District of Columbia judges handling local cases in Palmore v. United States, 411 U.S. 389 (1973), however, the Court said: "[T]he requirements of Art. III ... are applicable where laws of national applicability and affairs of national concern are at stake ... ." Id. at 407-08. See also authorities cited in id. at 410-22 (Douglas, J., dissenting).

judges protected by life tenure in cases involving alleged violations of due process may be deemed implicit in due process, and hence constitutionally protected.

B. Efforts of or Within Congress To Withdraw Jurisdiction from Federal Courts

1. Judicial Treatment of These Efforts: Ex Parte McCord and Subsequent Cases

The foremost authority cited to support the concept of unlimited congressional power to withdraw Supreme Court appellate jurisdiction is Ex parte McCord. McCord, though not in military service at the time, was held in military custody while awaiting trial before a military commission. He had been charged with making libellous and incendiary statements in a newspaper of which he was editor. McCord alleged that he was unlawfully restrained by the military forces, and sought a writ of habeas corpus. When his petition was denied, he appealed to the Supreme Court under an act passed in 1867 granting that Court jurisdiction over certain habeas corpus appeals. After argument but before decision, however, Congress repealed the 1867 act, and argument was subsequently held on the effect of the repeal.

The Supreme Court upheld the repealing statute and declined to exercise jurisdiction. It did, however, construe the repeal as leaving prior jurisdiction unaffected and thus avoided the question of whether a remedy could have been entirely cut off:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.
Thus, the decision in *McCardle* strongly emphasized that other means besides review under the statute repealed were available to remedy the allegedly illegal detention.\(^7\)

Nevertheless, the generally accepted view is that *Ex parte McCardle* declared that the exceptions clause gives Congress plenary power like the commerce clause.\(^8\) One commentator discussing *McCardle* expressed this concept as follows:

The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated and, hopefully, generally to be respected by Congress as a matter of enlightened policy once the power was granted, as it was, to the fullest extent. In short, the clause is complete exactly as it stands: the appellate jurisdiction of the Supreme Court is subject to "such Exceptions and under such Regulations as the Congress shall make."\(^9\)

In *Ex parte Yerger*,\(^{40}\) decided in the same year as *McCardle*, the Supreme Court upheld its jurisdiction over a habeas corpus proceeding brought before it by writ of certiorari, rather than appeal, under jurisdictional legislation prior to 1867. Thus *Ex parte Yerger* makes it clear that the *McCardle* Court merely allowed Congress to withdraw a matter. One commentator has criticized *McCardle* for the "unguarded suggestion by the Court that the case was dismissed for 'want of jurisdiction' when, according to the Court's own observations, it had adequate jurisdiction to proceed but simply declined, under the circumstances, to proceed sua sponte on a different jurisdictional basis than that previously relied upon by a party in no immediate danger of irreparable harm." Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229, 254 (1973). Van Alstyne also pointed out that "the Court treated the Repealer Act as though the Act (which was the only statute immediately in controversy before the Court) itself established some 'exception' to the Court's article III appellate jurisdiction when in fact the Repealer Act evidently created no exception to that jurisdiction and may not have been based on that clause at all." Id.

37. 74 U.S. (7 Wall.) at 515.


39. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229, 260 (1973). Eleven years after the decision in *McCardle*, the Supreme Court affirmed the constitutionality of congressional limitation of Supreme Court jurisdiction in admiralty appeals to questions of law arising on the record. The Francis Wright, 105 U.S. 381 (1882). In discussing the exceptions and regulations clause, U.S. Const. art. III, § 2, cl. 2, the Court stated: "What [the appellate] powers [of the Court] shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. . . . The whole of a civil law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is matter of legislative discretion, not of constitutional right. The Constitution prohibits a retrial of the facts in suits at common law where one trial has been had by a jury . . .; but in suits in equity or in admiralty Congress is left free to make such exceptions and regulations in respect to retrials as on the whole may seem best." Id. at 386.

40. 75 U.S. (8 Wall.) 85 (1869).
procedure whereby the Court could hear certain cases, rather than its power to hear those cases. The Court implied that withdrawals of jurisdiction such as the one at issue in *McCardle* would not necessarily be upheld in all cases. The Court stated that the congressional action in *McCardle* was taken under "peculiar" circumstances. The action was branded as "unusual and hardly to be justified except upon some imperious public exigency."42

In 1870, Congress withdrew the jurisdiction of the Court of Claims over cases which involved recovery of captured property, where the claimant had received a pardon containing a recital of previous adherence to the Confederacy.43 The following year, the Supreme Court in *United States v. Klein*44 found that this withdrawal of jurisdiction was an attempt to prescribe a rule of decision in conflict with the pardon power.45 However, this still left open the question of whether jurisdiction could be exercised when Congress had denied the power of the Court to act in the type of case before it. The Court resorted to the somewhat surprising statement that it was "impossible to believe that this provision was not inserted in the appropriation bill through inadvertence."46

A similar decision was made, but more modern language used, about a century later when the Supreme Court declined to apply a limitation on jurisdiction over conduct of Selective Service Boards alleged to be in direct contravention of statute.47 The Court said that the jurisdictional limitation could not "sustain a literal reading."48

In other cases, where it was not so clear that Congress had withdrawn jurisdiction in order to cut off a judicial remedy when constitutional rights were violated, the Supreme Court has held that a judicial remedy was available.49 As a general rule, the Court will construe ambiguous statutory language so as to provide a remedy, especially where doing so will avoid what the Court believes to be a serious

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41. *Id.* at 103.
42. *Id.* at 104.
43. Ch. 251, 16 Stat. 235 (1870).
44. 80 U.S. (13 Wall.) 128 (1871).
45. *Id.* at 145-48.
46. *Id.* at 148.
49. 393 U.S. at 238.
constitutional question. As Chief Justice Marshall once said: "Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended."

In a 1958 case involving the alleged disregard by the National Labor Relations Board of a prohibition against combining certain types of employees in collective bargaining units, the Court said that review must "surely" be available if a clear violation of law can be shown. The Court stated: "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control."

The same result has been achieved in some instances by simply ignoring a jurisdictional issue or treating the case as a deceptively simple one under general jurisdictional provisions. This is done on the unspoken premise that jurisdictional limitations obviously do not apply to a case involving a plain violation of legal rights where no other remedy is available. Hallowed language can be cited in support of a finding of jurisdiction in these cases, such as the following from Marbury v. Madison: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Thus, the Court may disregard a statutory limitation on jurisdiction without reaching a constitutional finding that the withdrawal of jurisdiction is actually invalid.

54. Id. at 189.
55. Id. at 190 (quoting Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 300 (1943)). See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 224-28 (1953) (Jackson, J., dissenting).
57. One methodology of judicial review allows review under broadly phrased constitutional provisions, primarily where other restraints are inadequate or threatened. See generally Givens, Chief Justice Stone and the Developing Functions of Judicial Review, 47 Va. L. Rev. 1321 (1961).
Withdrawals of jurisdiction which have been sustained have involved the lower federal courts and have never involved withdrawal of all federal judicial remedies for an alleged violation of federal constitutional rights. There has always been another remedy at least arguably available, or a question as to whether a federal constitutional right was in fact involved, or both.60 Language in many of these and other cases has clearly implied that the availability of federal judicial review over federal constitutional questions is basic to our constitutional system, and that its withdrawal would either be unconstitutional or raise the most serious constitutional questions.61 Where, however, the intent is plain and no constitutionally protected rights of the parties are at stake, e.g., because other remedies are available, or because the nature of the decision being made does not touch constitutionally protected interests of the parties, it has been held that judicial review can be denied by statute.62

(1919) (where there is a contention that the Interstate Commerce Commission has exceeded its statutory powers, the courts have jurisdiction to enjoin a commission order despite a party's failure to seek administrative redress); Jewel Cos. v. FTC, 432 F.2d 1155, 1159 (7th Cir. 1970) (district court denied jurisdiction where there could still be judicial review following proceedings of the FTC); Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342, 343-44 (D.C. Cir. 1965) (per curiam) (statutory provision for review of agency action by courts of appeals does not necessarily preclude district court jurisdiction); Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 861-62 (4th Cir. 1961) (federal court jurisdiction to compel administrative action is authorized to the extent necessary to satisfy a statutory requirement); Knoll Assocs., Inc. v. Dixon, 232 F. Supp. 283, 285-86 (S.D.N.Y. 1964) (federal court jurisdiction exists in administrative agency cases to protect constitutional rights or prevent substantial unfairness); Wanderer v. Kaplan, [1962] Trade Cas. (CCH) ¶ 70,535 (D.D.C. 1962) (district court had jurisdiction where plaintiff contended that the FTC had violated his constitutional right to counsel); Archer v. Lemke, [1962] Trade Cas. (CCH) ¶ 70,417 (N.D. Ill. 1962) (district court jurisdiction proper to protect witnesses contending denial by FTC of right to counsel); Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L.J. 175 (1960) (New York courts look beyond the text of applicable union constitutions to considerations of fairness and public policy).


2. Bills Attempting To Withdraw Federal Judicial Jurisdiction

Even though long established case law, as described above, makes it fairly plain that Congress cannot cut back on federal judicial jurisdiction, and in particular Supreme Court appellate jurisdiction, in order to restrict constitutional rights as defined by the Court, bills are still introduced to do just that. Some of these bills have dealt with criminal matters; others with civil matters.

In 1957, Senator Jenner introduced a bill which was designed to deprive the Court of appellate jurisdiction over all cases involving the validity of: (1) contempt proceedings against witnesses before congressional committees; (2) dismissal of government employees on security grounds; (3) state laws for the control of subversive activities; (4) regulations relating to subversive activities of public school teachers; and (5) state requirements for admission to the practice of law. This measure reflected its supporters' dissatisfaction with Supreme Court decisions in these areas. Under this bill, the meaning of the Constitution in the specified areas would be finally determined by each of the eleven courts of appeals and by the highest court of each state.

The bill was never passed and public hostility to the unpopular decisions receded. However, one must note that this was not an attempt by Congress to usurp the Court's power for itself. Under the bill, Congress' power over the enumerated subjects would not have been enhanced; but the courts of appeals and the highest courts in the states would have been given final authority over these subjects.

In 1964, the Supreme Court handed down six decisions dealing with the reapportionment of the legislatures of six states. There was an immediate outcry against these decisions by those who favored

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63. S. 2646, 85th Cong., 1st Sess. (1957). A bill was also introduced in the second session of Congress aimed at depriving the Supreme Court and the federal courts of appeals of appellate jurisdiction in any case where the action of a state concerning its public schools was attacked on grounds other than "substantial inequality of physical facilities and other tangible factors." S. 3467, 85th Cong., 2d Sess. (1958).


determination by a state of its own voting districts. In an effort to override the Court's holdings, several resolutions were introduced in Congress to provide for a constitutional amendment which would prevent further federal judicial action with respect to apportionment. In addition, bills such as one introduced by Representative Tuck in the 89th Congress would have eliminated district court original jurisdiction and the Supreme Court's appellate jurisdiction to hear state reapportionment cases. None of these efforts was successful; hence, the bills introduced never faced a court test. Nevertheless, these bills represent reliance on *McCoy* to enable Congress to restrict the appellate jurisdiction of the Supreme Court.

Four years later, another attempt was made to remove federal judicial jurisdiction in order to weaken court-defined constitutional rights, through early versions of Title II of the Omnibus Crime Control and Safe Streets Act of 1968. As reported by the Senate Judiciary Committee, Title II attempted to overrule certain Court decisions and remove jurisdiction. This version of Title II contained four sections. The first was aimed at displacing the *Miranda* warnings and replacing them with a voluntariness rule based upon the trial court's examination of the circumstances. The second would have removed the Court's jurisdiction to review state court cases in which it had been determined that a confession had been voluntarily made. The third section, though badly drafted, would have overruled *United States v. Wade*, which required that attorneys be present at lineups as a condition to the introduction of an eyewitness' line-up identification at trial. This section also removed federal jurisdiction over state cases admitting eyewitness identification. The final section sharply reduced the availability of habeas corpus for review of state criminal convictions.

The Senate rejected the second and fourth sections of Title II and that part of the third section which would have denied federal jurisdiction over state cases dealing with eyewitness identification. Thus, Title II as enacted diminished the impact of *Miranda* and *Wade*, but was not the overhaul of criminal procedure planned. It was modified

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73. 388 U.S. 218 (1967).
76. The bill came under attack from bar groups and others. *See*, e.g., Comms. on Civil
to apply the revisions of the *Miranda* and the *Wade* rules only to actions in federal court, and did not withdraw any of the jurisdiction of the Supreme Court or other federal courts.\(^7\)

C. The Institution of Judicial Review

Since, despite case law to the contrary,\(^7\) there are recurrent efforts to deprive federal courts of judicial review on constitutional issues, discussion of the role of judicial review remains important. Future periods of tension between Congress and the courts may produce renewed congressional endeavors to nullify the courts' position on constitutional matters by taking jurisdiction from them.

There is support for the institution of judicial review, formally enunciated in *Marbury v. Madison*,\(^7\) in the words of the Bill of Rights. The first amendment begins with the words “Congress shall make no law . . . .”\(^8\) The import of this phrase appears to be that the framers of the Bill of Rights did not intend the courts to enforce laws of the kind forbidden by the amendment. In a similar vein, Hamilton, writing for *The Federalist*, stated:

> There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.\(^8\)

In accordance with this concept, Hamilton stated that the courts should be the ultimate arbiters of the constitutionality of laws, and that laws which they found unconstitutional should be struck down:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.\(^8\)

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\(^8\) See pt. II(B)(1) supra.
\(^7\) See pt. II(B)(1) supra.
\(^7\) 5 U.S. (1 Cranch) 137 (1803).
\(^8\) U.S. Const. amend. I.
\(^8\) The Federalist No. 78 (A. Hamilton) 429-30 (Colonial Press ed. 1901).
\(^8\) Id. at 430. An interesting commentary on the significance of the question of judicial review to the politicians who were debating the issue has been made in I C. Warren, The Supreme Court in United States History (1922): “It has been very generally assumed by historians
In light of our country's English background and history from colonial times through the early constitutional period, Professor John M. Kernochan has concluded: "[T]he institution of judicial review established for the American nation by the opinion of Chief Justice Marshall in Marbury v. Madison in 1803 was . . . the natural fruition of centuries of development."\(^3\) Historical evidence consistent with the text of the Constitution thus accords with the unbroken tradition of the exercise of judicial review since 1803. Historical and textual support, however, can hardly settle the issue of its desirability in contemporary society.

When the Court makes an unpopular decision, critics frequently point out the nonelective character of the Court's membership. Controversies concerning the Court have tended to revolve around assertions that the Court substitutes its own views as to what is desirable for those of the elected representatives of the people. Underlying many of the criticisms is the view that judicial review of the constitutionality of the acts of the elected branches is a usurpation of power by the judiciary; such judicial review is claimed to be contrary to strict democratic principles.

The argument against judicial review has been made as follows: Democracy means government by the people, and under our system the people rule through representatives who can be voted out of office if the people disapprove of their policies. Judicial review of the acts of the elected branches contravenes majority rule and means that the judiciary is supreme on all questions which it chooses to decide. Since judges are appointed for life and hence are not responsible to the electorate, democratic theory is said to be violated.\(^4\)

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\(^3\) Kernochan, On the Origin of Judicial Review, in Cases on Constitutional Law, 69 (6th ed. N. Dowling 1959). Professor Kernochan's conclusion is based upon the English background for judicial review from the Norman Conquest through the Magna Carta (1215), the Petition of Right of 1628, the English Bill of Rights of 1689, the practices of the colonial period, the events of the period from the Revolution to the Constitution, the debates of the Convention and on ratification, and the writings of the early constitutional period prior to 1803. Id. at 20-84. See generally E. Rostow, The Sovereign Prerogative (1962), reviewed by Phillips, 18 Record of N.Y.C.B.A. 152 (1963); see also P. Bator, F. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 4-6 (2d ed. 1973); A. Bickel, The Least Dangerous Branch 14-16 (1962); The Federalist No. 78 (A. Hamilton).

The ancient theory of democracy was that the people should rule directly, deciding questions of public policy by popular vote. The Declaration of Independence adopted a different position, however. It affirmed instead that governments derive their "just powers from the consent of the governed." Consent seemed to mean that those who exercise authority must be chosen by the people in elections with free debate, or appointed by those who are so elected. Such is the nature of all the positions which have been established under the Constitution of the United States—they are either elective or filled by appointment by elected officials.

Once it is established that a position is to be filled in this manner, the question remains as to how long those selected should serve. A short term allows the electorate to alter the policies of government more rapidly. But if a term is too short, little may be accomplished because turnover will be great and continuity unduly disturbed. If government is to be either fair or effective, the people cannot afford the luxury of changing their minds too often. In considering this problem, the framers of the Constitution fixed the term of members of the House of Representatives at two years, that of the President at four years, that of the Senators at six years, and that of federal judges, including Justices of the Supreme Court, at life or until voluntary retirement, except in cases of misconduct.

In the first 180 years of the Court's history, 100 justices were appointed, which averages just over one appointment every two years. At this rate, five Justices, a majority of the Court, are replaced every decade. While the average service of a Justice is longer than the six-year term of a Senator, the composition of the Court is thus fairly responsive to the will of the elected branches over the long run. Where a serious issue has set the Court and the elected branches at odds, changing a small number of Justices may frequently prove decisive. The charge that the Court is undemocratic thus resolves itself into a question of degree: Is the term of service of the Justices too long, considering the duties of the Court? If the Court is to serve as an umpire preserving open access to the political and judicial processes

85. The Declaration of Independence (1776).
88. Id. art. II, § 1, cl. 1.
89. Id. art. I, § 3, cl. 1.
90. Id. art. III, § 1.
within fair procedures, and if the Court's role is to stand fast before the vicissitudes of the prevailing national consensus,\textsuperscript{92} which the Legislature should reflect, the term does not seem too long.

Even if the power of the Supreme Court \textit{considered alone} might be deemed undemocratic, it would still not follow that the consequence of the role of the Court is to remove our governmental structure further from "government of the people, by the people, and for the people."\textsuperscript{93} Political decisions in the United States have never been made in accordance with pure democratic theory alone, nor could they be, given the size of the nation and the problems which it must confront. Many issues are sufficiently technical that the public cannot deal with them directly in an informed manner.\textsuperscript{94} This does not diminish the role of the people; it merely makes it \textit{different} from that which is sometimes supposed. The public can make basic \textit{underlying} choices through elections and public debate. In fact, the very existence of the right to vote frequently makes the adoption of policies which would alienate important segments of voters less likely.

Some of our many departures from the theory of pure democracy have important virtues, and there is a lack of workable alternatives to others.\textsuperscript{95} Taken in the aggregate they represent a substantial departure from pure democratic theory. Accordingly, the question which should be asked concerning the role of the Supreme Court is not simplistically, "Is the Court compatible with democratic theory?" but rather, "What is the Court's impact on our constitutional system?" This matter should be examined from the aspects of both structure and long-term operation.

One consequence of the Court's role is to give our democratic government greater continuity—because of the very feature of life tenure sometimes attacked as undemocratic. The long-run impact of the Court is inherently conservative in the sense of conservation of enduring values. As Professor Charles L. Black, Jr., has put it, judicial review is "the people's institutionalized means of self-


\textsuperscript{93} A. Lincoln, \textit{Gettysburg Address}, \textit{reprinted in} H. Raymond, \textit{History of the Administration of President Lincoln} 382 (1864).

\textsuperscript{94} W. Lippmann, \textit{Public Opinion} 300-03 (1946); \textit{see, e.g., Senate Panel Backs New Energy Tax Bill}, \textit{N.Y. Times}, Oct. 15, 1977, at 1, col. 3.

\textsuperscript{95} For instance, our system of representation in Congress enables Congressmen to gain more specialized knowledge on the issues confronting them. Likewise, the President's authority over foreign policy, \textit{see United States v. Curtiss-Wright Export Corp.}, 299 U.S. 304 (1936), provides the only practical way that a large nation such as ours can keep diplomatic secrets and maintain coherent relations with other nations.
control.”96 Future Chief Justice Harlan F. Stone expressed a similar sentiment in 1915:

By vesting this power ultimately in the Supreme Court, a body removed from political activity and possessing no control over the armed forces or material resources of the nation, and by the method of its constitution removed from the immediate pressure of popular clamor, the Constitution insured the peace and order of the country and intrusted the civil liberty of its citizens to the body best adapted to preserve and perpetuate it.97

A second impact is to give greater weight to enduring national interests and greater recognition to needs affecting the nation as a whole.98 The Justices do not represent any particular state or district—they act on behalf of the entire nation in interpreting its Constitution and laws. The President is the only other officer who can ever individually occupy this role: all others, including administrative appointees, have a constituency of specific interest groups with which they must deal more regularly than with others.99

Do these considerations guarantee that the exercise of judicial review will be constructive? Obviously not. What, then, is our protection against possible abuse through judicial review? It should not be fear on the part of the Justices of reprisal against themselves or against the Court if the decisions they issue are contrary to contemporary public opinion. Indeed, it is when our public servants—on or off the bench—resist such pressures that they are later applauded for their courage.100 A valid protection is a constructive response on the part of the public and the elected branches to the Court's decisions. This involves the search for a new synthesis in those cases where judicial decisions do not meet all the needs in a situation.101 It entails neither hostility to the role of the Tribunal nor automatic acceptance of the most recent decision on a particular point as the last word.

There is also a practical objection to attempted withdrawals of Supreme Court jurisdiction to review federal constitutional questions; namely, the confusion and lack of uniformity in interpretations of federal law that would result. It was not by accident that Chief Justice

96. C. Black, The People and the Court 107 (1960).
97. H. Stone, Law and Its Administration 138 (1915); see id. at 130-58.
98. Cf. Hunt v. Washington State Apple Advertising Comm'n, 97 S. Ct. 2434 (1977) (Court rejected a state's contention that the standardization required by its statute served the national interest and was therefore a justifiable burden on interstate commerce).
100. See generally J. Kennedy, Profiles in Courage (1956).
101. See pt. IV infra.
Marshall said, in regard to major constitutional questions, "[B]y this tribunal alone can the decision be made."102

For all these reasons, it seems most unlikely that changes in the administration of criminal justice could workably be achieved by use of congressional power over federal judicial jurisdiction.

The *McCardle* decision has not resulted in successful use of the unlimited congressional power the decision appears to permit. The case should be viewed as an unfortunate departure from traditional judicial protection of due process. Were Congress now to try to use *McCardle* to eliminate federal appellate jurisdiction over selected criminal matters, there is little likelihood that courts would uphold such legislation, if the legislation were interpreted to withdraw jurisdiction over alleged violations of due process.

III. CONGRESSIONAL POWER TO CHARACTERIZE EQUAL PROTECTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

A. Background

Apart from article III power over the jurisdiction of the federal courts, broad congressional power over criminal procedure in state as well as federal cases has been said to flow from section 5 of the fourteenth amendment, which empowers Congress to enforce the provisions of that amendment by appropriate legislation.103 Section 5 of the fourteenth amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."104 This includes the due process and equal protection clauses of section 1 of the fourteenth amendment.

Until recently, this enforcement provision has had little impact on constitutional law. The early decisions concerning the section were pointed to Congress' new relationship with the states and had been

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104. U.S. Const. amend. XIV, § 5.
aimed at maintaining state sovereignty. In *United States v. Cruikshank*, a case involving the right of black citizens to vote, the Court held that this amendment merely gave Congress the power to enforce rights which should be enforced by state governments.

In 1879 the Court stated that "[t]he prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power." Thus, Congress was given merely a remedial power to counteract state laws which in some way had interfered with individual rights. As the Court subsequently stated, "The Fourteenth Amendment . . . did not invest . . . Congress with power to legislate upon subjects which are within the domain of state legislation." Under this interpretation, the Court would first look to the applicable state law to determine the rights which were involved, and only secondarily to the Congress as the guarantor of such rights. In practice, this role gave Congress very little room to effect any remedial legislation. It fostered a situation in which Congress could only act upon a right recognized by the state, but subsequently removed. Under this interpretation, the Court often did not find, as Congress had, that the state had in fact abridged a right. This very limited view of congressional power under section 5 of the fourteenth amendment continued up until 1966 when the Court decided *Katzenbach v. Morgan*.

105. 92 U.S. 542 (1876).
106. "That duty [equal protection of the laws] was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty." *Id.* at 555; see Orloski, *The Enforcement Clauses of the Civil War Amendments: A Repository of Legislative Power*, 49 St. Johns L. Rev. 493 (1974).
107. *Ex parte Virginia*, 100 U.S. 339, 346 (1880). The Court went on to state, "It is these [prohibitions against the states] which Congress is empowered to enforce, and to enforce against State action . . . ." *Id*.
108. See *The Civil Rights Cases*, 109 U.S. 3 (1883). This view finds some support in the legislative history of the amendment. Originally, the Joint Committee on Reconstruction reported a bill which would have given Congress vast discretionary powers to enforce the section 1 guarantees. This version never obtained the necessary two-thirds majority and the present compromise version of the amendment was substituted and enacted. See J. James, *The Framing of the Fourteenth Amendment*, 50, 82-83 (1956); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 57-60 (1955); Note, *Federal Power To Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 Colum. L. Rev. 449 (1974).
B. Congressional Power as Construed in Katzenbach v. Morgan

In Morgan, the Court upheld section 4(e) of the Voting Rights Act of 1965 on fourteenth amendment grounds. This Act provided that no person receiving a sixth-grade education in an American-flag school would be denied the right to vote on the ground that he was not literate in English. The principal effect of this provision was to enfranchise Puerto Rican residents of New York formerly barred from voting by the state's English literacy requirement. The provision was sustained, although literacy tests had been held not to be unconstitutional per se; and notwithstanding the fact that Congress had made no attempt to justify the law on the ground that states such as New York were using English literacy requirements as a subterfuge for ethnic origin discrimination.

In deciding the case, the Court characterized section 5 as a broad grant of discretionary power to Congress. Justice Brennan, writing for himself and five other Justices, analogized this grant to the authority arising under the necessary and proper clause. He stated that Congress could determine "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." As long as the Court could perceive a rational basis for the congressional determination that the measure was appropriate to insure the amendment's guarantees, it would not inquire further.

The Court also recognized Congress' independent authority to find that state practices violated the equal protection clause, even where the Court was unwilling to make that determination itself. As long as Congress had a rational basis for its judgment, the Court would not strictly scrutinize its actions. Nevertheless, the Court placed an important limitation upon the enforcement of any guarantees under the amendment. In replying to a suggestion in the dissent that Congress has the power under section 5 to define the substantive scope of the fourteenth amendment, Justice Brennan emphasized:

112. Id. at 658.
113. Id. at 643.
114. Id. at 652-53.
116. In a companion case to Morgan, the Court avoided the question of whether the New York law was invalidated by the equal protection clause. Cardona v. Power, 384 U.S. 672 (1966).
117. 384 U.S. at 650.
118. Id. at 651.
119. Id. at 653.
120. "Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement... constitute[s] an invidious discrimination in violation of the Equal Protection Clause." Id. at 656.
Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.121

According to Professor Cox of Harvard Law School, Morgan showed the existence of a "vast untapped reservoir of federal legislative power to define and promote the constitutional rights of individuals in relation to state government."122 This, he maintained, would permit Congress to adopt a "comprehensive code of criminal procedure" based on its "own findings of fact and evaluation of the competing considerations."123

C. Congressional Power as Construed in Oregon v. Mitchell

The Supreme Court cast doubt on the breadth of the Morgan decision, however, in Oregon v. Mitchell.124 This case involved the Voting Rights Act Amendments of 1970.125 Without benefit of a majority opinion and in five separate opinions the Court decided four constitutional questions that defined Congress' power with regard to standards for voting. The Court, per Justice Black, found: (1) that the provision lowering the minimum voting age from twenty-one to eighteen was valid as applied to federal elections;126 (2) that the provision lowering the minimum voting age from twenty-one to eighteen was invalid as applied to state elections, inasmuch as section 5 of the fourteenth amendment did not authorize Congress to legislate qualifications for state elections;127 (3) that the suspension of literacy tests for five years for federal, state, and local elections was a valid exercise of congressional power under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, since Congress based its determination on a finding of fact that literacy tests were used to

121. Id. at 651 n.10.
123. Id. at 108. See also Note, The Enabling Clause of the Fourteenth Amendment: A Reservoir of Congressional Power?, 33 Colum. L. Rev. 854, 862 (1933) ("Congress appears to be able to define equal protection and due process in positive terms, and thus exclude implicitly or expressly an otherwise acceptable alternative.").
126. 400 U.S. at 117-18.
127. Id. at 118.
deprive blacks of the franchise;128 and (4) that federal legislation governing registration and absentee voting in presidential elections was constitutional.129 In reaching these results, the Court departed from the precedent of Morgan and recognized new requirements under the Constitution for congressional action under the enforcement clause.

The Court divided three ways in Oregon. Morgan seemed to suggest that the Court would give conclusive effect to a congressional determination, founded on some ascertainable basis, that the extension of the vote to eighteen-year-olds was necessary to effectuate fourteenth amendment protections. Alternatively, it might find that such age discrimination constituted an invidious classification unsupported by a compelling state interest. Four Justices, however, argued that Congress lacked power to change age qualifications for all elections,130 while four others held the opposite.131 The deciding vote was cast on non-fourteenth amendment grounds by Justice Black, who decided that although Congress had power to regulate federal elections under article I, section 4, and the necessary and proper clause, the power to determine qualifications for state elections was expressly delegated to the states under article I, section 2.132

Justice Black stated that the historical context of all the Civil War amendments was of overriding importance, and that the enforcement clauses were chiefly intended to give Congress power to legislate against racial discrimination.133 Given the lack of racial discrimination as an issue in the case, Justice Black was firmly opposed to any enlargement of congressional powers through the enforcement clause.134 Justice Harlan, who reached the same result on this point as Justice Black,

128. Id. at 118.
129. Id. at 119.
130. Id. at 154 (Harlan, J., concurring in part and dissenting in part), 294 (Stewart, Burger & Blackmun, J.J., concurring in part and dissenting in part).
131. Id. at 135 (Douglas, J., concurring in part and dissenting in part), 240 (Brennan, White & Marshall, J.J., concurring in part and dissenting in part).
132. Id. at 117-30 (Black, J., announcing the judgments of the Court in an opinion expressing his own views).
133. Id. at 127. "The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race." Id.
134. As Justice Black recognized in his opinion, however, numerous decisions have held that racial discrimination is not the only conduct which can violate the due process and equal protection clauses. Id. at 126-27. In fact, it is through the fourteenth amendment that provisions of the Bill of Rights have been made applicable to the states. Id. at 129.
stated that the issue of equal protection was a judicial one, and emphasized that the judiciary is "supreme in the exposition of the law of the Constitution."\textsuperscript{135}

The limitation illustrated by \textit{Oregon v. Mitchell} on congressional power to reinterpret the meaning of due process and equal protection had been foreseen by two authors in 1933, who stated:

There would be no doubt but that Congress could codify the rules in the field of due process and equal protection already mapped out by the Supreme Court; and in so doing, and in novel situations, probably could define fresh paths. However, Congressional action might well arouse the jealousy of the courts . . . . \[It would be rare . . . . that a Congressional definition would be held constitutional which contradicted a previous position taken by the Court.\textsuperscript{136}

The result of \textit{Oregon} and \textit{Morgan} taken together may be that while Congress can effectuate the policies of the due process and equal protection clauses of the fourteenth amendment, ultimately the Court will interpret the meaning of these guarantees. Nevertheless, the Court has recognized that these clauses have expanded the powers of Congress.\textsuperscript{137} In addition, there is considerable historical support for the expansive use of congressional power under section 5.\textsuperscript{138}

The distinction between "rights" and the methods used to implement them obviously cannot be stretched so far that Congress could so exercise its enforcement power as to obliterate the rights. Perhaps concern that such attempts will be made makes federal courts hostile to efforts to limit their jurisdiction on constitutional matters. Such efforts are probably consigned to a dim future.

\textsuperscript{135} \textit{Id.} at 204 n.86 (Harlan, J., concurring in part and dissenting in part) (quoting Cooper v. Aaron, 358 U.S. 1, 18 (1958)); see \textit{id.} at 204-05 (Harlan, J., concurring in part and dissenting in part) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); note 82 supra and accompanying text.

\textsuperscript{136} Note, \textit{The Enabling Clause of the Fourteenth Amendment: A Reservoir of Congressional Power?}, 33 Colum. L. Rev. 854, 862 (1933) (footnotes omitted).

\textsuperscript{137} \textit{See}, e.g., \textit{Ex parte Virginia}, 100 U.S. 339, 345 (1880) ("It is the power of Congress which has been enlarged."). \textit{But see} note 103 supra and accompanying text. \textit{See also} South Carolina v. Katzenbach, 383 U.S. 301 (1966) (discussing congressional power under the fifteenth amendment).

IV. AN ALTERNATIVE: CONGRESSIONAL PRESCRIPTIONS TO IMPLEMENT CONSTITUTIONAL RIGHTS IN THE AREA OF CRIMINAL PROCEDURE

Many of the most important decisions on criminal procedure have concerned the formulation by the courts of safeguards for constitutional rights, based on the absence of other effective safeguards. Such formulation offers a more promising area for possible congressional action than attempts either to overrule judicial decisions by legislative action under section 5 of the fourteenth amendment, or to make them unenforceable by withdrawing jurisdiction under article III of the Constitution.

A. The Exclusionary Rule

For example, decisions concerning the disposition of evidence obtained in violation of the fourth amendment prohibition against unreasonable searches and seizures represent a judicial choice of a particular constitutional safeguard where no meaningful alternative seemed available. In 1961, the Court in *Mapp v. Ohio*\(^\text{139}\) required the states to observe the federal exclusionary rule because this appeared to be the "only effectively available way"\(^\text{140}\) to ensure compliance with the fourth amendment and thus deter enforcement authorities from improper conduct.\(^\text{141}\)

A number of additional means of enforcing the fourth amendment's guarantee against unreasonable searches and seizures have been proposed, some to supplement the exclusionary rule and some to replace it in whole or in part.\(^\text{142}\) The majority of these proposals suggest that, as an alternative to excluding the evidence obtained through an unlawful search and thereby possibly allowing a criminal to go unpunished, sanctions should be imposed upon the person or agency guilty of conducting the illegal search.\(^\text{143}\) Chief Justice Burger has suggested that legislation permitting such sanctions include a waiver of sovereign immunity for illegal acts committed by officers.\(^\text{144}\)

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\(^{140}\) Id. at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).


One possible sanction is civil damage suits. In connection with such suits, it has been suggested that there be a minimum amount of liquidated damages and that the equitable doctrine of unclean hands not be available as a defense.\textsuperscript{145} This would ensure that the individual whose rights had been violated would be compensated regardless of whether any incriminating evidence were found. The rights protected by the fourth amendment would not be ignored simply because the individual seeking their enforcement was suspected of a separate crime. Because of the possible prejudice that might exist when a suspected criminal brings a suit, it has also been suggested that these suits be held before a quasi-judicial tribunal similar to the Court of Claims.\textsuperscript{146}

An alternative to civil suit is that criminal sanctions be imposed against offending officers where the violation is willful. These sanctions currently exist, although in reality prosecutors rarely enforce them.\textsuperscript{147} To avoid this problem, it has been suggested that proceedings could be initiated without a prosecutor, perhaps merely upon an affidavit of the victim. Departmental action resulting possibly in fines or suspension could then be taken against the offending officer if the charges were upheld.\textsuperscript{148} The risk here, however, of spite actions against officers is severe—perhaps especially when they are doing their duty.

Rather than make all evidence obtained through an unlawful search inadmissible, it has been suggested that such evidence not be excluded if the officer obtaining it was acting in good faith; that is, he did not believe he was violating the individual's fourth amendment rights.\textsuperscript{149} Such a proposal appears to be difficult to apply. The concept of good faith is probably too vague to be used as a criterion for determining whether there shall be any remedy when an individual's constitutional rights have been violated. Another method for narrowing the scope of the exclusionary rule would be to admit evidence obtained in violation of the fourth amendment only if the crime is a serious one. The main problem with this approach is that it might encourage law enforcement officials to disregard entirely the mandate of the fourth amendment where serious crimes were involved.\textsuperscript{150}

\begin{itemize}
\end{itemize}
tee against unreasonable searches and seizures include: injunctive relief,\textsuperscript{151} conditioning of a partial lifting of the exclusionary rule on an adequate program to comply with the amendment,\textsuperscript{152} and new administrative procedures.\textsuperscript{153}

If any of these remedies were adopted to supplement the exclusionary rule or to replace it under certain circumstances, an important consideration would be whether individual officers or the governmental agencies involved should be liable for any damages suffered. Agency liability would guarantee a solvent defendant able to pay damages and would avoid undue deterrence of individual officers who might not be willing to act vigorously where a search was indicated for fear of personal lawsuits against them.\textsuperscript{154} In addition, the agency could be expected to establish rules to minimize its liability by disciplining officers whose actions resulted in agency liability. Administrative penalties against officers who willfully offended might also be adopted.\textsuperscript{155}

Federal law could provide for federal agency liability.\textsuperscript{156} Federal action to impose liability on state and local governments, however, might raise constitutional as well as public policy questions.\textsuperscript{157} Of course, state and local agencies could be allowed to consent to liability under federal law and offered some change in the exclusionary rule in return, if that were deemed desirable, and if the totality of remedies made available were found by the courts to be sufficiently effective.

B. Miranda Warnings

In \textit{Miranda v. Arizona},\textsuperscript{158} the Court set forth requirements for the admissibility into evidence of information given by criminal defendants during custodial interrogation, again as a judicially prescribed safeguard in the absence of other effective safeguards. The Court stated:

\begin{itemize}
  \item \textsuperscript{152} \textit{1969 Hearings}, supra note 7, at 225-27; \textit{Comm. on Criminal Law, New Approaches}, supra note 142, at 631.
  \item \textsuperscript{155} \textit{See note 153 supra.}
  \item \textsuperscript{156} \textit{See, e.g., 5 U.S.C. § 552a(g) (Supp. V 1973); Gellhorn & Schenck, Tort Actions Against the Federal Government, 47 Colum. L. Rev. 722 (1947).}
  \item \textsuperscript{157} \textit{See Fitzpatrick v. Bitzer, 427 U.S. 445 (1970); Monroe v. Pape, 365 U.S. 167 (1961).}
  \item \textsuperscript{158} 384 U.S. 436 (1966).
\end{itemize}
It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution . . . . Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform . . . . We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.¹⁵⁹

Hence, the Court in Miranda issued a broad invitation to legislative development of new procedures for the interrogation of suspects.¹⁶⁰ To date, the only legislative action that has been taken is Title II of the Omnibus Crime Control and Safe Streets Act of 1968,¹⁶¹ which provided that a confession would be admissible in evidence if the defendant gave it freely. Whether the defendant had been advised of his rights was only one factor to be considered in determining the voluntariness of the confession.¹⁶²

There have been other approaches suggested in this field, one being that newly arrested suspects should be brought immediately to a magistrate for interrogation, rather than to the police. This would reduce the possibility of improper pressures resulting in confessions. The accused's rights and privileges would be similar to the ones he would have at trial.¹⁶³

It is generally assumed that the fifth amendment guarantee against self-incrimination provides an absolute right to remain silent and prohibits the drawing of adverse inferences under any circumstances. However, some have suggested that extensive procedural safeguards could be established, including absence of contempt or perjury sanctions, absence of questions relating to internal mental operations or religious or political beliefs, right to a transcript, and presence of counsel,¹⁶⁴ which would make the drawing of an inference from silence not "compulsion" in the constitutional sense.¹⁶⁵ Such questions

¹⁶⁰. 384 U.S. at 467.
¹⁶². Id. § 3501.
¹⁶⁵. See 1969 Hearings, supra note 7, at 222-24. Judge Friendly has proposed that a procedure along these lines be adopted by constitutional amendment. Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671 (1968). However, the cases decided to date do not deal with the type of procedural safeguards discussed and do not clearly establish whether a constitutional amendment is necessary. See 1969 Hearings,
could be evaluated on the basis of history as well as "the steady pressure of facts and events."167

C. The Jencks Decision

Some congressional efforts to change criminal procedure in areas touching on constitutional rights are limited in scope. An example of this is the legislative activity following the Jencks decision. In Jencks v. United States,168 the Court enlarged a criminal defendant’s right of access to government documents useful for cross-examination of prosecution witnesses.169 Jencks was prosecuted for filing affidavits with the NLRB falsely stating that he was not a Communist.170 The Court reversed the conviction because the trial court refused to allow the defense access to relevant FBI reports.171

There was a large public outcry against this decision, entirely out of proportion to the limited import of its holding.172 In response, Congress felt obliged to pass contrary legislation. The statute that was finally adopted established procedures whereby the defense could obtain signed statements made and adopted by a witness, but only at trial.173 This procedure was substantially the same as that mandated by the Jencks decision, so Congress did not, in fact, attempt to counter the Supreme Court.

D. Evaluation

These are merely examples of some areas where further study could lead to changes in procedure. The objective both from the constitutional and practical standpoints should be to strengthen law enforcement and individual rights simultaneously by updated procedures. Indeed, the two are interdependent: Law enforcement cannot be fair if

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169. Id. at 669-72.
171. 353 U.S. at 672.
172. The public was largely concerned with indiscriminate sifting of FBI files. See 103 Cong. Rec. 10577-78 (1957); W. Murphy, Congress and the Court 129 (1962).
it is not effective, and can hardly be truly effective if it is not fairly administered.

Congress and the courts each have a role in the implementation of constitutional rights. In constitutional cases, however, the legislative safeguards must be what courts would consider effective if they are to stand up as valid replacements of prior judicial protections. In determining what procedures should be considered, it is necessary, of course, to look to the fundamental purpose of the constitutional provision involved. Underlying constitutional requirements may not be compromised by legislatures.

The challenges of more effective criminal procedure, are, of course, crucial on both the federal level and the state and local levels. The limited but significant powers of Congress in the latter area should be an additional encouragement to comprehensive reexamination of the machinery of criminal justice generally.

However, Congress must be very careful in selecting the areas of the law of criminal procedure which should be codified and in defining the constitutionally acceptable acts within that area. The advantage of having principles established by case law has always been their flexibility. Such flexibility is desirable because it permits subtle changes to meet the needs of the individual case and the current social mores. This is of particular importance in the area of constitutional law. If the Court should stray too far in any direction in deciding a case or in the language of its opinions, it can later alter its course. A striking example of this change is the development of the law on the exclusionary rule in the Warren and Burger Courts.

Statutes by their very nature have a greater permanence than case law. It is more drastic for the Court to hold a statute unconstitutional than it is for it to modify one of its earlier opinions. For this reason, Congress must be very careful in deciding what procedures to mandate.


V. Conclusion

Our system of separation of powers depends on a constructive tension between those powers. Checks and balances should operate to prevent any one branch from gaining too much control. Whereas the President possesses the Executive power\textsuperscript{179} and is Commander in Chief of the armed forces,\textsuperscript{180} and Congress controls the appropriation of federal funds,\textsuperscript{181} the judicial branch has no substantial national resources at its disposal. It must rely primarily upon recognition of its authority for the enforcement of its decisions.\textsuperscript{182} Yet it is this branch which has been responsible to define the extent of its own and the other 'branches' functions. Through the institution of judicial review it has interpreted the Constitution by which the powers of government are defined.

The Supreme Court was intentionally isolated from the temporary impact of popular will to prevent the exercise of any "tyranny of the majority."\textsuperscript{183} However, at times short-term majorities on particular issues may become restive with what they perceive as the tyranny of the Court, and seek a way to negate its decisions. This is particularly true in the definition of constitutional rights. The courts have, to date, developed most of the law regarding procedures to enforce federal constitutional requirements in both state and federal criminal cases.

Congressional attempts to change the results of these decisions or to alter their future course by regulation of the jurisdiction of the federal courts under article III will necessarily encounter severe difficulties. Efforts to alter judicial constructions of due process and equal protection guarantees by means of legislation under section 5 of the fourteenth amendment would seem an equally unpromising approach. On the other hand, under section 5 Congress would appear to have broad power to deal with state procedures for the enforcement of fourteenth amendment guarantees. In federal prosecutions, Congress has broad discretion as to constitutional safeguards. The limitation in both instances would be that the methods adopted by Congress to protect constitutional rights must be those which courts would find effective.

Though actions of this nature which Congress could take have been discussed, very little has been done. However, in this way Congress could work with the Court, rather than against it, in those instances where reliance on the continuing development of case law is deemed inadequate. This leaves a wide area for potential legislative activity.

\textsuperscript{179} U.S. Const. art. II, § 1, cl. 1.
\textsuperscript{180} Id. § 2, cl. 1.
\textsuperscript{181} Id. art. I, § 8, cl. 1.
\textsuperscript{182} The Federalist No. 78 (A. Hamilton) 428 (Colonial Press ed. 1901).
\textsuperscript{183} J. Acton, \textit{Sir Erskine May's Democracy in Europe}, in \textit{The History of Freedom and Other Essays} 97 (1907).