

CONGRESS, COURTS, AND CONTROL OVER PERSUASIVE SOURCES OF LAW

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ABSTRACT

A movement to ban the courts from using foreign sources of law, specifically Sharia law, has recently been underway in both state and federal legislatures. This movement to restrict judicial discretion, like other similar “source ban” laws enacted throughout the history of the United States, has been described by scholars as a response to popular sentiment in light of national and international events. This article addresses the constitutionality of these popularly supported laws that restrict the court’s consideration of unpopular, non-authoritative, or persuasive, sources of law, and it explores the line at which legislative authority must end and judicial discretion must be unfettered. Its argument is divided in two parts. First, this article argues that source bans are unconstitutional when applied to Article III courts deciding constitutional questions because there is a constitutional “floor” on legislative authority over the courts. The existence of a constitutional floor is supported by the overarching principles behind of the doctrines of judicial review, constitutional supremacy, and separation of powers. This article also argues that the debate over the breadth of the Exceptions Clause ultimately supports the argument of a “floor” for decisions involving constitutional questions. Second, this article argues that a different analysis is necessary to determine the validity of source bans applied to court decisions on sub-constitutional questions. It ultimately concludes that there is no applicable First Amendment protection for judicial opinions, but a source ban may be unconstitutional if the court is unable to engage in meaningful decision-making as a result of the ban, or if such a restriction on the court’s access to information is considered to be, just as a similar restriction was considered by the Supreme Court in *Legal Services Corporation v. Velazquez* to be, inconsistent with the general separation of powers scheme.

* B.S., Georgetown University, 2012; J.D., Cornell Law School, 2015. I would like to thank Professor Michael Dorf, whose insight and guidance throughout the process of writing this article has been invaluable. I also thank Professor Josh Chafetz for comments on an early draft, which have shaped my subsequent revisions. I am grateful to the editors and associates of the *Gonzaga Law Review* for their thoughtful edits and the improvements they have made to this article. Lastly, I would like to thank my mom, to whom I owe my every success.

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I. INTRODUCTION

Although the American legal system is commonly understood to have descended from the British common law system, there was a period of time after the Revolutionary War when American ill-will toward the English led some of the new states to ban citations of English decisions.¹ The new Americans labeled

1. FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES* 80 (1940).

English common law the “rags of despotism,” and English judges were “tyrants, sycophants, and oppressors of the people and enemies of liberty.”²

In Kentucky, for example, an 1816 statute mandated that “all reports of cases decided in England since the 4th of July, 1776, should not be read in court or cited by the court.”³ The purpose of the statute was likely to discourage the continued use of English law as authoritative law, but the language of the statute was vastly over-inclusive and banned use of “all” British law in the courts of Kentucky.⁴ The Kentucky Court of Appeals enforced the statute.⁵ In 1848, Kentucky historian Lewis Collins⁶ opined that the broad ban of all English laws achieved the result of “smother[ing] the light of science and stop[ping] the growth of jurisprudence.”⁷

However, growth in population and commercial traffic meant that the new states needed to develop a sophisticated system of law, and do so quickly.⁸ While French law was popular because Americans supported the French Revolution and French egalitarian values,⁹ practical considerations like the language barrier eventually led the states to adopt English laws, although some American laws remained French-influenced.¹⁰ Despite the Kentucky statute, Collins stated that several judges made “copious references” to English decisions and treatises issued after the war, so that the statute “may be considered dead.”¹¹

The sentiments that some sources of law are inimical to the American interest and that judges have a dangerous degree of discretion are not extinct.¹² Since the early 2000s, a modern movement to ban judges from considering foreign law, with a particular emphasis on Sharia law, has been underway in the

2. *Id.*

3. LEWIS COLLINS, HISTORICAL SKETCHES OF KENTUCKY 107 (1848).

4. *Id.*

5. *Id.*

6. *See generally id.* (Although Collins presents a historical account of Kentucky law, he was born in 1797 and would have contemporaneously witnessed the movement in Kentucky to ban British laws from its jurisprudence. Collins’s writings referring to the Kentucky law were published in 1848.).

7. *Id.*

8. *See* AUMANN, *supra* note 1, at 77–78.

9. *Id.* at 8687.

10. *Id.* at 9293.

11. COLLINS, *supra* note 3.

12. *See* Eun-Jung K. Kim, *Islamic Law in American Courts: Good, Bad, and Unsustainable Uses*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 287, 288 (2014) (“Judicial decisions that rely on Islamic law—and as a result, violate the rights of litigants—have led to support for legislation that prohibits U.S. state courts from applying, considering, or interpreting Islamic law.”).

United States.¹³ Like the movement to ban British law after the Revolutionary War, the modern movement to ban foreign law has been driven by popular feelings of animosity in light of major national and international events.¹⁴ Most states have considered legislation banning foreign law or Sharia law, and a handful of states have passed and enacted such laws.¹⁵ This article will refer to the laws of this movement as “foreign source guidance laws” in order to reflect the wide variety of forms that the laws of this movement may take.¹⁶ However, the media often refers to these laws as “anti-Sharia bills,”¹⁷ “foreign law bans,”¹⁸ or even “anti-Muslim” laws.¹⁹

Although this article will use foreign source guidance laws as an example for its analysis, the goal is to address more generally whether legislative bodies, specifically Congress, may direct the decision-making process of judges by restricting the non-authoritative, or persuasive, sources that judges may consult when rendering decisions and issuing opinions.

After an overview of foreign source guidance laws in Part II, this article will discuss, in Part III, the constitutional issues that arise when Congress enacts a source ban affecting an Article III court’s decision-making process for cases

13. See David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1417-18 (2006) (describing the initiation of this movement after the decision of *Lawrence v. Texas*, 539 U.S. 558 (2003), where Justice Scalia, in his dissenting opinion, noted that the majority’s citation of foreign law was “meaningless dicta,” “dangerous dicta.”).

14. See discussion *infra* Section II.B.

15. *Id.*

16. While some proposed laws ban all foreign law, others only restrict court use of foreign laws that are contrary to the U.S. Constitution and the constitution of the state. For example, Alabama’s version of the foreign source guidance law was narrow, only barring the enforcement of foreign laws that would violate any state law or right guaranteed in the Alabama or United States Constitution. *Alabama Foreign Laws in Court, Amendment 1 (2014), Constitutional Text Changes*, BALLOTPEDIA, [http://ballotpedia.org/Alabama_Foreign_Laws_in_Court_Amendment_1_\(2014\)_constitutional_text_changes](http://ballotpedia.org/Alabama_Foreign_Laws_in_Court_Amendment_1_(2014)_constitutional_text_changes) (last visited Jan. 26, 2016). See also Eugene Volokh, *Amendment banning “foreign law” in Alabama courts passes?*, WASHINGTON POST (Nov. 5, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/05/amendment-banning-foreign-law-in-alabama-courts-passes> (Volokh argued that Alabama’s version of the law closely mirrored “normal” American choice-of-law provisions.).

17. Omar Sacirbey, *Anti-Sharia Bill Passed in North Carolina Without Governor Pat McCrory’s Signature*, HUFFINGTON POST (Aug. 27, 2013, 12:39 PM), http://www.huffingtonpost.com/2013/08/27/anti-sharia-bill-north-carolina-gov-pat-mccrory_n_3823796.html.

18. Volokh, *supra* note 16.

19. Amos Toh & David Barkey, *Commentary: Anti-Muslim Bigotry Taints Florida Ban on Foreign Laws*, WASHINGTON POST (May 16, 2014), https://www.washingtonpost.com/national/religion/commentary-anti-muslim-bigotry-taints-florida-ban-on-foreign-laws/2014/05/16/fae45b08-dd27-11e3-a837-8835df6c12c4_story.html.

involving *constitutional* questions.²⁰ Part III will also address the essential judicial function of independent judicial review and argue that source ban laws obstruct that constitutionally prescribed core function. Although the Constitution authorizes Congress to facilitate Article III court functions through the Necessary and Proper Clause,²¹ the Exceptions Clause,²² and the inferior courts clause,²³ this article will argue that the necessity of an independent judicial review of constitutional issues presents a constitutional floor for congressional power over judicial decisions. Through a discussion of court cases and academic debate over the Exceptions Clause and jurisdiction stripping, this article will demonstrate that there is no evidence that congressional authority to make exceptions to the Court's jurisdiction can bypass the aforementioned constitutional floor.

In Part IV, the article will discuss source bans affecting the court's deliberations for *sub-constitutional* questions. In contrast to the limitations placed on congressional legislation affecting the court's decision-making process for constitutional questions, Congress has expansive power over the resolution of sub-constitutional issues.²⁴ However, Congress's power is not without limits.²⁵ Part IV includes discussion of two possible exceptions to Congress's power to regulate the sources the Court may consult when deliberating a sub-constitutional question. First, this article argues that Congress may not hinder the Court's inherent power to make a meaningful decision. Second, this article concludes that there is no First Amendment protection for judicial opinions or even judicial dicta. Instead, the best option is to conduct a separation of powers analysis. Part IV concludes.

II. BACKGROUND: THE FOREIGN SOURCE GUIDANCE LAWS

In the past five years, thirty-four state legislatures and the United States Congress have considered proposals to limit or ban a judge's use of foreign law

20. This paper will only discuss issues implicated by source bans on the federal level, not the state level. While this analysis will not be directly translatable to the constitutional doctrines of each of the fifty states, many states do model their constitutions after the federal constitution. For those states, the analysis may be similar.

21. U.S. CONST. art. I, § 8, cl. 18.

22. U.S. CONST. art. III, § 2, cl. 2.

23. U.S. CONST. art. I, § 8, cl. 9.

24. See discussion *infra* Section IV.A.

25. See discussion *infra* Section IV.B.

when deciding a case.²⁶ Seven states have passed these laws.²⁷ While the parameters of the proposed and enacted laws vary, the motivation behind the passage of these laws has largely been a reactionary fear of U.S. courts adopting Sharia law.²⁸ Most legislators point to the 2010 New Jersey case, *S.D. v. M.J.R.*,²⁹ in which the judge denied a wife's request for a restraining order against her husband.³⁰ Despite the wife's reports of her husband beating and raping her, the judge declined to issue a restraining order and cited the husband's genuine belief that religion mandated sexual relations upon the husband's demand.³¹

However, many critics of the foreign source guidance laws argue that the laws are redundant or addressing a non-existent threat.³² Randy Brinson, the president of the Christian Coalition of Alabama, said in response to the passing of Alabama's amendment regulating judicial use of foreign laws, "Sharia law is not going to be implemented in Alabama, it just isn't" and called the vote a "tremendous waste of effort."³³ As for *S.D. v. M.J.R.*, the New Jersey appellate court reversed the trial court's decision early in 2010, finding that the trial judge erred in failing to issue a restraining order.³⁴

Apart from the fear of judicial incorporation of Sharia law into American law, there are convincing criticisms of judges who use foreign laws. For instance, Justice Scalia's disagreement with judicial use of foreign laws to interpret the

26. See Liz Farmer, *Alabama Joins Wave of States Banning Foreign Laws*, GOVERNING.COM (Nov. 4, 2014), <http://www.governing.com/topics/elections/gov-alabama-foreign-law-courts-amendment.html> ("[a]ll but 16 states have considered such a measure").

27. *Id.* The seven states that have passed foreign source guidance laws are Arizona, Kansas, Louisiana, South Dakota, Tennessee, North Carolina, and Alabama. *Id.* The legislatures of two more states passed similar foreign law bans, but these laws are not enforceable: in Missouri, a bill was passed by the legislature but was vetoed by the governor and in Oklahoma, a law was passed but was struck down as unconstitutional by the Tenth Circuit Court of Appeals. *Id.*

28. See Michael Micsky, *Anti-Sharia Legislation and the Status of the American Muslim*, JURIST (Oct. 29, 2013, 9:41 AM), <http://jurist.org/dataline/2013/10/elizabeth-mohamad-sharia-law.php>.

29. 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).

30. Abel Awad, *The True Story of Sharia in American Courts*, THE NATION (June 13, 2012), <http://www.thenation.com/article/168378/true-story-sharia-american-courts#>.

31. *Id.*

32. Julia Edwards, *Alabama Voters Pass Sharia Law Ban*, HUFFINGTON POST (Nov. 5, 2014, 9:59 PM), http://www.huffingtonpost.com/2014/11/05/alabama-sharia-law_n_6105086.html.

33. *Id.*

34. *S.D. v. M.J.R.*, 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).

U.S. Constitution is well known.³⁵ In a book exploring when and how judges have used foreign law, Professors Markesinis and Fedtke included a chapter warning of the possible pitfalls when a judge cites to sources outside her own jurisdiction.³⁶ Some examples of judicial errors include: failing to use the most updated version of the foreign law; using generalities from the foreign source rather than considering the particular context in which the judge is deciding; and failing to assess the impact of the political environment and structure on the foreign law.³⁷ When using foreign sources, language barriers, different histories, different political considerations, and other factors render it more difficult for judges to take into consideration all of the nuances of a judicial opinion—nuances that a judge must take into account to accurately assess the significance of a judicial holding, regardless of whether the judge is looking at domestic law or foreign law.

Although the unconsidered use of foreign laws and other persuasive sources should be avoided, the major factors fueling support for the foreign source guidance laws warn of the potential motivations behind source bans that can make them dangerous.³⁸ Many of the foreign source guidance laws are fueled by an animosity toward a minority group residing in the United States, rather than a drive to create prudent judicial standards.³⁹ The history of state and federal foreign source guidance laws show how source bans can result from majority-minority group conflict on a charged political issue, even when the law is neutral on its face.⁴⁰

35. See, e.g., Mary Flood, *Scalia criticizes courts citing foreign trends*, CHRON (Nov. 18, 2008), <http://www.chron.com/news/houston-texas/article/Scalia-criticizes-courts-citing-foreign-trends-1766787.php>.

36. See SIR BASIL MARKESINIS & DR. JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?*, vi (2006).

37. See *id.* at 122-23. In addition, the authors warn against the danger of making assumptions about culture and the translatability of law, and they question a comparative approach which asks sociological questions like the following: are the Germans more like Americans, or are the English? *Id.* at 154. “It is all too easy to allow the cry of ‘cultural differences’ to become the universal apologetic based upon comparative example.” *Id.* (quoting John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 855 (1985)).

38. See, e.g., Amos Toh & David Barkey, *COMMENTARY: Anti-Muslim bigotry taints Florida ban on foreign laws*, WASHINGTON POST (May 16, 2004), https://www.washingtonpost.com/national/religion/commentary-anti-muslim-bigotry-taints-florida-ban-on-foreign-laws/2014/05/16/fae45b08-dd27-11e3-a837-8835df6c12c4_story.html.

39. See, e.g., *id.* (“Legislation forbidding the use of foreign law in state courts is the brainchild of anti-Muslim activists bent on demonizing the Islamic faith.”).

40. See discussion *infra* Part II.A-B.

A. *State Laws*

In early 2010, Oklahoma State Representative Rex Duncan and State Senator Anthony Sykes introduced House Joint Resolution 1056, an amendment to the Oklahoma Constitution prohibiting courts from considering foreign law.⁴¹ The authors of the amendment explicitly stated that the purpose of H.J.R. 1056, later dubbed the “Save Our State Amendment,”⁴² was to prevent Oklahoma judges from citing Sharia law.⁴³ According to Duncan, British judges had been faced with the same issue as American courts and had allowed Sharia law to become entrenched in the British legal system.⁴⁴ Duncan expressed his doubts that the British legal system would be able to survive with this development.⁴⁵ The Save Our State Amendment was Oklahoma’s preemptive strike against the dangers of Sharia law.⁴⁶

Through the proposed amendment, the Oklahoma legislature delivered a message to judges that the state’s public policy⁴⁷ was to avoid the policies contained within Sharia law, or any foreign law:

The Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically the courts shall not consider international law or Sharia law. The provisions of this subsection shall

41. Mark Schlachtenhaufen, *Sharia law, courts likely on 2010 ballot*, THE EDMOND SUN (OKLAHOMA) (June 4, 2010), http://www.edmondsun.com/news/local_news/sharia-law-courts-likely-on-ballot/article_a9028340-24bd-5675-9b2a-9c62650e3cae.html?mode=print. HJR 1056 was renamed as SQ 755 when it was submitted to the voter ballot. *Id.*

42. Penny M. Venetis, *The Unconstitutionality of Oklahoma’s SQ 755 and Other Provisions Like It That Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189, 190 (2011).

43. See H.R.J. Res. 1056, 52nd Leg., 1st Reg. Sess. (Okla. 2010).

44. Schlachtenhaufen, *supra* note 41.

45. *Id.*

46. *Id.*

47. See Robert E. Michael, *The Anti-Shari’a Movement and Oklahoma’s Save Our State Amendment – Unconstitutional Discrimination or Homeland Security?*, 18 ILSA J. INT’L & COMP. L. 347, 367 (2012) (discussing the policy implications of not recognizing foreign judgments). See also, e.g., *De Brimont v. Penniman*, 7 F. Cas. 309 (S.D.N.Y. 10 Blatchf. 1873) (holding that French laws requiring child support were not contrary to the local customs in the United States, and therefore did not fall under the public policy exception).

apply to all cases before the respective courts including, but not limited to, cases of first impression.⁴⁸

Oklahoma state legislators passed the Save Our State Amendment, and 70 percent of Oklahoma voters expressed their approval at the ballot in 2010.⁴⁹ However, the proposed amendment was never certified.⁵⁰ Shortly afterward, activist Muneer Awad filed suit in the United States District Court for the Western District of Oklahoma, asking the court for an injunction blocking the certification of the amendment.⁵¹ The district court granted Awad a preliminary injunction against certification, and the Tenth Circuit affirmed the judgment on the grounds that Awad would likely prevail on his Establishment Clause claim.⁵² On August 15, 2013, the district court issued a permanent injunction against the certification of the law, citing the amendment's violation of the Establishment Clause.⁵³ The injunctions against the certification of the Save Our State Amendment have not stopped other states from approving similar foreign source guidance laws. Since Oklahoma introduced H.J.R. 1056, 6 other states have passed statutes or amendments, and 32 have considered similar resolutions.⁵⁴

In subsequent drafts of foreign source guidance law bills, it appears that legislators have avoided explicit mention of Sharia law in order to avoid implicating the Establishment Clause.⁵⁵ One example of a draft with neutral language is the American Laws for American Courts ("ALAC") model legislation.⁵⁶ In contrast to the language of the Oklahoma amendment, ALAC used general language to prohibit the courts' use of foreign law:

48. H.R.J. Res. 1056, 52nd Leg., 1st Reg. Sess. (Okla. 2010).

49. Michael, *supra* note 47, at 351.

50. *See Judge to Oklahoma: Shariah Law OK*, INVESTOR'S BUS. DAILY, Aug. 20, 2013, at A12.

51. *Id.*

52. *Awad v. Ziriox*, 670 F.3d 1111, 1132 (10th Cir. 2012).

53. *Awad v. Ziriox*, 788 F. Supp. 2d. 1198, 1207 (W.D. Okla. 2013).

54. *Religious courts in the West: We're not in Kansas any more*, THE ECONOMIST (Apr. 10, 2013), <http://www.economist.com/blogs/erasmus/2013/04/religious-courts-west-0>; Faiza Patel, Matthew Duss & Amos Toh, *Foreign Law Bans: Legal Uncertainties and Practical Problems*, CENTER FOR AMERICAN PROGRESS, 1 (2013), <http://www.brennan-center.org/sites/default/files/publications/ForeignLawBans.pdf>.

55. *See* Bradford J. Kelley, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601, 615 (2013) ("The Sharia Law bill debate has generated concerns that the bills violate First Amendment guarantees regarding the establishment of religion and the free exercise of religion.").

56. *American Laws for American Courts*, PUBLIC POLICY ALLIANCE, <http://publicpolicyalliance.org/legislation/american-laws-for-american-courts> (last visited Feb. 13, 2016).

Any court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this State and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of the state.⁵⁷

Legislators have described the motivation behind the neutral foreign source guidance laws to be a generalized concern about the increased judicial support for transnational jurisprudence.⁵⁸ Larry Metz, who introduced the foreign law bill in Florida, argued that the legislature must “provide guidance” for the courts due to the increasingly international atmosphere of American society.⁵⁹ While some supporters of foreign source guidance laws only suggest that judges should be curbed from indiscriminately applying foreign law, others argue that U.S. courts should not be considering foreign sources at all. Bob Marshall, a state legislator in Virginia, decided to introduce a foreign source guidance law after hearing that constituents were concerned about “foreign influence in U.S. law.”⁶⁰ The American Public Policy Alliance (“APPA”), the advocacy organization that drafted ALAC, argues that transnational jurisprudence is dangerous and un-American.⁶¹ The incorporation of foreign law in American law is problematic, APPA argues, because “when courts look to international or foreign law in making legal decisions, this entire fundamental process [of the political process]

57. *Id.*

58. See *The Threat of Transnationalism*, PUBLIC POLICY ALLIANCE, <http://publicpolicyalliance.org/issues-2/the-threat-of-transnationalism> (last visited Feb. 13, 2016) (criticizing trans nationalist scholars such as Harold Koh, and United Supreme Court Justices Sandra Day O’Connor, Anthony Kennedy, and Ruth Bader Ginsburg).

59. “*Anti-Shariah*” bill passes Florida House, UPI (Mar. 2, 2012, 9:03 AM.), http://www.upi.com/Top_News/US/2012/03/02/Anti-Shariah-bill-passes-Florida-House/UPI-10921330696988.

60. Ashby Jones & Joe Palazzolo, *States Target Foreign Law*, WALL STREET JOURNAL (Feb. 7, 2012), <http://online.wsj.com/news/articles/SB10001424052970204662204577199372686077412>. While Marshall does not mention any specific instances raised by his constituents, other state legislators who do mention specific problems with transnationalism in the courts mention the spread of Sharia law as the problem. *Id.*

61. *The Threat of Transnationalism*, *supra* note 58; but see COLLINS, *supra* note 3 (rebutting this argument).

is bypassed.”⁶² Even reliance on law from the United Kingdom was not exempt from the APPA’s draft of the ban.⁶³

However, despite the change in language, the true driving force behind most states’ foreign law bans was still the fear of Sharia law.⁶⁴ In Kansas, Senate Bill 79 was modeled after ALAC’s version of the law, but the antagonism toward Sharia law was clear during legislative proceedings.⁶⁵ In Michigan, State Representative David Agema, the author of Michigan’s iteration of a proposed foreign law ban, said, “The people who are angry about this bill obviously have ulterior motives,” alleging that Muslims were campaigning to impose Sharia law in American courts.⁶⁶

B. Federal Laws

Foreign source guidance laws have also been proposed in Congress.⁶⁷ In 2005, United States Senator Richard Shelby and United States Congressman Robert Aderholt filed the Constitutional Restoration Act.⁶⁸ The bill prohibited courts from relying on any law or action of a “foreign state or international organization other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.”⁶⁹ Roy Moore, the author of the bill, explained that the provision banning the use of foreign law was included in the bill because American law acknowledged the existence of God, and was therefore distinct and incompatible with foreign, secular law.⁷⁰ English

62. *The Threat of Transnationalism*, *supra* note 58.

63. *Freedom of Speech, Expression and the Press*, AMERICAN PUBLIC POLICY ALLIANCE, <http://publicpolicyalliance.org/issues-2/freedom-of-speech-expression-and-the-press> (last visited Feb. 14, 2016) (arguing that libel tourism is an example of a foreign threat to the United States). The Mahfouz suit, part of which took place in the United Kingdom, was mentioned as an example of a law that should not be applied in American courts. *Id.* However, some state legislatures specifically omit English common law from the banned list of sources when drafting bills. *See, e.g.*, H.J.R. 4, 62nd Leg. (Wyo. 2013).

64. *See, e.g.*, Ryan H. Boyer, “Unveiling” Kansas’s Ban on Application of Foreign Law, 61 U. KAN. L. REV. 1061, 1061 (2013).

65. *Awad v. Ziriax*, 788 F. Supp. 2d. 1198, 1206 (W.D. Okla. 2013); *Religious Courts in the West*, *supra* note 54.

66. Jim Harger, *Why Rep. Dave Agema wants to stop Sharia by banning “foreign laws” in Michigan courts*, MLIVE (Sep. 3, 2011, 6:26 AM), http://www.mlive.com/news/grand-rapids/index.ssf/2011/09/sharia_law_is_targeted_by_stat.html.

67. S. 520, 109th Cong. (2005).

68. *Id.*

69. *Id.*

70. Judge Roy Moore, *Questions and Answers on the Constitutional Restoration Act*, FREE REPUBLIC (Feb. 13, 2004, 9:29 PM), <http://www.freerepublic.com/focus/f-news/1077826/posts>.

common law prior to the revolution was exempt from the prohibition because of its close ties to the foundations of American law.⁷¹ The bill's drafters and supporters focused on the promotion of religious freedom⁷², rather than the dangers of globalization. Supporters of the Constitutional Restoration Act also believed that "courts have exceeded their power" in interpreting the Constitution and that courts should be reined in.⁷³ The Constitution Restoration Act provided a clause for the impeachment and removal of judges who did not abide by the provision.⁷⁴ However, the bill has languished at the committee level for the last decade, never becoming law.⁷⁵

In 2011, Florida Congresswoman Sandy Adams introduced H.R. 973.⁷⁶ The bill prohibited an Article III court from "decid[ing] any issue in a case before that court in whole or in part on the authority of foreign law, except to the extent the Constitution or an Act of Congress requires the consideration of that foreign law."⁷⁷ In an editorial explaining her rationale for introducing H.R. 973, Adams urged readers to consider the "daunting possibility" that Supreme Court justices may soon issue a decision banning Americans from questioning the president's decisions and cite case law from China or Cuba to support its holding.⁷⁸

Adams' bill was introduced after several Supreme Court opinions cited foreign and international law.⁷⁹ Adams argued that the use of foreign and international laws in Supreme Court rulings would "lead to [the] erosion" of the American legal system.⁸⁰ The bill was introduced at the same time as the state foreign source guidance laws, and supporters of H.R. 973 also advocated for the federal bill because it would ban the federal courts from implementing Sharia

71. *Id.*

72. *Constitution Restoration Act of 2004: Hearing on H.R. 3799 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 108th Cong. 78* (2004).

73. S. 520, 109th Cong. (2005).

74. H.R. 1070, 109th Cong. (2005).

75. *Id.*

76. H.R. 973, 112th Cong. (2011).

77. *Id.*

78. Sandy Adams, *We need to keep foreign law out of U.S. courts*, THE DAILY CALLER (Mar. 30, 2011), <http://dailycaller.com/2011/03/30/we-need-to-keep-foreign-law-out-of-u-s-courts>.

79. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005).

80. Adams, *supra* note 78.

law.⁸¹ Like the Constitutional Restoration Act, H.R. 973 has languished in committee review after its introduction.⁸²

III. CONTROL OVER CONSTITUTIONAL QUESTIONS

“The people have expressly granted certain powers to Congress, and they alone had the right to form the Constitution. In doing so, they directed a particular mode of making amendments, which we are not at liberty to depart from . . . The people of America can never be safe, if Congress have a right to exercise the power of giving constructions to the Constitution different from the original instrument.”

—Elbridge Gerry, *First Congress in 1798*⁸³

The Court has recognized that matters involving constitutional questions are subject to a separate and more stringent analysis than sub-constitutional questions.⁸⁴ Congressional enactments banning the Court from using certain sources is addressed in the following section. Congressional interference in the decision-making process for sub-constitutional questions is addressed separately in Part IV.

This article argues that, for constitutional questions, Congress may not enact source bans. Part III.A discusses the effect of the source bans on the judicial review of constitutional questions. Part III.B examines the essential function of the Article III court of conducting independent judicial review. Part III.C

81. See, e.g., Marty Browhill, *HR 973 Keeps law making in your hands*, SAVEAMERICANFOUNDATION.COM (Aug. 10, 2011), <http://www.saveamericafoundation.com/2011/08/10/this-bill-must-pass>.

82. See generally H.R. 973, 112th Cong. (2011) (although introduced nearly five years ago, this bill has yet to become law).

83. Elbridge Gerry, *President's Power of Removal*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 385 (Jonathan Elliot, ed., 1891).

84. See, e.g., *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001) (“*City of Boerne* [*v. Flores*, 521 U.S. 507 (1997)] also confirmed, however, the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees”); *Evans v. Thompson*, 518 F.3d 1, 8-9 (1st Cir. 2008) (“Congress cannot tell the courts what constitutional rights to recognize.”); *United States v. Enas*, 255 F.3d 662, 674-75 (9th Cir. 2001) (“Were this an issue of constitutional history, the outcome would be different. It cannot be the case that Congress may override a constitutional decision by simply rewriting the history upon which it is based.”); *Aguayo v. Christopher*, 865 F. Supp. 479, 487 (N.D. Ill. 1994) (“[O]ne of the oldest principles of constitutional law holds that the judiciary’s powers are qualitatively different when a controversy requires a judge to interpret and give effect to the Constitution. Courts do not allow “statutory limitations” to block the enforcement of the Constitution.”).

addresses the contention that the Exceptions Clause provides Congress with plenary authority over the Court's jurisdiction, effectively allowing Congress to strip the Court of its jurisdiction over constitutional matters at Congress's discretion. The resulting implication is that Congress may exert influence over the Court's decisions on constitutional questions. This article will argue that the cases and debates surrounding the Exceptions Clause do not support a conclusion of unmitigated congressional power over the court. Instead, there is evidence of a constitutional floor for independent judicial review of constitutional matters that limits any power Congress has over Article III Courts through the Exceptions Clause or other clauses.⁸⁵

A. *The Effect of Source Bans on Constitutional Questions*

The foreign source guidance laws, and their background motivations, provide a compelling illustration of why source bans are antithetical to the U.S. Constitution when these laws are applied to the courts' decision-making regarding constitutional questions.

Bans on sources can be directly reflective of majority views on emotionally-charged and controversial issues, in contrast to rules proposing to direct the court's use of canons of interpretation⁸⁶ or to eliminate the doctrine of stare decisis,⁸⁷ which only have indirect effects on substantive issues. The history of the foreign source guidance laws serves as a cautionary tale: a source ban may be the result of a battle between majority and minority opinions on a substantive matter, but the foreign source guidance laws bans are more aptly described as a majority group's dislike or phobia of a *minority group of persons*.⁸⁸ After the U.S. District Court for the Western District of Oklahoma and the Tenth Circuit opinions held that Oklahoma's ban violated the Establishment Clause,⁸⁹ legislators wrote laws that veiled the impetus behind the foreign source guidance laws in neutral language.⁹⁰ Nevertheless, the motivation behind the neutrally worded laws is likely the same as the laws that explicitly banned Sharia law from the courts. A law governing court conduct and stemming from a majority's fear

85. See generally discussion *infra*.

86. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

87. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

88. See discussion *infra* Section II.A.

89. *Awad v. Ziriak*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111, 1129 (10th Cir. 2012).

90. See discussion *infra* Section II.A.

or dislike of a minority group can hinder the courts' ability to protect the constitutional rights of the minority group.

While conservative legislators proposed the foreign source guidance laws,⁹¹ a source ban can become a political tool for both liberals and conservatives to influence the courts' decisions. An unpopular Supreme Court decision about abortion, global warming, religious rights, affirmative action, the death penalty, or gun rights could be the impetus for a ban on sociology research, scientific reports, religious texts, empirical studies, international human rights treaties, or crime statistics reports, respectively.

When a source ban eliminates the Court's access to sources that support the minority view, this potentially skews the Court's interpretation of the Constitution away from that minority view and toward that of the current Congress, albeit with less brute force than a jurisdiction-stripping statute.⁹² Then Congress, if unable to garner enough votes to achieve its objective through a Constitutional amendment, could force the same effect through ordinary statute by limiting a Court's ability to neutrally conduct judicial review. Thus, Congress could override the provisions guaranteeing the Court's independence from the legislative branch by forcing the Court's hand through legislation dictating substantive results.

Source bans may have subtle effects, especially when the source bans address texts that courts use infrequently, such as foreign sources.⁹³ However, since Congress cannot lawfully affect the substance of the Constitution through a regular statute, Congress should not be able to indirectly affect the courts' review of a constitutional question.

In *Stern v. Marshall*, the Supreme Court recognized that its holding on the constitutionality of restrictions on the jurisdiction of bankruptcy courts had limited significance.⁹⁴ The Court asked, "[i]f our decision today does not change all that much, then why the fuss?"⁹⁵ Similarly, a court faced with a foreign source guidance law might find itself unaffected, because the court rarely, if ever, uses foreign sources. Still, in *Stern v. Marshall*, the Court refused to open the

91. H.R. 568, 108th Cong. (2003).

92. See, e.g., Rebecca R. Zubaty, *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLA L. REV. 1413, 1440 (2007) ("In determining whether to rely on a foreign authority under the reason-borrowing approach, the essential question is whether the material constitutes a meaningful source of the foreign lawmaker's intent.").

93. See *id.* at 1452 ("Where the text of the constitution or statute examined by the foreign court materially differs from the U.S. provision at issue, it is disingenuous to compare the results reached by the courts and the reasoning used to reach those results without acknowledging and addressing such differences.").

94. *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011).

95. *Id.*

floodgates because “[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.”⁹⁶ For that reason, source bans cannot be a sanctioned tool for the legislative branch to push forward a constitutional interpretation favoring its own enactments, under a legitimizing veil of judicial review.

B. *Judicial Independence and Constitutional Supremacy*

Congress may not limit or hinder the court on matters of constitutional interpretation because it would be incompatible with independent judicial review, which is a pivotal court function.⁹⁷ Without independent judicial review, the separation of powers framework is disrupted, the system of checks and balances is handicapped, and a mechanism for the people’s protection from legislative excesses infringing upon constitutionally guaranteed rights is eliminated.⁹⁸

While the separation of powers doctrine in the U.S. Constitution has been interpreted to have the quality of “separateness but interdependence” and “autonomy but reciprocity,”⁹⁹ each branch holds powers that cannot be delegated to or usurped by another branch, and the “judicial power of the United States” is one such power.¹⁰⁰ The “judicial power” is not so broad as to constitute power over all matters that have judicial character.¹⁰¹ However, the court has absolute purview over issues that lie at the “core” of Article III judicial power.¹⁰² Although the precise boundaries of the core judicial power have not been comprehensively mapped in the Constitution, in the discussions of the Framers

96. *Id.*

97. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362-63 (1953).

98. See generally Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) (describing the importance and function of independent judicial review).

99. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

100. *United States v. Nixon*, 418 U.S. 683, 704 (1974); see also *id.* at 707 (holding there could be no absolute and unqualified presidential privilege because it would obstruct the constitutional duty of the judicial branch “to do justice in criminal prosecutions”).

101. See, e.g., *Commodity Futures Trading Com’n v. Schor*, 478 U.S. 833, 848-49 (1986) (holding that a Congressional statute regulating jurisdiction over common law counterclaims did not violate the separation of powers).

102. See, e.g., *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (holding that private rights disputes are at the “core” of judicial power and cannot be delegated to Article I powers).

of the Constitution,¹⁰³ or in Supreme Court cases, judicial review is a core function, which enables the judicial branch to uphold constitutional supremacy.¹⁰⁴ Part III.C discusses whether the Constitution grants Congress the authority to bypass judicial review over constitutional questions through the Exceptions Clause.

Allowing Congress to place restrictions on how Article III courts decide constitutional matters would be inimical to the judicial branch's role in the separation of powers structure. *Marbury v. Madison* declared the Article III courts' duty to conduct a judicial review¹⁰⁵ to uphold the Constitution in the face of sub-constitutional enactments that contravened its principles.¹⁰⁶ While Congress has the power to "make all Laws which shall be necessary and proper,"¹⁰⁷ a more fundamental law is that the U.S. Constitution supersedes Congress's legislative power.¹⁰⁸ Congress, the President, the Article III courts, state actors, and federal actors are expected to uphold the Constitution.¹⁰⁹ Because the Constitution is supreme law, it would follow that "no legislative act . . . contrary to the Constitution can be valid."¹¹⁰ In *Marbury*, when faced with a situation where both congressional law and the Constitution governed, but where the statute was contrary to the Constitution, the Court held that "it is emphatically the province and duty of the judicial department to say what the law is . . . If two laws conflict with each other, the courts must decide on the operation of each."¹¹¹ From this conclusion, it follows that any idea proposing

103. See generally THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS (Jared Sparks, ed., 1832), http://press-pubs.uchicago.edu/founders/documents/a3_2_1s60.html (In a letter to Timothy Peckering, Gouverneur Morris wrote about the debates at the Constitutional Convention over the bounds of judicial power, stating that "conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases which, express my own notions, would not alarm others nor shock their self love.").

104. See discussion *infra* Section IV.A.

105. Ironically, judicial review became engrained in the American legal tradition due to Parliament's growing legislative authority over the English courts in the seventeenth century. MAURO Cappelletti, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 130-31 (1989). In England, the Glorious Revolution in 1688 led to the supremacy of parliament enactments over the rules made by the courts of England. *Id.* In the American colonies, it resulted in the supremacy of English statutes over local legislative law, and it gave American colonial judges the power to review whether local enactments conformed to the supreme law. *Id.*

106. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

107. U.S. CONST. art. I, § 8, cl. 18.

108. U.S. CONST. art. VI, § 1.

109. U.S. CONST. art. VI, § 1, cl. 2; U.S. CONST. art. VI, § 1, cl. 3.

110. THE FEDERALIST NO. 78, at 391 (Alexander Hamilton) (Ian Shapiro ed., 2009).

111. See *Marbury*, 5 U.S. at 177.

that the “courts must close their eyes on the constitution, and only see the law . . . would subvert the very foundation of all written constitutions.”¹¹²

Even if Congress thought the Court would likely strike down a congressional statute as being contrary to the Constitution, Congress lacks the power to mandate an interpretation of the Constitution that would ensure the statute’s validity; in no circumstances may Congress enforce its own interpretation of the Constitution over the Court’s interpretation. In the Federalist Papers, Hamilton argued:

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of the constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within limits assigned to their authority.¹¹³

Although historical documents provide the context for why Congress may not superimpose its own interpretation of the Constitution, there have been several instances where Congress has made such an attempt. For instance, when confronted with such a situation in *Dickerson v. United States*, the Supreme Court stated, “Congress may not legislatively supersede Supreme Court decisions interpreting and applying the Constitution.”¹¹⁴ Although Congress has made explicit attempts to restrict the authority of the Court’s judicial review through a constitutional amendment, the amendment has not been passed.¹¹⁵

Practical measures have been taken to assure the Article III courts’ independence from Congress when deciding cases. Judicial independence from Congress was written into the text of the Constitution.¹¹⁶ The members of the Constitutional Convention quickly rejected a constitutional provision that would allow for the removal of judges by Congress upon agreement by the two

112. *Id.* at 178.

113. THE FEDERALIST NO. 78, at 393-94 (Alexander Hamilton) (Ian Shapiro ed., 2009).

114. *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (citations omitted).

115. See EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION 156 (1989) (In 1821, a senator introduced an amendment that would allow the Senate to review decisions of the Supreme Court.).

116. See U.S. CONST. art. III, § 1.

houses.¹¹⁷ James Wilson stated, “[t]he judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our [government.]”¹¹⁸ The members of the Constitutional Convention engaged in a lengthier debate over whether Article III judges should be granted life tenure on good behavior or a limited tenure of seven years.¹¹⁹ Although some members were concerned that life tenure for judges would re-create a monarchical government,¹²⁰ Madison countered that his vision of a system with separate and independent legislative, executive, and judicial branches was the cure for monarchy: “Why was it determined that the Judges should not hold their places by such tenure [depending on legislative branch for re-appointment]? Because they might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well as the maker of the laws.”¹²¹ The Good Behavior Clause of the Constitution ensures that “judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”¹²² Armed with its practical assurances of independence from Congressional interference, the Court was, and still is, expected to decide matters that came before it, including constitutional issues, in an independent manner.¹²³

C. *An Exception to Judicial Control in the Exceptions Clause?*

As discussed above, the Constitution contains clauses authorizing congressional action regarding some aspects of the judicial branch’s functions. These clauses are the Necessary and Proper Clause, the Exceptions Clause, and the inferior courts clause.¹²⁴ While Congress would likely enact source bans through the Necessary and Proper Clause rather than the Exceptions Clause, this article presents a discussion of the debates surrounding the Exceptions Clause because of the broader implications regarding Congress’s power over the courts and the resolution of constitutional questions. Some judges and scholars have

117. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 428–29 (Max Farrand, ed., 1911).

118. *Id.* at 429.

119. *See, e.g., id.* at 33–36.

120. *See id.* at 35 (Colonel Mason argued that Madison’s vision of an independent judiciary with life tenure would easily lead to a “hereditary monarchy” because it would be impossible to subject “good behavior” to trial.).

121. *Id.* at 34.

122. U.S. CONST. art. III, § 1.

123. *See id.*

124. U.S. CONST. art. I, § 8, cl. 9, 18; *id.* art. III, § 2, cl. 2.

argued that the Exceptions Clause unambiguously gives Congress plenary authority over the Court's jurisdiction.¹²⁵ If this is correct, Congress may eliminate the Court's jurisdiction over constitutional questions as it wishes, and this interpretation would seriously undermine an understanding that the Court has absolute independence from Congress in its decision-making when a constitutional question arises. This article will provide a summary of several Supreme Court decisions on jurisdiction stripping, as well as some prominent scholarly interpretations of the Exceptions Clause. Ultimately, the discussions surrounding the Exceptions Clause support the interpretation that there is a constitutional floor on congressional influence over the Court's review of constitutional questions. It is a floor that exists despite any power allotted to Congress by the Exceptions Clause or any other clause in the Constitution.

1. An Introduction to the Exceptions Clause and Jurisdiction Stripping Bills

The Exceptions Clause in the Constitution, when paired with the legislative branch's "ample authority under article III, section 2," seems to grant Congress the ability to alter the jurisdiction of the Supreme Court.¹²⁶ The Constitution first states that the Supreme Court has original jurisdiction in "all cases affecting ambassadors, other public ministers and consuls, and those in which the state shall be party."¹²⁷ Then, in the Exceptions Clause, the Constitution sets out the cases in which the Supreme Court has appellate jurisdiction, stating: "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."¹²⁸

Congress has purported that the Exceptions Clause grants Congress the authority to strip the Supreme Court of jurisdiction altogether.¹²⁹ Legislatures, including Congress, are the first to respond to the public, and when legislatures pass laws favoring one side of "intensely partisan debates over narrowly drawn, emotionally volatile issues," those supporting the other side of the issues may counter by asserting in the courts that there was a violation of their constitutional

125. See Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 390 (1983) (quoting Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 260 (1973)).

126. *Id.* at 413.

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

128. *Id.*

129. Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 500 (1983).

rights.¹³⁰ Congress has attempted to bypass these court challenges through the introduction of jurisdiction-stripping bills that would prevent a Supreme Court ruling from finding the law unconstitutional.¹³¹ Even when a jurisdiction-stripping bill does not pass, the threat of such a law being passed has had a chilling effect on the courts.¹³²

Congress has proposed a number of bills to eliminate Supreme Court jurisdiction over politically charged issues. For example, H.R. 1228 was authored shortly after the Court's *Brown v. Board of Education* decision, and the bill would have eliminated federal court jurisdiction over any cases alleging that a state law relating to the operation of public schools was unconstitutional.¹³³ More recently, legislators in Congress have proposed jurisdiction-stripping bills for cases involving same-sex marriage,¹³⁴ public displays of the Ten Commandments,¹³⁵ and abortion,¹³⁶ to name a few.¹³⁷ Jurisdiction stripping bills have rarely garnered the requisite amount of votes to become law, leaving the Court with little opportunity to address the issue directly.¹³⁸

2. The Supreme Court on Jurisdiction Stripping

The Court has not yet issued a decision on the Exceptions Clause and the Court rarely discusses the Exceptions Clause directly.¹³⁹ However, the Court has made statements, sometimes only in dicta, concerning jurisdiction stripping. The statements made by the Court support the argument that there is an important limitation on congressional power over jurisdiction when it comes to constitutional questions.

130. *Id.*

131. *Id.* at 501.

132. Alex Glashausser, *A Return to Form for the Exceptions Clause*, 51 B.C. L. REV. 1383, 1387 & n.32 (2010), (citing DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848* at 355 (2007)) (discussing the chilling effect on the Supreme Court by a 1831 bill to repeal Supreme Court jurisdiction over appeals from state courts and how the bill “‘seems to have intimidated’ the Supreme Court into sidestepping the politically volatile issue of forced removal of Cherokees from Georgia.”).

133. H.R. 1228, 85th Cong. (1957).

134. Marriage Protection Act, H.R. 1269, 111th Cong. (2009).

135. Constitutional Restoration Act, H.R. 1070, 109th Cong. (2005).

136. Sanctity of Life Act, H.R. 776, 109th Cong. (2005).

137. For a more extensive discussion of recent jurisdiction stripping bills proposed in Congress, see Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003 (2006).

138. Glashausser, *supra* note 132, at 1387.

139. Norton, *supra* note 137, at 1012.

After the Civil War, Congress enacted legislation limiting the Court's jurisdiction in various matters related to the Reconstruction.¹⁴⁰ In *United States v. Klein*, the Court agreed with the respondent that a congressional statute eliminating the Court's jurisdiction to decide constitutional issues incidental to that statute violated the separation of powers.¹⁴¹

Scholars have cited *Ex Parte McCardle* as a decision establishing Congress' sweeping authority to use its constitutional power to make exceptions and regulations to the Supreme Court appellate power, even if the jurisdictional limitations implicated the Court's power to judicial review.¹⁴² If *McCardle*'s holding is binding, then Congress could side-step judicial review by eliminating the court's jurisdiction on a specific subject matter. However, although *McCardle* allowed Congress to alter the Court's jurisdiction regarding a constitutional matter, the congressional enactment never eliminated or restricted the Court's power to review the habeas petitioner's constitutional claims.¹⁴³ While *McCardle* could conceivably stand for the proposition that the purpose of the Exceptions Clause is to allow Congress to logistically frustrate the Court's ability to review constitutional matters, this proposition ignores the aims of the greater Constitutional framework.

a. The *Klein* Cases

Congress enacted the Abandoned and Captured Property Act during the Civil War to allow for the collection of abandoned property in the Confederate states.¹⁴⁴ The statute provided that any owner of such property could file a claim in the Court of Claims to collect the value of the property so long as the owner could provide proof that he did not aid the Confederate cause, among other conditions.¹⁴⁵ After the war, President Lincoln promised to pardon all persons who engaged in the war and to restore property rights to those who took an oath of loyalty to the United States.¹⁴⁶ During this time, Klein brought a claim for proceeds for abandoned property as an administrator of an estate, and the Court

140. See KEYNES & MILLER, *supra* note 115, at 158–59.

141. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

142. See, e.g., Rossum, *supra* note 125, at 403-09.

143. A number of scholars support this view of *McCardle*'s holding. See, e.g., Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1601-05 (1986); RAOUL BERGER, CONGRESS V. THE SUPREME COURT 285-296 (1969); KEYNES & MILLER, *supra* note 115, at 158-59.

144. *Klein*, 80 U.S. (13 Wall.) at 130.

145. *Id.* at 131.

146. *Id.* at 131–32.

of Claims granted his request.¹⁴⁷ Congress subsequently enacted a law stating that the presidential pardon could not have any evidentiary effect in the Court of Claims for abandoned property, and it stripped the Supreme Court of its jurisdiction for those cases.¹⁴⁸

The Court found that the congressional restriction on the courts was impermissible, violating the Constitution's separation of powers doctrine by impinging upon both judicial power and executive power.¹⁴⁹ The restriction encroached upon executive power because Congress had no power to change the effect of a presidential pardon, and the overall effect of the statute was to eliminate the legal effects of that pardon.¹⁵⁰ Similarly, the restriction improperly infringed on judicial power by stripping the Supreme Court of the ability to decide a live constitutional question over which it would otherwise have jurisdiction.

Some may contend that such infringement on judicial jurisdiction was in accordance with the existing precedent; however, the Court distinguished *Klein* from the Court's previous decision in *Pennsylvania v. Wheeling Bridge Company*.¹⁵¹ In *Wheeling Bridge*, the state had declared a bridge a nuisance, and Congress responded by passing an act legalizing the structure.¹⁵² The Court stated that, while Congress created new circumstances in *Wheeling Bridge* and the court was left to apply its ordinary rules, in *Klein*, Congress forbid the court "to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary."¹⁵³ This was not a normal legislative enactment, as existed in *Wheeling Bridge*. Instead, the *Klein* statute "certainly impair[ed] the executive authority and direct[ed] the court to be instrumental to that end."¹⁵⁴

Klein was not the last time the Supreme Court would address a claim of congressional encroachment upon judicial power. The issue was raised again in *Robertson v. Seattle Audubon Society*.¹⁵⁵ Seattle Audubon, joined by other environmental groups, filed a suit against the Chief of the United States Forest Service.¹⁵⁶ In its suit, Seattle Audubon alleged that the amendments the Forest

147. *Id.* at 132.

148. *Id.* at 133–34.

149. *Id.* at 146–48.

150. *Id.* at 148.

151. *Klein*, 80 U.S. (13 Wall.) at 130; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855).

152. *Wheeling*, 59 U.S. at 430.

153. *Klein*, 80 U.S. (13 Wall.) at 146–47.

154. *See id.*

155. *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992).

156. *Id.* at 432.

Service had made to its guide prohibiting timber harvesting improperly provided protection for the spotted owl, thus violating three federal statutes.¹⁵⁷ In response to this litigation, Congress enacted the Northwest Timber Compromise, including subsection (b)(6)(A), which stated:

[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.¹⁵⁸

Shortly after Congress enacted the Compromise, Audubon alleged that the provision violated Article III of the Constitution.¹⁵⁹ The Ninth Circuit held that the statute in question violated the separation of powers under *Klein*, stating that *Klein* stands for the principle that Congress could not mandate the “direct[ion of] a particular decision in a case, without repealing or amending the law underlying the litigation.”¹⁶⁰

However, the Supreme Court reversed the Ninth Circuit’s holding.¹⁶¹ The Court stated that (b)(6)(A) merely replaced the previous legal standard with a new standard: instead of mandatory compliance with five provisions, the Forest Service only needed to comply with two provisions.¹⁶² The Court stated that Congress could have reached the same result by writing a new clause stating that compliance with two provisions was adequate.¹⁶³ Furthermore, even if the Ninth Circuit’s reading of *Klein* was correct and *Klein* stood for the proposition that Congress could not decide a case without amending law,¹⁶⁴ the Court found that Congress had properly amended the law through subsection (b)(6)(A).¹⁶⁵

157. *Id.*

158. *Id.* at 434–35.

159. *Id.* at 436.

160. *Id.*

161. *Id.* at 437.

162. *Id.*

163. *Id.* at 439-40.

164. *Id.* at 441 (declining to decide the validity of the Ninth Circuit’s interpretation of *Klein*.)

165. *Id.*

In another decision, *Plaut v. Spendthrift Farm, Inc.*, the Court briefly discussed the parameters of *Klein*. Before *Plaut*, the Court had decided, in *Lampf*, that securities fraud litigation must commence within one year after discovery or three years after such violation; consequently, the suit brought by the respondents in *Lampf* was dismissed as untimely.¹⁶⁶ Congress then passed the Federal Deposit Insurance Corporation Improvement Act of 1991, which includes an amendment to the Securities Exchange Act of 1934:

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 [the date before the *Lampf* decision was issued]—(1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws application in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.¹⁶⁷

In *Plaut*, the Court stated that “[its] decisions to date have identified two types of legislation that require federal courts to exercise the judicial power in a manner that Article III forbids.”¹⁶⁸ One type of legislation was the kind specified in *Klein*, and the other variety was legislation that commanded federal courts to reopen final judgments, thus demanding retroactive action.¹⁶⁹ The Court ultimately decided that *Plaut*’s violation fell under the latter type of legislation, but the Court briefly discussed the first category of law, which was specified in *Klein*.¹⁷⁰ While the Court declined to analyze the “precise scope” of *Klein*, it recognized that *Seattle Audubon* clearly stated that “[the] prohibition does not take hold when Congress ‘amend[s] applicable law.’”¹⁷¹ Thus, the amendment to the Exchange Act was an ordinary amendment of the law, even though it applied retroactively.¹⁷²

Lower courts have interpreted the aforementioned cases differently, and courts have opined that the holdings of the “*Klein* cases” are unclear.¹⁷³ The lower courts have utilized the language of *Seattle Audubon* and *Plaut*, distinguishing between legislation that “decides a matter” and legislation that

166. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 213–14 (1995).

167. *Id.* at 214–15.

168. *Id.* at 218.

169. *Id.*

170. *Id.*

171. *Id.* (citing *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992)).

172. *Plaut*, 514 U.S. at 240.

173. *See, e.g., In re Stone*, 986 F.2d 898, 901–02 (5th Cir. 1993).

merely amends law¹⁷⁴: the statute in *Wheeling Bridge* allowed the Court to apply its ordinary rules to the new circumstances created by the statute, as did the statutes in *Seattle Audubon* and *Plaut*.¹⁷⁵

However, the facts in *Klein* do not clearly illustrate the distinction between a legislative amendment to applicable law and a statute that is not an amendment. Although it is clear that the enactments in *Wheeling Bridge*, *Seattle Audubon*, and *Plaut* are legislative amendments, it is not immediately clear that the statute in *Klein* is not. The statute in *Klein* can be framed as a congressional amendment of a previous statute providing for a collection of proceeds from the Court of Claims. The previous statute allowed a person to file a claim for abandoned property so long as the person did not aid the Confederate cause; the new statute merely amended the previous statute to state that a person may file for a claim for abandoned property so long as the person did not aid the Confederate cause, notwithstanding evidence of a presidential pardon.¹⁷⁶

If Congress, in fact, had the power to alter the effects of a presidential pardon, the statute in *Klein* would be indistinguishable from the statutes “amending law” in the other cases. The language distinguishing laws that “amend previous laws” from laws that “decide matters for the court” may only be a proxy for deeper principles in the separation of powers doctrine, but the analytical power of this proxy seems limited.

While this article disagrees with the emphasis placed on the language of statutes “amending law” and statutes “deciding cases,” this article does agree that there is a profound difference between a “*Klein* statute” and a statute falling outside the *Klein* prohibition. A normal statute resolves a sub-constitutional issue between parties and can render the controversy between parties on the interpretation of the statute moot. Even with normal statutes, Congress can “remove” the case from the Court’s jurisdiction by eliminating the parties’ standing for the issue through changing the parties’ respective legal statuses, as Congress did in *Wheeling Bridge*. However, this type of removal of jurisdiction has never been held to violate the separation of powers. By contrast, a *Klein* statute renders a claim against a statute “moot” by stripping the court of its jurisdiction to address *constitutional* issues that arise from that statute. By rendering all constitutional claims moot, a *Klein* statute effectively *decides for the court* the constitutionality of the statute, because the courts are precluded from deciding the constitutionality themselves.

174. *United States v. Pool*, 645 F. Supp. 2d 903, 916 (E.D. Cal. 2009); *Havana Club Holding, S.A. v. Galleon, S.A.*, 62 F. Supp. 2d 1085, 1095 (S.D.N.Y. 1999); *Hadix v. Johnson*, 144 F.3d 925, 939-40 (6th Cir. 1998).

175. *Plaut*, 514 U.S. at 240; *Seattle Audubon*, 503 U.S. at 441; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 434-35 (1855).

176. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1871).

The ramifications of *Klein* can be stated more simply: Congress cannot create statutes that remove the Court's jurisdiction over cases addressing constitutional matters. This is the logical result from other Court decisions holding that Congress may not supersede the Court's interpretation of the Constitution.

b. *McCardle* and Congress's Plenary Authority over Jurisdiction

In 1867, Congress passed a statute providing that a decision on a petition for habeas corpus made by any court inferior to the federal circuit courts could be taken to the circuit courts for review.¹⁷⁷ A decision from the circuit court could then be appealed to the Supreme Court.¹⁷⁸ Pursuant to the 1867 statute, McCardle appealed a lower court decision on his habeas petition to the circuit court.¹⁷⁹

In 1868, while McCardle's appeal was ongoing, Congress repealed the provisions of the 1867 Act that allowed an appeal of a habeas decision from a circuit court to the Supreme Court.¹⁸⁰ Mr. Sharkey, counsel for the prisoner alleging wrongful imprisonment, argued that this act was the congressional exercise of judicial power.¹⁸¹ "What, under a supposition that Congress must define when, and where, and how, the Supreme Court shall exercise it, becomes of this 'judicial power of the United States,' so expressly, by the Constitution, given to this court?" Mr. Sharkey asked.¹⁸² He argued that "[t]his act of March 27th, 1868, does take away the whole appellate power of this court in cases of habeas corpus."¹⁸³ The Court held that it did not have jurisdiction to review McCardle's appeal. The Court determined that the exception to jurisdiction was plainly stated in the 1868 act, and that the Constitution expressly granted Congress the power to make exceptions to the appellate jurisdiction of the court.¹⁸⁴

However, the Court's holding in *McCardle* does not provide Congress with sweeping and expansive power to restrict the Court's jurisdiction over constitutional matters. First, while Congress may have the power to limit the jurisdiction of the Court through the Judiciary Act and similar acts, "the appellate powers of this court are not given by the judicial act, but are given by the

177. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 507 (1868).

178. *Id.*

179. *Id.* at 508.

180. *Id.*

181. *Id.* at 509.

182. *Id.*

183. *Id.* at 509–10.

184. *Id.* at 513–14.

Constitution.”¹⁸⁵ This means the Court has some form of appellate power derived from the Constitution, independent from and despite of any congressional enactments.¹⁸⁶ This statement is also consistent with the idea that Congress’s powers to eliminate appellate review under the Exceptions Clause is not absolute because the Constitution also expressly provides appellate power to the Court.¹⁸⁷ In *McCardle*, the Court declined to address whether the Constitution could allow Congress to undermine judicial power through the Exceptions Clause.¹⁸⁸ However, Congress must be able to do so in order to avoid absurd Constitutional interpretations, which would lead to equally absurd results such as an exception swallowing the judicial power.¹⁸⁹

Second, the Court stated,

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 in 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.¹⁹⁰

While the Court did not disagree with Mr. Sharkey, the Court did not find in favor of Mr. Sharkey’s client, *McCardle*.¹⁹¹ The Court came to this conclusion primarily because the case was meant to address the issue more narrowly than the case presented by Mr. Sharkey, as the issue before the Court dealt with a Congressional statute regulating the appeal process for habeas petitioners, and not a statute eliminating the “whole appellate power of the court [over] cases of habeas corpus.”¹⁹² Before the 1867 act, the Court already had the jurisdiction to review appeals of habeas cases outside of an appeal from Circuit Courts. After the 1867 act, a writ of certiorari was not sufficient; prisoners who filed habeas petitions had to complete an additional procedure to seek review by the Supreme

185. *Id.* at 513.

186. *Id.* (Because the Judiciary Act of 1789 was enacted by Congress, the *McCardle* court cites *Durousseau v. United States*[, 10 U.S. (6 Cranch) 307 (1810)] for the principle that the Judiciary Act implied the negation of the Court’s jurisdiction when there was no positive grant, because the Act broadly and positively regulated the Court’s appellate jurisdiction.).

187. Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 157 (1960).

188. *See id.*

189. *Id.* at 169 (Leonard Ratner used eighteenth and nineteenth century dictionaries to analyze the meaning of the Exceptions Clause, concluding that “[a]ccording to these definitions, an exception cannot nullify the rule or description that it limits.”).

190. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868).

191. *See id.*

192. *Id.*

Court.¹⁹³ When the Court decided *Ex Parte Yerger* in the same year, it held that the repeal act of 1868 did not except the Court's habeas jurisdiction put in place by the Judiciary Act of 1789.¹⁹⁴

Because *McCardle* only addressed whether Congress can re-rout the Court's jurisdiction, rather than entirely eliminate the Court's jurisdiction over any constitutional issues, *McCardle* cannot stand for the proposition that Congress has the sweeping authority, under the Exceptions Clause, to affect and except the Court's oversight over *any* issues. Moreover, as Professor Tribe noted, even in *McCardle*, the Court had decided the constitutionality of the statute, with the Court stating, "We are not at liberty to inquire into the motives of the legislature. We can only examine into its powers under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."¹⁹⁵ Although both *McCardle* and *Yerger* refer to Congress's authority to limit the Court's jurisdiction under the Exceptions Clause, this congressional power has only been sanctioned when Congress regulates, rather than eliminates, constitutional issues.¹⁹⁶

Some scholars, such as Professor Wechsler, have proposed that the Exceptions Clause can be used as a tool to "strike at what [Congress] deems judicial excess."¹⁹⁷ The Court's holdings in *McCardle* and *Yerger* allow such a possibility, which may make complicate or inhibit the Court's ability to make decisions. As this article will argue in Part IV, Congress has expansive power over sub-constitutional issues. However, a view that the Constitution allows Congress to circumvent a judicial check on *unconstitutional enactments* is contradictory to several principles that have been established in Supreme Court jurisprudence. For instance, in *Klein*, the Court stated that Congress may not predetermine the decision of a matter where it violates the constitution; in *Dickinson*, the Court stated that Congress may not supersede the Court's

193. *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1868).

194. *Id.* at 105–06.

195. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 272 (3d ed. 2000) (quoting *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

196. *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 102, 105–06 (1868); *McCardle*, 74 U.S. at 514.

197. Hebert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965); see generally Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH U. L. REV. 671 (1997) (offering a summary of the views of scholars who support the orthodox view of an expansive Exceptions Clause and a comprehensive power establishing the inferior courts). Cf. Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 933 (2013) (arguing that Congress uses its Exceptions Clause power to facilitate the Court's functions).

interpretation of the Constitution; and in *Marbury*, the Court stated that the Court itself has the judicial duty to uphold the Constitution through judicial review.¹⁹⁸

3. The Ambiguous Exceptions Clause

In *Hamdan v. Rumsfeld*, the government raised “grave questions” about Congress’s authority to alter the Court’s jurisdiction.¹⁹⁹ However, as Justice Scalia skeptically remarked in his dissenting opinion, “It is not clear how there could be any such lurking questions, in light of the aptly named ‘*Exceptions Clause*’ of Article III, § 2.”²⁰⁰ Despite Justice Scalia’s incredulity about the complexity of the Exceptions Clause’s meaning, judges and scholars disagree about even the basic questions and premises behind the provision.²⁰¹ One basic premise that scholars disagree on is to which word the “exceptions” of the Exceptions Clause applies. Some have argued that Congress can make exceptions to “jurisdiction,” while others have interpreted the “exception” to apply to “supreme,” “facts,” or “appellate.”²⁰² It has nearly been 150 years since *Klein* and *McCardle* were decided, but the debate is still alive.

The prevalent, orthodox view is that the Exceptions Clause grants²⁰³ Congress the authority to make exceptions to the Court’s *jurisdiction*.²⁰⁴ Proponents of this view argue that it is a straightforward interpretation of the clause.²⁰⁵ One champion of this view, Professor Harrison, has argued that Article III provides two “ceilings” for the judicial power, just as the enumerated powers in Article I provide a ceiling for the legislative power.²⁰⁶ Similarly, he contends that the Extending Clause provides one ceiling for the maximum potential scope

198. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

199. *Hamdan v. Rumsfeld*, 548 U.S. 557, 575 (2006) (Stevens, J.).

200. *Id.* at 672 (Scalia, J., dissenting).

201. *Id.*; Glashausser, *supra* note 132, at 1387.

202. Glashausser, *supra* note 132, at 1393–97.

203. *Id.* at 1390. This is another point of disagreement: while some scholars interpret the Exceptions Clause to be the source of Congress’s plenary authority over jurisdiction, other scholars view the Necessary and Proper Clause to be the basis for that authority. *See, e.g.*, David E. Engdahl, *Intrinsic Limits of Congress’s Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 123, 126–27, 132–33 (1999) (discussing favoring congressional authority arising from the Necessary and Proper Clause rather than the Exceptions Clause).

204. Glashausser, *supra* note 132, at 1390.

205. *See, e.g.*, 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, 901 (1982); 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, 209 (1997); John Eidsmoe, *The Article III Exceptions Clause: Any Exceptions to the Power of Congress to Make Exceptions?*, 19 REGENT U. L. REV. 95, 145 (2006).

206. Harrison, *supra* note 205, at 212–18, 220.

of federal power, and Article III, Section 2, Clause 2 provides another ceiling for the jurisdiction.²⁰⁷ In his interpretation, the Exceptions Clause grants Congress authority to depart from the constitutionally stated ceilings.²⁰⁸ Professor Harrison argues that scholars who deviate from the orthodox view have less elegant interpretations; moreover, while there is text in the Constitution that supports “ceilings” for Article III courts, there is no such text that provides the “floor” for judicial power that is proposed by other scholars.²⁰⁹

Justice Scalia endorsed the orthodox view in his *Hamdan* dissent.²¹⁰ He stated that the Exceptions Clause subjects the Court to Congress’s jurisdictional restrictions, subject only to “substantive limitations”:

“[The language of the Exceptions Clause] explicitly permits exactly what Congress has done here. But any doubt our prior cases might have created on this score is surely chimerical in *this* case. As just noted, the exclusive-review provisions provide a substitute for habeas review adequate to satisfy the Suspension Clause, which *forbids* the suspension of the writ of habeas corpus. *A fortiori* they provide a substitute adequate to satisfy any implied substantive limitations, whether real or imaginary, upon the Exceptions Clause.”²¹¹

Both Professor Harrison’s interpretation and Justice Scalia’s interpretation of the Exceptions Clause give Congress plenary authority over the jurisdiction of the Court, although Justice Scalia’s interpretation also mentioned other Constitutional limitations, such as the Suspension Clause and the Due Process Clause.²¹²

Scholars who ascribe to the orthodox view of the Exceptions Clause find that it unambiguously applies to “jurisdiction,” yet fail to ascertain what, if any, “floor” applies to the clause.²¹³ Still, as Professor Hart has stated, the limit of the Exceptions Clause is that “the exceptions must not . . . destroy the essential role of the Supreme Court in the constitutional plan,” and that *McCardle* adheres to that limitation.²¹⁴ Professor Ratner elaborated on²¹⁵ Professor Hart’s essential functions theory by stating that essential appellate functions are: “(1) to provide

207. *Id.* at 213–15.

208. *Id.*

209. *See id.* at 220.

210. *Hamdan v. Rumsfeld*, 548 U.S. 557, 672 (2006) (Scalia, J., dissenting) (emphasis in original).

211. *Id.*

212. *Id.*

213. Glashauser, *supra* note 132, at 1392–94.

214. Hart, *supra* note 97, at 1365.

215. *Id.*

a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority.”²¹⁶

A scholar’s interpretation of the purpose of the Exceptions Clause is an important factor in whether the scholar believes that the clause places a limitation on Congress’s authority over the Court’s jurisdiction. For instance, Professor Weinberg argued that the Exceptions Clause was written to “accommodate the convenience of the people” from vexatious appeals and to protect state jury’s findings of fact.²¹⁷ She emphasized the rights of the people by quoting from John Marshall during the Virginia ratifying convention for the Constitution, when he stated, “Congress is empowered to make exceptions to the [Supreme Court’s] appellate jurisdiction, as to law and fact These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.”²¹⁸ Accordingly, Professor Weinberg interpreted the Exceptions Clause to include an implicit constitutional floor for the protection of the people’s rights through the separation of powers: Congress may not eliminate the Court’s jurisdiction over federal questions.²¹⁹

By contrast, Professor Wells supported an interpretation of the Exceptions Clause that protects the majority rule.²²⁰ While Professor Wells did not dispute that the majority cannot supersede constitutionally guaranteed rights, he argued that, disregarding the Bill of Rights, Congress, rather than the “undemocratic Court,” should determine laws.²²¹ The role of the Exceptions Clause is, therefore, to cabin the power of the Supreme Court by allowing Congress to check the Court’s incursion on state interests when Congress determines that state courts are more receptive to local interests.²²²

In addition to the orthodox view, there are several prominent non-conventional interpretations of the Exceptions Clause. They are discussed less

216. Ratner, *supra* note 187, at 161. Scholars have argued that Professor Ratner’s elaboration on essential functions theory of the court, while more precise than Professor Hart’s explanation, lacked roots in the text of the Constitution. *See, e.g.*, Akil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 220 (1985).

217. Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1366–68 (2003).

218. *Id.* at 1368 (alterations in original) (citing 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 560 (1861)).

219. Weinberg, *supra* note 217, at 1382-84.

220. Michael Wells, *Congress’s Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465, 471 (1991).

221. *Id.*

222. *Id.* at 473-74.

extensively than the orthodox view in this article because the prominent non-conventional views preserve the judicial branch's independent purview over constitutional matters even in light of the Exceptions Clause. Even if these interpretations are correct, they do not challenge this article's argument that the Article III courts' power to decide constitutional issues is inviolable.

Mandatory federal jurisdiction is the theory that each case listed in the Extensions Clause must be tried in a federal court, though not necessarily the Supreme Court.²²³ Thus, "exceptions" applies to the word "supreme" or "appellate," rather than "jurisdiction."²²⁴ Some scholars who support mandatory jurisdiction have argued that there is parity between Article III judges of inferior courts and the justices of the Supreme Court, and that Congress can divert the federal review of a case to an inferior Article III court.²²⁵ Others argue that appellate review by the Supreme Court is pivotal.²²⁶ Professor Amar presented a version of mandatory federal jurisdiction in his argument for a bifurcated vision of Article III. He stated that federal judicial power *must* extend to "all" of the first three categories in the Extending Clause, and *may* extend to the remaining categories.²²⁷ Still, others have argued that the Exceptions Clause allows Congress to transform the Supreme Court's appellate jurisdiction into original jurisdiction.²²⁸

4. The Exceptions Clause and the Constitutional Floor

While the orthodox view is the most straightforward reading of the Exceptions Clause and interprets the clause without an explicitly stated floor, it would inherently contradict the structure of the federal government if the Exceptions Clause allowed Congress plenary power over Court jurisdiction. Scholars have recognized that the Suspension Clause and the Bill of Rights are substantive constitutional floors to congressional power authorized by the Exceptions Clause. However, those are not the only substantive limits on congressional power over jurisdiction. Few scholars state that a constitutional floor can only exist when the Constitution explicitly authorizes the national

223. Glashausser, *supra* note 132, at 1396.

224. *Id.*

225. *See, e.g.*, Amar, *supra* note 216, at 221.

226. *See, e.g.*, Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 508 (1974); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinion: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1006 (2007).

227. Amar, *supra* note 216, at 240.

228. Glashausser, *supra* note 132, at 1397.

government to provide protection;²²⁹ instead, the floor arises from the constitutional framework itself, which creates a federal government limited by the rights of the people.²³⁰ Along with the Suspension Clause and the Due Process Clause, the framework includes the Constitution's separation of powers doctrine.²³¹ As one author stated, it is "baffling that . . . critics can shrug off this essential requisite of the independence of the judiciary and separation of powers, a constant, unwavering feature of American law."²³²

Limiting Congressional interference with judicial review of constitutional matters should be one of the most basic and essential limitations. Without a constitutional floor on jurisdictional exceptions, Congress could achieve a result that would otherwise need a constitutional amendment: Congress could bypass Court interpretation by eliminating the Court's role altogether. A silenced constitutional issue becomes a non-issue. If this practice were allowed by the Constitution, the Court would also be stripped of the power to enforce other recognized substantive constitutional rights or "floors," such as those in the Suspension Clause and the Due Process Clause.

Despite an explicit Constitutional authorization allowing Congress to make exceptions through the Exceptions Clause, the Court has upheld statutes stripping jurisdiction only when the court's jurisdiction was altered and judicial review was preserved, as in *Klein*. The literature on congressional jurisdiction stripping gives little ammunition for a counter-argument that the Court's review of constitutional issues is not a pivotal and inviolable function of the Court. Instead, the history surrounding jurisdiction-stripping bills only illustrates the possible dangers of allowing Congress to set the parameters of judicial review in its own discretion.

IV. CONTROL OVER SUB-CONSTITUTIONAL QUESTIONS

A. *Congress and the General Power to Legislate*

While Congress may not influence or override the Court's decisions on constitutional questions, Congress may dictate how the Court interprets its statutes.²³³ Therefore, source bans affecting only sub-constitutional issues—such

229. Weinberg, *supra* note 217, at 1383.

230. *Id.*

231. *Id.*

232. *Id.* at 1384.

233. Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 511 (1989) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.").

as a provision stating that foreign sources may not be used to interpret federal statutes—fall under different rules and considerations than source bans affecting constitutional interpretation. Thus, most source bans affecting the court's interpretation of sub-constitutional issues do not violate the Constitution.

The Constitution grants Congress all legislative powers,²³⁴ and it does not give Article III courts a competing rulemaking power. Congress has the legislative authority to enact a provision that fills a gap, clarifies an ambiguity, or otherwise amends a statute that would have needed judicial interpretation.

When creating or amending statutes, Congress utilizes a variety of forms to state or clarify the meaning of the statute. For example, the statute at issue in *Seattle Audubon* applied only to the parties who were involved in a specific set of litigation. In another Supreme Court case, the attorney general remarked that the early state legislatures and Congress frequently enacted laws by referencing British statutes.²³⁵ In a Note, Mr. Blatnik argued that a statute applicable to a wide array of other statutes is unconstitutional, as a broad statute is a de facto amendment of the Constitution.²³⁶ However, it is doubtful that broad statutes addressing sub-constitutional matters are problematic, even though they affect many other laws.

First, the supremacy clause is still in effect, and it subjects the broad statute to the limitations of the Constitution. Second, a broad statute does not restrict the courts from conducting an independent analysis on the constitutionality of any congressional enactment. For example, a sub-constitutional foreign source guidance law would prevent the Court from using foreign sources to interpret a federal statute, Statute X. However, to determine the constitutionality of Statute X, modified by the guidance law, the Court has full discretion to interpret the Constitution using foreign sources, even though it is still restricted from interpreting the meaning of Statute X using foreign sources. Moreover, even if the sub-constitutional foreign source guidance law provided that the Court could not use foreign sources to interpret the language within the guidance law, the Court has full discretion and independence to interpret the Constitution when it decides whether the particular source ban is constitutional. Third, the broad

234. U.S. CONST. art. I, § 1.

235. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 527 (1838).

236. Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Bourne v. Flores*, 98 COLUM. L. REV. 1410, 1453 (1998). However, it should be noted that Mr. Blatnik's argument on the constitutionality of the Religious Freedom Restoration Act is distinguishable from the argument made in this paper, because Mr. Blatnik argues that RFRA effectively overrides the Court's decision on a constitutional interpretation of the Establishment Clause or Due Process Clause, rather than the court's decision on a sub-constitutional question. *Id.* Assuming that RFRA is a forced constitutional interpretation rather than a sub-constitutional enactment, RFRA would fall under the analysis in Part III of this paper.

statute, possessing no special constitutional status, can be superseded or repealed by another statute under the normal legislative process. Fourth, Congress has the ability to specify the meaning for statutes over any contrary court interpretation of the statute. When Congress enacts a statute asserting its interpretation for all statutes in one provision, Congress does not exercise more power than it had before. Even if a statute leaves the court with less to interpret and less gaps to fill, that does not make the statute more unconstitutional than the statute before it.

Under these general principles, it is proper for a statute to specify the sources the Court may or may not consult when interpreting sub-constitutional legislative enactments. However, recognizing that this is still a disputed proposition, this article also considers two counterarguments. The first counterargument is that a source ban is unconstitutional when it hinders meaningful decisions. The second counterargument is that there may be First Amendment issues implicated by source bans.

B. Counterargument 1:

The Court's Inherent Power to Make Meaningful Decisions

"[An] unremovable duty of the courts is to give private and public texts their fair meaning. It is one thing for private parties or the legislature to supply the definition of the words, and specify the implication of the words, that go into this determination of fair meaning; it is something else for them to prescribe that fair meaning will not govern. That cannot be done. . . . Logical reasoning is the duty of the courts, and not even the legislature can exclude it."

—Justice Antonin Scalia and Bryan A. Garner²³⁷

Although Congress has the broad authority to make necessary and proper laws, courts have recognized limitations on legislative regulation of the courts' decision-making processes, even on sub-constitutional issues. Many state courts and some lower federal courts have recognized powers that are "inherent" to courts.²³⁸ The Supreme Court has observed the wide use of the inherent powers

237. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 233 (2012).

238. *Hadix v. Johnson*, 144 F.3d 925, 942 (6th Cir. 1998) *abrogated on other grounds* by *Miller v. French*, 530 U.S. 327 (2000).

doctrine among the state courts²³⁹ and has recognized the doctrine in its own jurisprudence, albeit with caution.²⁴⁰

If operating under the inherent powers doctrine, the fundamental court powers would be irremovable by legislative act.²⁴¹ The Supreme Court recognized this conception of the court's inherent powers in *United States v. Hudson*, stating, “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.”²⁴² Although *Hudson* rejected the argument that jurisdiction over criminal cases was an “inherent power” of the Court, when explaining its holding, the Court gave the examples of fining or imprisonment for contempt to enforce the observance of order in courts as “powers which cannot be dispensed within a Court, because they are necessary to the exercise of all others.”²⁴³ Of course, courts have recognized that, although some powers are inherent to the judicial institution, they are not essential. Non-essential powers may therefore be altered or eliminated by the legislature, though the courts may exercise these powers without an affirmative legislative act.

Inherent powers are not derived from statutes, but are “vested in the courts upon their creation”²⁴⁴—an inherent power remains such even though it has been stated in a statute.²⁴⁵ Some states have held that the inherent powers of the court do not come into effect until methods prescribed by the legislature are found to be ineffective.²⁴⁶ Examples of inherent powers accepted by state and lower federal courts include the power to punish for contempt and otherwise regulate behavior within the courts; the power to implement the adjudicative function, such as power to summon witnesses, appoint court experts, and manage dockets; and the power to hire and compensate personnel, like court clerks.

In *Hadix v. Johnson*, the Sixth Circuit stated that meaningful decision-making was an inherent power of the courts.²⁴⁷ If the legislature were “permitted

239. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–631 (1962) (holding that the authority of a court to dismiss sua sponte was an inherent power of the courts, making its decision by looking at state court decisions and district court practice, rather than statutes or rules).

240. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32 (1812).

241. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) (en banc).

242. *Hudson*, 11 U.S. at 34.

243. *Id.*

244. *Riggins Trucking*, 757 F.2d at 561; *see also* *Hadix v. Johnson*, 144 F.3d 925, 943 (6th Cir. 1998) *abrogated on other grounds by* *Miller v. French*, 530 U.S. 327 (2000) (“It is beyond dispute that there are certain inherent powers of the Judiciary that are untouchable by legislative act.”).

245. *Armstrong v. Guccione*, 470 F.3d 89, 102 (2d Cir. 2006) (“[I]t is possible for statutory and inherent sources of judicial authority to coexist.”).

246. *State ex rel. Hillis v. Sullivan*, 137 P. 392, 395 (Mont. 1913).

247. *Hadix*, 144 F.3d at 943.

to tie the deliberative hands of the Judiciary by erecting procedural hurdles that render thorough and thoughtful deliberation an impossibility, the will of the majority could effectively take control of the judicial process by sufficiently elevating the procedural hurdles in select areas of especially unpopular litigation.”²⁴⁸ Banning some sources from a court’s consideration when a court makes a decision in a well-developed area of law may not “tie the deliberative hands” of the court. However, in undeveloped areas of law with little authoritative precedent, prohibiting the courts from consulting entire bodies of persuasive sources can curtail the court’s essential ability to make decisions effectively. An example of this situation has already been mentioned in this article: the newly formed states of the United States looked to English and other European sources to develop American law. In the modern context, when there is a developed system of law, as is the case for American state and federal courts, consulting non-authoritative sources (specifically foreign law) can be useful to courts faced with a local law that has a gap, an ambiguity, or an obvious need of modernization.²⁴⁹

A law that bans a broad array of sources can hinder meaningful deliberations by the court in a way that laws that ban a scattered collection of sources that the court is unlikely to consult would not. A source ban may impermissibly constrain the court when the court is faced with an issue of first impression that is technical or complex. Resorting only to deductive reasoning and common sense while ignoring available resources containing the careful deliberations of scholars and other judges can result in a resolution that fails to grasp intricacies, thus harming the parties that come before the court.

Of course, a generalized court may not be the best body to resolve some complex issues; in some situations, a regulatory agency or specialized court familiar with the technical aspects of the transaction is a preferable fact-finder and decision-maker. However, that assumes that such a regulatory agency or specialized court exists. If there is a live issue and no such court or agency is in place, the parties disputing a matter should not be forced to choose between waiting for Congress to resolve the matter statutorily and taking their chances with an unguided opinion of the court. Other complex and technical issues, such as questions of civil procedure, may well be within the expertise of the Court. However, a correct decision is more likely reached by consulting scholarly sources or judicial opinions addressing the same situation rather than relying on deductive logical skills in an emergency situation.

Although this paper has used foreign source guidance laws to illustrate the potential consequences of source bans, there are other examples of source bans

248. *Id.*

249. MARKESINIS & FEDTKE, *supra* note 36, at 121–24.

that may be more relevant in daily judicial operations, as courts rarely use foreign sources, and they may often rely on other persuasive sources if necessary. However, the significant impact of source bans becomes more evident if the bans are applied to other types of sources. For instance, banning the consultation of legal academic papers or decisions from courts in other states or circuits can be problematic for a court, especially if the issue is undeveloped in that particular jurisdiction. Similarly, a broad ban on legislative history or other documents that might shed light on the contextual circumstances of statutes may also hinder meaningful decision-making by the courts.

Of course, there is nothing impermissibly restrictive about an enactment that sets a preferred hierarchy of legal and non-legal sources. However, an absolute prohibition on broad bodies of sources—especially sources that the court would likely consult to resolve complex or technical issues in undeveloped areas of law—can encumber the essential judicial operations. An easy solution is to include a “failsafe” provision in the statute, allowing the court discretion to consult non-authoritative sources if it is unlikely that the court will be able to resolve an issue in a manner consistent with the statutory purpose and if it is fair to the parties in front of it.

C. *Counterargument 2:*
The First Amendment and the Protection of Judicial Dicta

*“An informed, independent judiciary presumes an informed,
independent bar.”*

—Justice Anthony Kennedy²⁵⁰

In 1996, Judge Posner wrote the Seventh Circuit opinion for *Khan v. State Oil Co.*,²⁵¹ an antitrust case involving maximum retail price maintenance,²⁵² which a 1968 Supreme Court case established as per se illegal under the Sherman Act.²⁵³ However, the previous decision drew heavy criticism from economists, who argued that the economic rationale behind the opinion was wrong. Posner agreed with those critics.²⁵⁴

250. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 534 (2001).

251. *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996).

252. Maximum retail price maintenance is a practice whereupon the manufacturer or supplier of a product maintains an agreement with the retailer or reseller that the retailer will not sell the product for a price greater than the amount set by the manufacturer.

253. *Albrecht v. Herald Co.*, 390 U.S. 145, 153-54 (1968) (stating that fixing a maximum price is illegal per se).

254. *Khan*, 93 F.3d at 1361, 1362.

In Posner's opinion, he first established that the defendant engaged in maximum retail price maintenance.²⁵⁵ Then, after briefly stating the per se rule set by the Supreme Court, Posner listed the reasons economists found the per se rule to be erroneous, stating "Despite these points, the Supreme Court has thus far refused to reexamine the cases."²⁵⁶ Posner resumed his attack of the authoritative Supreme Court precedent²⁵⁷ later in the opinion:

We have considerable sympathy with the [defendant's] argument that *Albrecht* [holding that maximum resale price maintenance was per se illegal] is inconsistent with the cases that establish the requirement of proving antitrust injury. In fact, we think the [defendant's] argument is right and that it may well portend the doom of *Albrecht*. . . . Yet despite all its infirmities, its increasingly wobbly, moth-eaten foundations, *Albrecht* has not been *expressly* overruled It should be overruled. Someday, we expect, it will be.²⁵⁸

Posner ends this portion of the opinion by stating, "[b]ut all this is an aside,"²⁵⁹ instead choosing to affirm a decision in favor of the plaintiffs.²⁶⁰ The Supreme Court later granted certiorari for *Khan*, and overruled *Albrecht* in 1997,²⁶¹ including a block quote from Posner's Seventh Circuit decision in the majority opinion.²⁶²

Judges are bound by authoritative law, including statutory law, even though the judge may question the wisdom of the law.²⁶³ The *Khan* decision issued by the Seventh Circuit and the subsequent Supreme Court decision adopting Judge Posner's view show the utility and importance of the court's freedom to discuss the rationale behind the holding of decisions, even if the discussion is dicta. This portion of the paper discusses the second counterargument to Congress's broad power over regulating the Court's decision-making process on sub-constitutional question: First Amendment protection for judicial speech.

255. *Id.* at 1361.

256. *Id.* at 1362.

257. *Albrecht*, 390 U.S. 145.

258. *Khan*, 93 F.3d at 1363.

259. *Id.* at 1364.

260. *Id.* at 1366.

261. *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997).

262. *Id.* at 15, 16.

263. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.").

Several lower federal courts have held that the First Amendment's protection applies to judicial opinions because a judge's opinion is a sufficiently expressive act.²⁶⁴ However, the Supreme Court has declined to recognize First Amendment protection for speech undertaken in an official capacity.²⁶⁵ In the absence of First Amendment protection, this article argues that the doctrine of separation of powers protects official judicial speech.

A number of Supreme Court cases have addressed First Amendment claims for persons acting in a professional capacity, such as an attorney or judge. In *Republican Party of Minnesota*, the Court analyzed First Amendment protection for the speech of candidates for judicial office under a strict scrutiny standard.²⁶⁶ *Legal Services Corp. v. Velazquez*²⁶⁷ and *Gentile v. State Bar of Nevada*²⁶⁸ both addressed protections for attorney speech when the attorney was acting in his professional capacity. *Velazquez* looked to precedent discussing limited forums, such as *Rosenberger*.²⁶⁹ *Gentile* suggested that a "clear and present danger" test or a "substantial likelihood of materially prejudicing an adjudicative proceeding" test to resolve the First Amendment issue. However, the Court did not need to decide between the two tests, as it concluded that there would be a First Amendment violation under either standard.²⁷⁰

While these decisions provide First Amendment protection for members of the bar while acting as legal professionals, these tests are also applicable to the speech of lawyers and judges acting in their private capacity, rather than as government actors. In *Velazquez*, the Court emphasized the private nature of speech in the case, stating that the attorneys affected in the case were speaking not on behalf of the government, but "on behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government's speaker."²⁷¹ Similarly, the attorney in *Gentile* was speaking on behalf of a private client.²⁷² The judicial candidate in *Republican Party v. White* spoke about his views on legal issues as a citizen campaigning for public office, not as a sitting judge acting in an official capacity.²⁷³

264. See discussion *infra* p. 43.

265. See discussion *infra* pp. 42, 43.

266. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002) (analyzing the issue under strict scrutiny as the standard was not disputed between the parties).

267. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542, 548-49 (2001).

268. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1058 (1991).

269. *Velazquez*, 531 U.S. at 543, 544.

270. *Gentile*, 501 U.S. at 1036.

271. *Velazquez*, 531 U.S. at 542.

272. *Gentile*, 501 U.S. at 1030.

273. *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring) (citations omitted) ("Whether the rationale of *Pickering* . . . could be extended to

By contrast, the First Amendment does not apply to speech by legal professionals undertaken as a government official.²⁷⁴ In *Gercetti v. Ceballos*, the Court addressed a claim by a deputy district attorney, who alleged adverse employment actions after he wrote a memorandum recommending the dismissal of a case.²⁷⁵ The Court reiterated that the First Amendment “protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.”²⁷⁶ However, the district attorney was not speaking as a “citizen” when he wrote the memorandum.²⁷⁷ Accordingly, the Court held that when “public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²⁷⁸

The Court in *Carrigan* also made a distinction between the speech of the government and the speech of a citizen.²⁷⁹ The Court stated: “A legislator voting on a bill is not fairly analogized to one simply discussing that bill or expressing an opinion [on] it. The former is performing a governmental act as a representative of his constituents[;] only the latter is exercising his personal First Amendment rights.”²⁸⁰ Additionally, the Court stated that the First Amendment does not provide “a right to use governmental mechanics to convey a message” and that a legislator has “no right to use official powers for expressive purposes.”²⁸¹ Under the language of *Gercetti* and *Carrigan*, judges can still speak as citizens when publishing articles, offering interviews, giving speeches, or otherwise speaking about law-related subjects—“a judge does not check his First Amendment rights at the courthouse door.”²⁸²

The Supreme Court has utilized a variety of tests to determine whether speech by members of the bar are protected under the First Amendment, and scholars have proposed a number of other considerations for particularized

allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here.”).

274. See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

275. 547 U.S. 410, 413-14 (2006).

276. *Id.* at 417 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

277. *Id.* at 421.

278. *Id.*

279. *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 128 n.5 (2011).

280. *Id.*

281. *Id.* at 127.

282. *In re Jud. Misconduct*, 632 F.3d 1289 (9th Cir. 2011) (discussing the First Amendment rights of a judge when the judge made public comments related to legal matters).

situations involving judicial speech.²⁸³ However, the Supreme Court has not issued a decision on the First Amendment's applicability to judicial speech rendered in an official opinion of the court. Several federal courts have discussed this issue, with varying conclusions. For example, the Third Circuit held in *In re Kendall*:

What a judge says in an opinion is sufficiently expressive to trigger First Amendment review. The judge intends to convey a particularized message by explaining his legal analysis and conclusions, and there is a great likelihood that the opinion's message would be understood by its audience – no less than if the judge had published the same analysis and commentary in a law review article.²⁸⁴

The court in *In re Kendall* used the language in *Carrigan* to distinguish between the judicial speech in opinions, which it deemed to be speech of a citizen, protected under the First Amendment, and the holding of the court, which declined to reach whether the First Amendment protected the situation.²⁸⁵ The court used the “clear and present danger” test set forth in *Landmark Communications, Inc. v. Virginia*,²⁸⁶ to determine whether the First Amendment protected the judge's speech; ultimately, the court held that Judge Kendall was entitled to First Amendment protection for the speech in his opinion.²⁸⁷ Similarly, in the U.S. District Court's opinion in *Harrison v. Coffman*, the court held that the opinion of an administrative law judge was subject to protection under the First Amendment.²⁸⁸ Though the ALJ was an Article I judge, the court treated her work as judicial or quasi-judicial.²⁸⁹ The court analyzed her First Amendment protection under the public employee test from *Connick and Pickering*, which asks whether the speech in question addresses matters of public concern, and if so, whether the government's interest outweighs the interest in protecting that speech.²⁹⁰

283. See, e.g., Erwin Chemerinsky, *Is It the Siren's Call?: Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831, 840–42 (1995); Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181 (1986) (discussing the applicable rules at the intersection of First Amendment protections and professional discipline for judicial speech).

284. *In re Kendall*, 712 F.3d 814, 824 (3rd Cir. 2013).

285. *Id.* at 824 n.6.

286. *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843–45 (1978).

287. *Id.* at 827.

288. *Harrison v. Coffman*, 35 F. Supp. 2d 722, 723, 726 (E.D. Ark. 1999).

289. *Id.* at 724.

290. *Id.* (citing *Connick v. Myers*, 461 U.S. 138 (1983)); see *Pickering v. Bd. of Ed. of Tp. High Sch.*, 391 U.S. 563, 568, 573 (1968); Chemerinsky, *supra* note 284, at 842–43

However, the Fifth Circuit case *Jenevein v. Willing* declined to extend First Amendment protection to official judicial speech.²⁹¹ After a state court judge held a press conference in his courtroom, the state issued an order of public censure; the judge subsequently filed suit against the state for violating his First Amendment rights.²⁹² Although the court used the strict scrutiny test applicable to the government's regulation of an elected official's speech,²⁹³ the court nevertheless held that, to the extent that the state censured the judge for using the "trappings of judicial office to boost his message," the censorship did not violate the First Amendment.²⁹⁴ Instead, the state had the power to censure the judge for issuing the press conference in his robes and in his courtroom, even though the state did not have the power to censure the judge if he had issued the same statements after "walking to a public forum a block away."²⁹⁵

The historical roots of the judicial opinion may illuminate the correct interpretation of the First Amendment. Early American practice illustrates the distinction between the judicial opinion and the court holding: the former was discretionary and the latter was not. Research by William Popkin shows that from 1791 to 1800, the years prior to the Marshall Court, the Supreme Court issued 63 opinions.²⁹⁶ Out of these decisions, 14 were seriatim decisions; 18 were "By the Court" cases, including "relatively short statements, much shorter than the opinions of the court in the Marshall era"; and 31 "other" opinions, which occurred when the court reporter "told the reader what the Justices did, often with sufficient judicial reasoning to be considered a nascent opinion of the court."²⁹⁷ Additionally, when reporters were busy with other professional obligations, when written opinions were undependable, or when other events led to the unavailability of the actual words of the judge, the court reporter would merely present the "essence" of the individual judge's opinion in the reporter's own terms.²⁹⁸ In other words, "the practice of the pre-Marshall Court had no set form and was unsettled."²⁹⁹ When Marshall became Chief Justice, Marshall transformed the style of the opinions issued by the Supreme Court, "rigorously

(arguing that the best standard to apply to judicial speech is the *Gentile* standard, though a strict scrutiny or government employee standard may also be applicable).

291. *Jenevein v. Willing*, 493 F.3d 551, 560-61 (5th Cir. 2007).

292. *Id.* at 552-53.

293. *Id.* at 558.

294. *Id.* at 560.

295. *Id.* at 561.

296. WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* 62 (2007).

297. *Id.* at 62-63.

298. *Id.* at 66.

299. *Id.* at 67 (citing John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court, 1790-1945*, 77 WASH. U. L.Q. 137, 138-39 (1999)).

follow[ing] the practice of delivering an opinion of the court,” and entrenching the form of the modern American court opinion.³⁰⁰

This history of Supreme Court practice suggests that, while a judicial opinion that includes the reasoning of the court may be an important institutional feature of the court today, issuing a reasoned court opinion was not a practice mandated by virtue of the institution. In fact, “By the Court” was used to state the court’s holding of the case, rather than provide judicial reasoning.³⁰¹ The Court performs its institutional role by deciding cases, and the provision of its notes on the analysis is only discretionary.³⁰² Additionally, the delivery and publication of a written opinion was clearly a discretionary institutional task, as creating a record of the court’s opinion was up to the discretion of the private court reporter and his perception of the demand for written reports by practicing attorneys.³⁰³ The history of the judicial opinion finds a parallel structure in *Carrigan*, which distinguishes a legislative *vote* (an official act), from a legislator’s discussions of a bill (the acts of a citizen).³⁰⁴

However, judicial speech in an opinion is not perfectly analogous to legislative discussions of a bill—after all, judicial speech in the form of a written opinion is cited by lower courts as authoritative. An analysis by a judge or justice in an authoritative opinion is not treated the same as an analysis by the same judge or justice, published in an out-of-court forum. Nor is judicial speech easily grouped into the circle of activities that the judge conducts as a private citizen, such as publishing an opinion in a law review or giving a speech at a public forum. Instead, a judicial opinion is issued in the judge’s official capacity. Moreover, although the discretionary nature of judicial opinions was reflected by the use of private and somewhat sporadic court reporters in early American history, the practice of keeping court records has changed and can instruct the role of court analysis and dicta today: both the federal government and some states provide the court with funds to employ official reporters. When the modern judicial opinion is treated as authoritative, and when the government funds the distribution of the text of the opinion, there is a strong argument that judicial speech rises to the level of an official act as described in *Carrigan*.³⁰⁵

Despite the issues with arguing for First Amendment protection of judicial speech from legislative interference, the value of official judicial speech in the operation of the courts should not be underestimated; in fact, the separation of powers doctrine can provide another route for protect judicial speech. In

300. *Id.* at 71.

301. *Id.* at 62-63.

302. *Id.* at 66-67.

303. *Id.*

304. *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 125-26, 128 n.5 (2011).

305. *Id.* at 122-128.

Velazquez, the court found that the restrictions placed on attorney speech constituted “[a] scheme so inconsistent with accepted separation-of-powers principles” that there was an insufficient basis to uphold the restrictions.³⁰⁶ The Court found that the restrictions on attorney representation potentially hindered the attorneys’ competent representation of the clients.³⁰⁷ In absence of this proper presentation to the court, attorneys could not advise the courts of certain legal issues. In turn, “the enactment under review prohibits speech and expression upon which courts must depend for the *proper exercise of the judicial power*. Congress cannot wrest the law from the Constitution which is its source.”³⁰⁸

If the Supreme Court views the restrictions on attorney speech on legal issues to be an improper violation of the separation of powers, surely the same principle must also apply to judicial speech. If attorneys before the court must be free to inform the court of legal issues, to allow the proper exercise of judicial power, and to uphold the principles of the separation of powers doctrine, then directly blocking the speech of judges is even more likely to prevent the proper exercise of judicial power. As was evident through Judge Posner’s criticism of Supreme Court precedent regarding antitrust law, judges serve an important role in educating and advising other judges on legal matters. Moreover, a restriction on judicial speech could interfere with the process of appellate review of a lower court’s decision. A lower court could be restricted from providing the appellate court with all of the considerations it used when making its decision, and in turn, the appellate court could be unable to determine whether the lower court met necessary standards.

V. CONCLUSION

This article does not discuss policy ramifications of laws such as the foreign source guidance laws, which other scholars have addressed at length,³⁰⁹ but instead focuses on the question of the constitutionality of source bans. It is apparent that source bans can be antithetical to constitutional principles because they can undermine the Article III court’s ability to neutrally, meaningfully, and adequately decide constitutional and sub-constitutional questions. However, the theoretical consequences may diverge from the actual consequences of the law in practice. Thus, this article will conclude by briefly commenting on the practical ramifications of any law banning judges from considering a source.

306. *Velazquez*, 531 U.S. at 546.

307. *Id.*

308. *Id.* at 545 (emphasis added).

309. See, e.g., Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219 (2014); Martha F. Davis, *Shadow and Substance: The Impacts of the Anti-International Law Debate on State Court Judges*, 47 NEW ENG. L. REV. 631 (2013).

While a source ban can frustrate the process by which a court currently uses foreign or other banned sources of law—that is, using the source openly in the court’s opinion to persuade other judges and attorneys—a source ban is likely to make it more difficult for the legislature and for citizens to control a court when the court abuses its discretion.

In France and Italy, statutes restrict judges from citing scholarly papers.³¹⁰ A decision citing a scholarly paper in France, for example, would be subject to legal challenge.³¹¹ However, despite the restrictions, judges still use academic or scholarly sources to make decisions.³¹² Judges in France frequently discuss scholarly sources and foreign sources at conferences of judges, and some have openly stated that scholarly texts influence their decisions.³¹³ In many situations, a judge’s reasoning behind the integration of these non-legislative sources is only circulated in internal court documents like *rappports* or *conclusions*, and the opinion is not accessible to the public.³¹⁴ The decisions available to the public are brief, omitting any mention of the influence of academic sources.³¹⁵

In contrast, British judges cite foreign sources in long opinions that are the length of articles.³¹⁶ In these article-length documents, the judges explain why a source was chosen, as well as the considerations made when using a law enacted outside of the United Kingdom, accounting for any cultural differences, structural legal differences, and the substantive legal differences that prohibited a direct translation of the law.³¹⁷ These opinions are public.³¹⁸

When comparing French and British judges, it appears that French judges have more room for unchecked discretion because the rationale behind its adoptions of law is not available for the public to scrutinize. Even while the citation of scholarly sources has been banned, judges use and are influenced by scholarly sources. British judges, on the other hand, are not banned from citing sources, but they are restricted from unmitigated use of outside sources³¹⁹ because of the very public nature of their decisions. In actuality, judges are

310. MARKESINIS & FEDTKE, *supra* note 36, at 62–66.

311. *Id.* at 64.

312. *Id.*

313. *Id.* at 65.

314. *Id.*

315. *Id.* at 64, 66.

316. *Id.* at 66, 327.

317. *Id.* at 66, 69.

318. *Id.* at 66-67.

319. See Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT’L REV. LAW & ECON. 295, 300 (1996) (finding that French courts had more “judicial daring” than British courts).

checked by the possibility of public disapproval if judges choose and use outside sources indiscriminately.

Although source bans prohibit both the use of such a law and any citation to it, there is no proposed mechanism to enforce a restriction on the judge's *use* of information. One enforcement mechanism may be the use of a censorship policy that blocks access to legal research search engines with the banned source in the federal courthouses, as well as the judges and clerks' personal access to legal materials and colloquy with colleagues in the legal profession. Putting such an extreme solution aside, if a judge uses a foreign source, the legislature and the public have very little control over the enforcement of a source ban. However, holding courts accountable for the proper use of persuasive sources is more easily achieved under a system that permits the use of the persuasive sources so long as judges are required to explain why and how they have used those sources.

In early American history, states enacted statutes mandating reported judicial opinions for the purpose of maintaining judicial accountability. Putting aside policy reasons favoring judicial discretion, and considering the pitfalls that even well-intentioned judges may fall into when using unorthodox or complex sources, legislatures concerned with judicial excesses are better served by requiring more disclosure from judges when issuing decisions, rather than enforcing source bans that would encourage judges to be less candid about their actual sources and rationales for a decision.