

April 1983

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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 (1983), <https://scholarship.law.wm.edu/wmlr/vol24/iss3/3>

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CONGRESS, THE CONSTITUTION, AND THE APPELLATE JURISDICTION OF THE SUPREME COURT: THE LETTER AND THE SPIRIT OF THE EXCEPTIONS CLAUSE

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I. INTRODUCTION

Writing in a 1979 issue of *The Public Interest*, Senator Daniel Patrick Moynihan puzzled over the question, "What do you do when the Supreme Court is wrong?"¹ Short of impeachment, the only responses he could identify were "debate, litigate, legislate."² He never so much as acknowledged the existence, much less the possible employment, of Congress' power to curtail the appellate jurisdiction of the Court.³ Events, however, have passed Senator Moynihan by. Over a score of bills were introduced in the Ninety-Seventh Congress to deprive the Supreme Court of appellate jurisdiction either to hear cases involving such issues as abortion rights and voluntary prayer in the public schools or to order school bus-

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1. Moynihan, *What Do You Do When the Supreme Court Is Wrong?* 57 *PUB. INTEREST* 3 (1979).

2. *Id.* at 8.

3. Proposals to employ art. III, § 2 of the United States Constitution to limit the appellate jurisdiction of the Supreme Court have been debated throughout our constitutional history. See R. BERGER, *CONGRESS v. THE SUPREME COURT* 285-96 (1969); W. MURPHY, *CONGRESS AND THE COURT* (1962); Nagel, *Court-Curbing Periods in American History*, 18 *VAND. L. REV.* 925 (1965).

A subsidiary question concerns Congress' power to curb the jurisdiction of the lower federal courts, leaving issues to be decided solely in the state courts. It is generally conceded that Congress could substantially reduce the authority of these courts or even abolish them altogether. See *Palmore v. United States*, 411 U.S. 389, 400-02 (1973); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical View and New Synthesis*, 124 *U. PA. L. REV.* 45 (1975); Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 *GEO. L.J.* 839 (1976); Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 *HARV. L. REV.* 17 (1981). This Article addresses Congress' power to limit the jurisdiction of the lower federal courts only in relation to the central question under consideration. See *infra* note 173.

ing to achieve racial balance. Many of these same proposals were reintroduced in the Ninety-Eighth Congress.⁴ These measures have in turn prompted considerable scholarly attention and controversy. Symposia in *Judicature*,⁵ the *Villanova Law Review*,⁶ and the *Harvard Journal of Law and Public Policy*,⁷ seminars sponsored by the American Enterprise Institute⁸ and the Free Congress Research and Education Foundation,⁹ hearings before the Subcommittee on the Constitution of the Senate Judiciary Committee,¹⁰ and the foreword to the *Harvard Law Review's* analysis of the 1980 Term of the United States Supreme Court¹¹ all have been devoted to the questions of whether and to what extent Congress can or should strip the Court of appellate subject matter jurisdiction.

On the surface, these measures would appear to be wholly within the constitutional authority of Congress.¹² After all, article III, section 2 of the United States Constitution provides that

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned the Supreme Court shall have appellate Juris-

4. See S. 26, 98th Cong., 1st Sess. (1983), which would deprive lower federal courts of jurisdiction in cases involving state or local abortion law. See also H.R. 618, 98th Cong., 1st Sess. (1983). Similarly, the following bills would deprive the federal courts, including the Supreme Court, of jurisdiction in cases involving voluntary prayer in public schools. S. 88, 98th Cong., 1st Sess. (1983); H.R. 525, 98th Cong., 1st Sess. (1983); H.R. 253, 98th Cong., 1st Sess. (1983). A final group of bills would, in varying degrees, limit the jurisdiction of all federal courts to order school desegregation through mandatory busing. H.R. 798, 98th Cong., 1st Sess. (1983); H.R. 158, 98th Cong., 1st Sess. (1983).

5. *Limiting Federal Court Jurisdiction*, 65 JUDICATURE 177 (1981).

6. *Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV. 893 (1982).

7. 6 HARV. J. L. & PUB. POL'Y (Special Issue 1983).

8. On October 1 and 2, 1981, the American Enterprise Institute held a seminar in Washington, D.C., the topic of which was "Judicial Power in the United States: What Are the Appropriate Constraints?"

9. The title of the Foundation's seminar, held in Washington, D.C. on June 14, 1982, was "A Conference on Judicial Reform."

10. *Constitutional Restraints Upon the Judiciary: Hearings before the Subcomm. on the Constitution of the Senate Judiciary Comm. to Define the Scope of the Senate's Authority Under Article III of the Constitution to Regulate the Jurisdiction of the Federal Courts*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings*].

11. Sager, *supra* note 3.

12. This Article does not consider whether these specific measures are properly drafted and technically correct. It considers only whether Congress has the power constitutionally to pass such measures. See *infra* note 19.

diction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.¹³

For many students of constitutional law, the simple reading of these words ends the matter.¹⁴ The language is clear and, for them, conclusive. As Justice Noah Swayne observed in *United States v. Hartwell*¹⁵ over a century ago: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."¹⁶

This understanding of Congress' power to curtail the appellate jurisdiction of the Supreme Court is reinforced by *Ex Parte McCordle*,¹⁷ the only Supreme Court decision that has directly addressed this issue. In this post-Civil War case, the Court unanimously upheld a law that stripped the Court of authority to hear appeals from persons imprisoned during the Civil War who sought release from custody under an 1867 habeas corpus statute. Republican leaders in Congress feared that the Supreme Court, which had already indicated hostility toward the Reconstruction program, would use *McCordle* to hold much of that program unconstitutional. Consequently, Congress repealed the 1867 act on which *McCordle*'s appeal was founded. This was an obvious attempt by Congress to use the exceptions clause to deprive the Court of its appellate power to review the substantive constitutionality of congressional acts. Moreover, the repealing act was not passed until after the case already had been argued before the Supreme Court. Nonetheless, the Court at once dismissed the case for want of jurisdiction. As Chief Justice Chase explained:

We are not at liberty to inquire into the motives of the Legis-

13. U.S. CONST. art. III, § 2, cl. 2.

14. See E. CORWIN & J. PELTASON, UNDERSTANDING THE CONSTITUTION 109 (8th ed. 1979); E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 179 (1974); BERGER, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801; Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1949); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965). See also 39 CONG. Q. WEEKLY REP. 947-51 (May 30, 1981) (statements of Professors Martin H. Redish, Paul Bator, and John T. Noonan).

15. 73 U.S. (6 Wall.) 385 (1868).

16. *Id.* at 396. See also J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 16 (1980) ("The most important datum bearing on what was intended is the constitutional language itself.").

17. 74 U.S. (7 Wall.) 506 (1868).

lature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing Act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.¹⁸

For many scholars, then, the constitutional text, supplemented by the Court's reflections on it in *McCardle*, answers any questions concerning the constitutionality of measures restricting the jurisdiction of the Court. As they see it, the only real question raised by congressional initiatives diminishing the Court's appellate jurisdiction is "the wisdom of doing so."¹⁹

Not everyone, however, is willing to concede that these measures raise only policy questions.²⁰ Opinion on the constitutionality of congressional curtailment of the Court's appellate jurisdiction is divided, for there are those who argue that such a power could destroy the Court's power of judicial review and, ultimately, undermine our constitutional system of separation of powers.²¹ They fear

18. 74 U.S. (7 Wall.) at 514.

19. E. CORWIN & J. PELTASON, *supra* note 14, at 179. This Article does not address the "wisdom" of the bills discussed *supra* note 4, nor does it explore the policy questions they raise. Rather, it is limited exclusively to a consideration of Congress' constitutional power to enact such measures.

20. See, e.g., S. REP. NO. 1097, 90th Cong., 2d Sess. 155-57 (1968); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 53-54 (1980); C. PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT* (1961); O. STEPHENS & G. RATHJEN, *THE SUPREME COURT AND THE ALLOCATION OF CONSTITUTIONAL POWER* 40 (1980); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 ORE. L. REV. 3 (1973); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Sager, *supra* note 3. Even John Hart Ely, who writes that the constitutional language itself is "the most important datum" bearing upon what the Constitution means, nonetheless concludes that "Congress' theoretical power to withdraw the Court's jurisdiction over certain classes of cases is . . . fraught with constitutional doubt." ELY, *supra* note 16, at 46.

21. See, e.g., C. PRITCHETT, *supra* note 20, at 122; Brant, *supra* note 20, at 21. Even among those who deny that Congress has the power to curtail the Court's appellate jurisdiction, opinion is divided over whether "any legislation of this sort [is] unconstitutional as a

that if Congress had the power to deprive the Supreme Court of its appellate jurisdiction, Congress could constitutionally "deny litigants Supreme Court review in cases involving bills of attainder, ex post facto laws, freedom of speech, press and religion, unreasonable search and seizure, equal protection of the laws, right to counsel, and compulsory self-incrimination."²² This parade of imaginary horrors convinces some commentators that Congress can no longer claim with good conscience the authority to curtail the Court's appellate jurisdiction,²³ and should Congress nevertheless proceed to exercise this authority, the Supreme Court ought not to tolerate it,²⁴ but rather ought to invalidate the offending measure.²⁵

Those who argue against Congress' power to make exceptions to the Court's appellate jurisdiction find themselves in a most uncomfortable bind. They are forced to deny an explicit power of Congress, expressly granted by the Constitution, in order to protect the Court's implicit power of judicial review, a power which has no textual basis.²⁶ To extricate themselves from this bind, they commonly advance an argument that has much in common with the argument advanced by the Court in *United Steelworkers of America v. Weber*.²⁷ In that case, Justice Brennan observed that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit"²⁸ Similarly, those who would limit Congress' power to curtail the Court's appellate jurisdiction argue that congressional power to make exceptions may be

violation of the separation of powers and as an attack on the status and independence of the nation's highest judicial tribunal," C. PRITCHETT, *THE FEDERAL SYSTEM IN CONSTITUTIONAL LAW* 15 (1978), or whether legislation is unconstitutional only if it deprives the Supreme Court of its essential role of interpreting the Constitution and resolving conflicts between federal laws and between state and federal laws. See Hart, *supra* note 20, at 1365; Ratner, *supra* note 20, at 160-61.

22. Brant, *supra* note 20, at 5. See also Ratner, *supra* note 20, at 158.

23. C. PRITCHETT, *supra* note 20, at 122.

24. Slonim, *Law Scope: Say Dormant Prayer Bill Has Broad Implications*, 66 A.B.A.J. 437 (1980) (quoting Lawrence Tribe).

25. Brant, *supra* note 20, at 28.

26. Raoul Berger acknowledges this bind: "The distressing fact is that Congress' power to make 'exceptions' to the Supreme Court's appellate jurisdiction is expressly conferred whereas judicial review . . . is derived from questionable implications and debatable history." R. BERGER, *supra* note 3, at 4.

27. 443 U.S. 193 (1979).

28. *Id.* at 201.

within the letter of article III and yet not constitutional, because not compatible with the spirit of judicial review.²⁹ Justice Rehnquist, dissenting in *Weber*, remarked that Justice Brennan's line of argument was worthy "not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini . . ."³⁰ The same criticism is appropriate with regard to the interpretation of the exceptions clause, and perhaps even more so. At least in *Weber*, if the Court were mistaken in preferring the statute's spirit over its letter, the mistake could be easily rectified, because "Congress may set a different [statutory] course if it so chooses."³¹ A mistaken interpretation of the exceptions clause would be difficult to rectify, however, because a different course can be set only by constitutional amendment.

The debate over Congress' power to make exceptions has been curious. One side cites the letter of article III and concludes that Congress' power over the Court's appellate jurisdiction is absolute: "The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated . . . In short, the clause is complete exactly as it stands."³² The opposition in this debate invokes the spirit of judicial review and insists that "the long accepted power of ultimate resolution of constitutional questions by the Supreme Court" must

29. Jesse Choper adopts this position: "The theoretical underpinnings for a wide legislative power to curtail the appellate jurisdiction . . . are hardly as firm as the literal phrasing of Article III and the quite sweeping judicial language would suggest." J. CHOPER, *supra* note 20, at 53.

30. 443 U.S. at 222 (Rehnquist, J., dissenting).

31. *Id.* at 216 (Blackmun, J., concurring).

32. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 260 (1973). See also Roberts, *supra* note 14. "What is there to prevent Congress taking away, bit by bit, all the appellate jurisdiction of the Supreme Court of the United States . . .? I see nothing, I do not see any reason why Congress cannot, if it elects to do so, take away entirely the appellate jurisdiction of the Supreme Court . . ." *Id.* at 4. For this reason, former Justice Roberts favored a constitutional amendment that would have stripped the Congress of its art. III powers. *Id.* See also *Hearings, supra* note 10 (testimony of Thomas R. Ascik, Paul M. Bator, Jules Gerard, Martin H. Redish, and Charles E. Rice); A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 483 (4th ed. 1970); A. MASON & W. BEANEY, *AMERICAN CONSTITUTIONAL LAW* 3, 24 (6th ed. 1978); Burton, *Two Significant Decisions: Ex Parte Milligan and Ex Parte McCordle*, 41 A.B.A.J. 124, 176 (1955).

not be disturbed.³³ Given the nature of this debate, neither side can win, because each is talking past the other.³⁴ There is, however, a clear loser—the Constitution, which is presented as a fatally flawed document that neither says what it means nor means what it says. This Article asserts that the Constitution is not flawed in this respect and that the spirit of judicial review is altogether consistent with the letter of Congress' powers under article III. This Article will examine the arguments on behalf of Congress' power to make exceptions to the Court's appellate jurisdiction and systematically challenge the spirited objections of those who seek to protect the Court's power to interpret the Constitution by ignoring the Constitution.

II. THE ARGUMENT FOR PLENARY CONGRESSIONAL POWER

Those who argue that Congress has plenary power over the Court's appellate jurisdiction present a straightforward case based on three kinds of evidence: the text of the Constitution; the intention of the framers; and the firm, consistent, and unwavering understanding of the Supreme Court. Although further consideration of the clear and conclusive words of article III is unnecessary, an examination of what the framers meant when they used those words and how the Supreme Court has interpreted them is in order.

A. *The Intent of the Framers*

No evidence in the records either of the Federal Convention of 1787 or of the various state ratifying conventions would indicate that Alexander Hamilton's words in *The Federalist*, No. 80 were not representative of the understanding of virtually the entire founding generation. In that essay, Hamilton reviewed in detail the powers of the federal judiciary and observed that "[i]f some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that

33. COMM. ON THE JUDICIARY, MINORITY REPORT ON THE OMNIBUS CRIMINAL CONTROL AND SAFE STREETS ACT OF 1967, S. REP. NO. 1097, 90th Cong., 2d Sess. 156 (1968) [hereinafter cited as MINORITY REPORT]. See also *Hearings*, *supra* note 10 (testimony of George J. Alexander, Edward I. Cutler, Lloyd M. Cutler, Leonard G. Ratner, and Telford Taylor).

34. For an exception to this generalization, see Van Alstyne, *supra* note 32.

the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniences."³⁵

The Federal Convention spent very little time debating the jurisdiction of the federal judiciary.³⁶ On July 24, nearly two months after the Convention began, the delegates agreed to submit the various resolutions they had approved to the Committee of Detail, so that it might "report a Constitution comfortable to the Resolutions passed by the Convention."³⁷ Their submission concerning the federal judiciary was most rudimentary: "[T]he jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony."³⁸ Nevertheless, the Committee of Detail transformed this vague resolution into language that is almost identical to article III, section 2. After defining the Supreme Court's original jurisdiction, the committee provided that "in all the other cases before mentioned, it [jurisdiction] shall be appellate, with such exceptions and under such regulations as the Legislature shall make."³⁹

Although the Report of the Committee of Detail was presented to the Convention on August 6, 1787, the judicial article was not taken up for consideration until August 27. On that date, Dr. Samuel Johnson of Connecticut suggested that the power of the judiciary ought to extend to equity as well as law—and moved to insert the words "both in law and equity" after the words U.S.⁴⁰ This proposal was adopted. After an intervening discussion, "Mr. Gouverneur Morris [of Pennsylvania] wished to know what was meant by the words 'In all the cases beforementioned it (jurisdiction) shall be appellate with such exceptions &c,' whether it extended to matters of fact as well as law—and to cases of Common law as well as Civil law."⁴¹ James Wilson, the principal architect of the draft reported by the Committee of Detail, answered that the

35. THE FEDERALIST, No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961).

36. See 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 22, 46 (rev. ed. 1937).

37. *Id.* at 106.

38. *Id.* at 132-33.

39. *Id.* at 173.

40. *Id.* at 428.

41. *Id.* at 431.

committee meant "facts as well as law & Common as well as Civil law."⁴² No comments were forthcoming from other members of the Committee, presumably indicating their agreement with Wilson's answer. To remove all doubt, however, Mr. Dickinson of Delaware moved to add the words "both as to law & fact" after the word "appellate," which was agreed to by unanimous consent.⁴³

Acceptance of this addition concluded the discussion.⁴⁴ No questions were raised concerning Congress' plenary power to make exceptions. The conclusion is inescapable: both the words chosen by the delegates and the discussion surrounding their choice of these words suggest an unlimited congressional power over the Court's appellate jurisdiction. John Marshall accurately summarized the delegates' intentions when he declared in the Virginia Ratifying Convention that "Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people."⁴⁵

42. *Id.*

43. *Id.*

44. *But see* Brant, *supra* note 20, at 7. Brant correctly points out that subsequent to Dickinson's motion, an unidentified delegate moved to insert the following substitute for the clause on appellate jurisdiction: "In all the other cases before mentioned the Judicial power shall be exercised in such a manner as the Legislature shall direct." 2 M. FARRAND, *supra* note 36, at 431. This motion was defeated, six states to two. Brant argues that this proposed clause "would have given Congress the extensive power it claims it possesses under the authority to make exceptions from the Court's appellate jurisdiction. It is hardly conceivable that such a motion would have been offered if the delegates believed that they had just voted to confer substantially the same power under a different wording." Brant, *supra* note 20, at 7. *See also* Merry, *supra* note 20, at 59; Sager, *supra* note 20, at 49-50 n.95. Brant argues that Congress is authorized under art. III, § 2 to make exceptions only to the Court's review of matters of fact. *See generally infra* notes 80-91 and accompanying text. Brant's argument fails, however, because he is mistaken in his assertion that the power to determine how the judicial power shall be exercised is substantially the same as the power to make exceptions to the Court's appellate jurisdiction. The former power, in fact, is much greater, and the delegates understood this. Brant does not appreciate that it is one thing for Congress to have power to determine what cases the Supreme Court shall hear in its appellate jurisdiction, but quite another for Congress to have power to determine what the outcome of those cases shall be.

45. 3 DEBATES ON THE FEDERAL CONSTITUTION 560 (J. Elliot 2d ed. 1888).

B. *The Court's Consistent Support for Plenary Congressional Power*

Although "the ultimate touchstone of constitutionality is the Constitution itself and not what [the judges] have said about it,"⁴⁶ it is nevertheless significant to observe that the Supreme Court's holdings concerning the exceptions clause are altogether consistent with both the express words of article III, section 2, and the manifest intention of the framers.⁴⁷ The Court, of course, has addressed directly an actual congressional contraction of its appellate jurisdiction only once.⁴⁸ Nevertheless, it has on numerous occasions taken the opportunity to reflect more generally on the nature and extent of Congress' article III powers. A brief consideration of these reflections reveals the Court's firm and unwavering understanding from the opening days of the republic to the present.

In the first of the relevant cases, *Wiscart v. Dauchy*,⁴⁹ Chief Justice Oliver Ellsworth acknowledged that "even the [Court's] appellate jurisdiction is . . . qualified; inasmuch as it is given 'with such exceptions, and under such regulations, as Congress shall make.'"⁵⁰ He then drew what he considered to be the necessary conclusion from the Court's qualified jurisdiction: "If Congress has

46. *Graves v. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring). See also *infra* notes 178-86 and accompanying text.

47. "The government body most ready to assert the power of Congress to deprive the Court of its appellate jurisdiction has been the Court itself." Comment, *Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity?* 1969 DUKE L.J. 291, 297 n.37. In fact, no justice has ever denied Congress' broad powers under art. III. Although Justice Douglas did declare in his dissent in *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n.11 (1962), that "[t]here is a serious question whether the *McCardle* case could command a majority today," and although this passage frequently is cited in writings that suggest that the contemporary Supreme Court would not accept congressional restrictions of its appellate jurisdiction equivalent to those upheld in *McCardle*, the context of Justice Douglas' dictum suggests something quite different; namely, if Congress were to attempt to deprive the Supreme Court of jurisdiction over a case that is already under judicial consideration, then it is questionable whether *McCardle* would be followed today. Douglas subsequently expressed his understanding of the broader question of Congress' power over the appellate jurisdiction of the Supreme Court in his concurrence in *Flast v. Cohen*, 392 U.S. 83 (1968): "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, art. III. See *Ex Parte McCardle* . . ." *Id.* at 109.

48. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). For a discussion of *McCardle*, see *supra* notes 17-18 and accompanying text.

49. 3 U.S. (3 Dall.) 321 (1796).

50. *Id.* at 327.

provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."⁵¹ Ellsworth's opinion is especially weighty, as he had been a delegate to the Federal Convention and had served on the Committee of Detail that drafted the exceptions clause.

Ellsworth's conception of the Court's jurisdiction continued in an unwavering line through five consecutive chief justices.⁵² Thus, Chief Justice John Marshall in *United States v. More*⁵³ argued that an affirmative grant of certain appellate power by Congress is an implied denial of all appellate power not mentioned: "[A]s the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its power must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described."⁵⁴ Marshall elaborated upon this argument in *Durousseau v. United States*:⁵⁵

The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject. When the first legislature of the Union proceeded to carry the third article of the constitution

51. *Id.*

52. To the extent that differences of opinion arose among them, such differences were only over the question of whether the Court's appellate jurisdiction was originally granted by the Constitution or by the Congress. Three different answers were given. The first maintained that any withdrawal of the Court's appellate jurisdiction requires Congress to make a positive exception. All constitutionally granted jurisdiction not positively excepted by Congress is retained by the Court. This was the view of Justice James Wilson in his opinion in *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) at 326. The second approach was that the Court possesses no appellate jurisdiction unless positively granted by Congress. The Court's appellate jurisdiction is viewed as congressionally granted rather than as constitutionally authorized. This was the view of Chief Justice Ellsworth in *Wiscart*, see *supra* text accompanying note 50, and of Chief Justice Taney in *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119-20 (1847), see *infra* text accompanying note 57. The third approach combined features of the first two. Like the first, it based the Court's appellate jurisdiction on the Constitution. However, once Congress had acted to grant the Court appellate jurisdiction, this approach followed the second approach and implicitly denied all jurisdiction not positively granted. This was the view of Chief Justice Marshall in *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 313-14 (1810). See *infra* text accompanying note 56. See also Comment, *supra* note 47, at 297-300.

53. 7 U.S. (3 Cranch) 159 (1805).

54. *Id.* at 173.

55. 10 U.S. (6 Cranch) 307 (1810).

into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court.⁵⁶

Marshall's successor, Chief Justice Taney, likewise acknowledged the utter dependency of the Court's appellate jurisdiction upon acts of Congress: "By the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes."⁵⁷

Chief Justice Chase's statements in *McCardle* concerning the letter of article III, section 2 have already been considered.⁵⁸ Chase not only recognized Congress' power over the Court's appellate jurisdiction, but also made an important contribution to our understanding of the role of the Court: "[J]udicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."⁵⁹

Finally, in *The "Francis Wright,"*⁶⁰ Chief Justice Waite affirmed and extended what his predecessors had argued:

What [the appellate powers of the Supreme Court] shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the

56. *Id.* at 313-14. See also 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 453 (1833) ("It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.").

57. *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119-20 (1847).

58. See *supra* text accompanying note 18. Chief Justice Chase's opinion in *McCardle* echoed, for the most part, Justice Swayne's opinion for an equally unanimous Court in *Daniels v. Rock Island R.R.*, 70 U.S. (3 Wall.) 250 (1854):

The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects, it is wholly the creature of legislation.

Id. at 254.

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

60. 105 U.S. 381 (1881).

use of the jurisdiction. Not only may whole classes be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.⁶¹

In the same opinion, Waite also referred to "the rule, which has always been acted on since, that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe."⁶²

Not all judicial support for the opinion that the letter of article III, section 2 is clear and conclusive comes from eighteenth and nineteenth century jurists. For example, while dissenting on other issues in *Yakus v. United States*,⁶³ Justice Wiley Rutledge unequivocally affirmed that "Congress has plenary power to confer or withhold appellate jurisdiction."⁶⁴ Similarly, in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,⁶⁵ Justice Frankfurter noted that:

Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*. *Ex parte McCordle*
⁶⁶

For many, then, the words of the Constitution, the intention of the founding generation, and the unwavering opinion of the Supreme Court all clearly, consistently, and unequivocally reveal a constitutional plan for the courts:

[That plan is] quite simply that the Congress could decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated

61. *Id.* at 386.

62. *Id.* at 385.

63. 321 U.S. 414 (1944).

64. *Id.* at 472-73.

65. 337 U.S. 582 (1949).

66. *Id.* at 655 (Frankfurter, J., dissenting). See also *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962); *Burton*, *supra* note 32, at 176; *Roberts*, *supra* note 14, at 4.

differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as "the supreme law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁶⁷

III. ARGUMENTS AGAINST ABSOLUTE CONGRESSIONAL POWER OVER THE COURT'S APPELLATE JURISDICTION

Those who place the spirit of judicial review over the letter of article III and who insist that Congress' power under the exceptions clause is either limited or nonexistent make a variety of arguments that can be reduced to seven general headings.⁶⁸ One contention is that those who rely on the letter of article III have misconstrued the language of that article. A second contention insists that *Ex Parte McCordle*⁶⁹ is a very narrow holding with little or no application beyond its facts. A third argument asserts that the power Congress originally possessed under article III, section 2 has been effectively repealed by the passage of time. A fourth argument contends that Congress cannot make exceptions that would destroy the essential role of the Supreme Court. A fifth and related contention maintains that Congress' power to curtail the Court's jurisdiction is qualified by the constitutional principles of separation of powers and federalism. A sixth claim argues that Congress is limited in its ability to make exceptions by other constitutional provisions, such as those found in the Bill of Rights and the fourteenth amendment. Finally, a seventh argument contends that congressional contraction of the Court's appellate jurisdiction cannot be unconstitutionally motivated, that is to say Congress cannot have as its goal or objective the displacement of a disfavored judicial precedent.

What animates those who make these arguments is their conviction that the spirit of judicial review is jeopardized by the letter of article III. Because those who contend that Congress has plenary power over the Court's appellate jurisdiction generally have been content to rely simply on the letter of the Constitution and have

67. Wechsler, *supra* note 14, at 1005-06. Under this plan, "Congress has the power by enactment of a statute to strike at what it deems judicial excess." *Id.*

68. Not everyone who would limit Congress' power under art. III, § 2 relies on all seven of these arguments. Some of these arguments contradict each other.

69. 74 U.S. (7 Wall.) 506 (1868).

felt no particular obligation or rebut these arguments, these general claims have gone largely unchallenged.⁷⁰ Little effort has been made to show that the traditional concept of judicial review⁷¹ is wholly consonant with the letter of article III. In the following analysis of these arguments, such an effort will be made.

A. *The Argument from Textual Construction*

The first of the arguments against Congress' plenary powers under the exceptions clause is that those who rely on the letter of article III have misconstrued the meaning of its words. Variations of this argument exist, with Leonard Ratner focusing on how the word "exceptions" was commonly used at the time of the Federal Convention,⁷² and with such scholars as Irving Brant,⁷³ Henry Merry,⁷⁴ and Raoul Berger⁷⁵ concerning themselves with the meaning of the phrase "both as to Law and Fact."

From a survey of dictionaries existing at the time of the Federal Convention, Ratner finds that an exception was generally defined "as an exclusion from the application of a general rule or description."⁷⁶ This definition indicates that "an exception cannot destroy the essential characteristics of the subject to which it applies."⁷⁷ On this basis, Ratner argues that Congress' power to make exceptions to the Court's appellate jurisdiction is not plenary; any exceptions it makes must be narrower in application than the description of the Court's entire appellate jurisdiction.⁷⁸ This os-

70. Intelligent exceptions to this generalization are Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190 (1981); Van Alstyne, *supra* note 32.

71. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). On the difference between the traditional and modern forms of judicial review, see Wolfe, *A Theory of U.S. Constitutional History*, 43 J. POL. 292 (1981).

72. Ratner, *supra* note 20, at 168-71.

73. Brant, *supra* note 20.

74. Merry, *supra* note 20.

75. R. BERGER, *supra* note 3. Berger, however, subsequently qualified his position. See Berger, *supra* note 14.

76. Ratner, *supra* note 20, at 168.

77. *Id.* at 170.

78. Sager agrees with Ratner's interpretation:

An "exception" implies a minor deviation from a surviving norm; it is a nibble, not a bite. And there is reason to think that this sense of the term was, if anything, clearer at the time the Constitution was drafted than now. The lan-

tensible limitation on Congress' power, however, is essentially meaningless. If an exception implies some residuum of jurisdiction, Congress can meet this test by excluding everything but, for example, patent cases. As one of the interlocutors in Henry Hart's famous dialogue remarks: "This is so absurd, and it is so impossible to lay down any measure of a necessary reservation, that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress."⁷⁹

A more ingenious, if ultimately no more successful variation of this argument against Congress' plenary power under article III, section 2 focuses on the meaning of the phrase, "both as to Law and Fact." Those who make this argument refuse to concede that the framers of the Constitution intended to vest Congress with the power to effect the wholesale destruction of judicial review. Rather, they insist, the "sole purpose of the exceptions clause was to permit Congress to limit appellate jurisdiction over questions of fact in cases at law."⁸⁰ Irving Brant, a noted historian, provides the most recent and sophisticated version of this argument. He contends that as a result of an unfortunate placement of commas in the phrase, "Jurisdiction, both as to Law and Fact," the words "both as to Law and Fact" appear to be a parenthetical, and the modifying clause beginning "with such Exceptions" seems to attach to "Jurisdiction," when, in fact, what the entire exceptions clause was meant to modify is simply appellate jurisdiction of

guage of Article III from which Congress draws its authority to limit the jurisdiction of the Supreme Court, thus contains only a bounded power to make exceptions.

Sager, *supra* note 3, at 44.

79. Hart, *supra* note 20, at 1364. Ratner recognizes this and concedes ultimately that "general usage . . . cannot provide a definitive interpretation," whereupon he launches into an "essential role of the Court" argument of the kind discussed *infra* notes 123-32 and accompanying text. Ratner, *supra* note 20, at 171. Sager likewise acknowledges the difficulty of textual interpretation: "To be sure, there is nothing self-evident about the precise limits of Congress' authority in such an amorphous grant, but this lack of an obvious answer invites an application of the tools of constitutional interpretation." Sager, *supra* note 3, at 44. If Sager's methodology for constitutional interpretation included some appreciation of the work of the constitutional framers and their understanding of separation of powers and federalism, his invitation to join him in applying this methodology would be more warmly received. See *infra* notes 138-61 and accompanying text.

80. Brant, *supra* note 20, at 11.

questions of fact.⁸¹

At the time of the Federal Convention, considerable diversity in legal practice existed among the states, both with respect to cases in common and civil law and particularly with respect to cases in equity and maritime jurisdiction. Re-examination of factual issues was permitted in some states, but was not permitted in others. Under its appellate jurisdiction, the Supreme Court inevitably would be called upon to review cases where questions of fact were central and at issue. This prospect, however, raised the spectre of the Supreme Court having the power to overturn a jury's findings of fact in a criminal case. According to Brant, the problem faced by the Convention was to draft a provision that would permit the Court to review questions of fact in civil, equity, and maritime cases, but that would prevent it from abusing this power by retrying facts found by juries in criminal cases. Given the tremendous diversity among the states, drafting a constitutional clause to resolve this problem was all but impossible. Therefore, Brant argues, the framers took the easy way out and drafted language (albeit, Brant concedes, poorly punctuated language) that left the whole issue for handling by the Congress through the medium of the exceptions clause. The exceptions clause thus was "fashioned to meet the principal criticism of the appellate jurisdiction, its inclusion of matters of 'fact.'" ⁸²

Despite Brant's ingenuity, and that of Merry and Berger as well, this interpretation of the exceptions clause ultimately fails. This interpretation cannot be reconciled with the actual words and punctuation of the Constitution. Had the framers intended what Brant alleges they intended, they obviously were possessed of the necessary skills to have conveyed clearly that intention.⁸³ Similarly, Brant's interpretation cannot be squared with the proceed-

81. *Id.* at 5.

82. R. BERGER, *supra* note 3, at 307. See also Berger, *supra* note 14: "[T]he founders merely intended by that clause to prevent the Court from revising the findings of a jury." *Id.* at 806.

83. As Chief Justice Marshall wrote in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), "[the framers] would have declared this purpose in plain and intelligible language." *Id.* at 249. For example, they could have declared: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, but with appellate Jurisdiction as to Fact subject to such Exceptions and under such Regulations as the Congress shall make."

ings of the Convention. What the Committee of Detail presented to the Convention in no way suggested that Congress' power to make exceptions to the Court's appellate jurisdiction was limited to the treatment of factual issues. Quite the contrary, the only discussion in the Convention relating to the exceptions clause centered on whether the Court was to have power to review questions of fact, not whether Congress' power to curtail the Court's jurisdiction was limited to such questions.⁸⁴

Nor can Brant's interpretation survive exposure to the post-Convention statements of Edmund Randolph and Alexander Hamilton. When the exceptions clause was before the Virginia State Ratifying Convention, Randolph, who had participated in the Federal Convention, declared that "[i]t would be proper to refer here to *any* thing that could be understood in the federal court. [Congress] may except generally both as to law and fact, or they may except as to law only, or fact only."⁸⁵ Alexander Hamilton also stressed that Congress' power to make exceptions applied to law as well as to facts: "The supreme court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable."⁸⁶ Hamilton remarked that the propriety of Congress' power to except matters of law from the Supreme Court's appellate jurisdiction "has scarcely been called into question."⁸⁷ "[C]lamors have been loud," he noted, only with respect to granting the Court any appellate jurisdiction over matters of fact.⁸⁸ In an effort to quiet the fear of those alarmed by the prospect of any appellate retrial of facts found by a jury, Hamilton declared, again clearly

84. See *supra* notes 40-43 and accompanying text. Brant likewise fails to appreciate that all the controversy present in the state ratifying conventions concerning whether the Supreme Court ought even to have power to review questions of fact in its appellate jurisdiction, a controversy that Brant cites as evidence supporting his general argument, is simply not germane to the question of whether Congress has power to contract the appellate jurisdiction of the Supreme Court with respect to substantive questions of law. For similar citation of and reliance on wholly irrelevant evidence, see Merry, *supra* note 20, at 59-62.

85. 3 J. ELLIOTT *supra* note 45, at 572. Randolph was echoing John Marshall's comments from the previous day: "What is the meaning of the term exceptions? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court." *Id.* at 560.

86. THE FEDERALIST, No. 81, at 552 (A. Hamilton) (J. Cooke ed. 1961).

87. *Id.* at 549-50.

88. *Id.* at 550.

contrary to Brant's contention, that "the Supreme Court shall possess appellate jurisdiction, both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulation as the national legislature may prescribe."⁸⁹ All of this merely reaffirms Hamilton's assurance that if any "inconveniences" should arise from the powers the Constitution grants to the federal judiciary, Congress will have authority to make such exceptions and to prescribe such regulations as it believes necessary "to obviate or remove these inconveniences."⁹⁰

Finally, Brant's interpretation is fundamentally at odds with an unwavering line of judicial opinion beginning with Chief Justice Ellsworth, himself a delegate to the Federal Convention and a member of the Committee of Detail, and extending to the present.⁹¹

B. *Reliance on Ex Parte McCordle*

A second major argument against Congress' claim to plenary power under article III, section 2 centers on the meaning of *Ex*

89. *Id.* at 552. Hamilton also observed that separating law and fact in certain issues was impossible. *Id.* at 551.

90. THE FEDERALIST, No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961). Although Brant quotes from THE FEDERALIST No. 80, he engages in a form of academic gerrymandering and conveniently overlooks this passage. See Brant, *supra* note 20, at 9. Brant focuses his attention instead on a passage from THE FEDERALIST No. 81:

To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature shall prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

Id., No. 81, at 552. See also Merry, *supra* note 20, at 309 (also ignoring THE FEDERALIST No. 80). This passage, of course, is irrelevant to the issue of whether Congress' power under the exceptions clause is limited simply to curtailing the appellate jurisdiction of the Supreme Court in cases raising questions of fact. To prove that Congress' power extends to regulating the treatment of facts does not prove that its power is limited to such regulation. See *supra* note 84.

Despite all of this evidence, Sager maintains the following position:

[I]f the Framers of Article III had had the bad sense to believe the control of jurisdiction was a workable way to give Congress a substantive check on the federal judiciary, we might well have to live with that fact and with its implications for the constitutional shortcuts that Congress would be entitled to take.

But there is no evidence that they held this belief

Sager, *supra* note 3, at 42.

91. See *supra* notes 49-67 and accompanying text.

Parte McCardle.⁹² Rather than supporting Congress' claim as is commonly maintained, several scholars contend that *McCardle* concedes nothing to Congress.⁹³ They note that in *McCardle*, the Court carefully pointed out that the repealing act of 1868⁹⁴ did not affect judicial authority to issue writs of habeas corpus under section 14 of the Judiciary Act of 1789:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus* is denied. But this is an error. The [repealing] act of 1868 does not except from that jurisdiction any cases but appeals from the Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.⁹⁵

These scholars further note that this statement was reaffirmed a few months later in *Ex Parte Yerger*.⁹⁶ In *Yerger*, on a petition for habeas corpus, the Court reviewed a circuit court decision denying the writ to a civilian awaiting trial by a military commission for violating the Reconstruction Acts. Without the slightest hesitation, the Supreme Court unanimously sustained its jurisdiction and held that the repealing act of 1868 did not affect its authority under the Judiciary Act of 1789 to issue the writ.⁹⁷ Thus, these scholars argue, *McCardle* does not sanction congressional impairment of the Court's jurisdiction:

The [repealing] statute did not deprive the Court of jurisdiction to decide *McCardle's* case; he could still petition the Supreme Court for a writ of habeas corpus to test the constitutionality of his confinement. The legislation did no more than eliminate one procedure for Supreme Court review of decisions denying habeas corpus relief while leaving another equally efficacious one

92. 74 U.S. (7 Wall.) 506 (1868).

93. See R. BERGER, *supra* note 3, at 2-3; Hart, *supra* note 20, at 1365; Ratner, *supra* note 20, at 178-81. See also Rotunda, *supra* note 3, at 849-51.

94. Act of Mar. 27, 1868, ch. 34, 15 Stat. 44. The Judiciary Act of 1789 provided all federal judges with the power to issue writs of habeas corpus. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81.

95. 74 U.S. (7 Wall.) at 515.

96. 75 U.S. (8 Wall.) 85 (1869).

97. *Id.* at 96-98.

available.⁹⁸

These scholars also look to *United States v. Klein*,⁹⁹ decided two years after *Yerger*, in which the Court held that Congress could not enact legislation to eliminate an area of jurisdiction in order to control the results in a particular case. Klein sued in the Court of Claims under an 1863 statute that allowed the recovery of land captured or abandoned during the Civil War if the claimant could prove he had not assisted in the rebellion.¹⁰⁰ Relying on an earlier Supreme Court decision¹⁰¹ that a presidential pardon proved conclusively that the recipient of the pardon had not aided the rebellion, Klein prevailed in the Court of Claims. While the government's appeal to the Supreme Court was pending, Congress passed a statute providing that a presidential pardon would not support a claim for captured property, and that acceptance of a pardon for participation in the rebellion, without a disclaimer of the facts recited, was conclusive evidence that the claimant had aided the enemy.¹⁰² Furthermore, the statute provided that on proof of such pardon and acceptance, which could be heard summarily, the jurisdiction of the federal judiciary in the case should cease, and the Court of Claims should forthwith dismiss the suit of such claimant.¹⁰³ As Chief Justice Chase remarked: "The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it both in the Court of Claims and in this court on appeal."¹⁰⁴ The Supreme Court held the act to be unconstitutional because it subverted the judicial process by prescribing "a rule for the decision of a cause in a particular way,"¹⁰⁵ and it also infringed upon the constitutional power

98. Ratner, *supra* note 20, at 180.

99. 80 U.S. (13 Wall.) 128 (1871).

100. *Id.* at 131. The statute at issue was the Act of Mar. 12, 1863, ch. 120, 12 Stat. 820.

101. *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869).

102. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

103. *Id.*

104. 80 U.S. (13 Wall.) at 144.

105. *Id.* at 146. The Court continued:

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the Court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law,

of the executive by impairing the effect of a pardon.¹⁰⁶

These efforts to construe *McCardle* narrowly and to employ *Yerger* and *Klein* to protect the spirit of judicial review from the letter of article III, section 2, however, are unsuccessful. Neither *McCardle* nor *Yerger* in any way suggests that the Court would have been justified in invalidating the act of 1868 if the act had excepted from the Supreme Court's appellate jurisdiction cases arising under section 14 of the Judiciary Act of 1789. Quite the contrary, as Chief Justice Chase noted in *McCardle*, judicial duty entails the refusal to exercise ungranted jurisdiction as well as the obligation to exercise jurisdiction when it is conferred by the Constitution or by law.¹⁰⁷ *McCardle* and *Yerger* are wholly faithful to Justice Chase's understanding. In *McCardle*, the Court declined to exercise jurisdiction that had been positively excepted by the repealing act of 1868. In *Yerger*, the Court firmly exercised jurisdiction that the Judiciary Act of 1789 conferred and which the repealing act in no way limited. Thus, the Court on both occasions acted consistently with Chief Justice Marshall's observation in *Cohens v. Virginia*:¹⁰⁸ "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one

must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

Id. at 147.

106. *Id.* at 147-48.

To the executive alone is entrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority, and directs the court to be instrumental to that end.

Id.

107. See 74 U.S. (7 Wall.) at 515.

108. 19 U.S. (6 Wheat.) 264 (1821).

or the other would be treason to the constitution."¹⁰⁹

Similarly, reliance on *Klein* is misplaced. *Klein* involved a congressional attempt to forbid the Court from giving the effect to evidence which, in the Court's judgment, such evidence should have, and directed the Court to give the evidence an effect precisely contrary.¹¹⁰ In *Klein*, Congress sought to curtail the appellate jurisdiction of the Supreme Court to obtain a particular result in a specific case; by so doing, Congress "inadvertently passed the limit which separates the legislative from the judicial power."¹¹¹ Congress' action in *Klein* is altogether different from congressional contractions of the Court's jurisdiction that seek merely to shift the determination of any result, whatever that result might be, to the lower federal or state courts, both of which are also bound by the Constitution as the supreme law of the land.¹¹² Shifting jurisdiction to lower federal or state courts is wholly permissible, and the Court in *Klein* declared as much, acknowledging that "if this Act did nothing more . . . [than] simply deny the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."¹¹³

C. *The Contraction of Congress' Power Due to the Passage of Time*

A third argument against the letter of article III operates from the perspective of what Justice Rehnquist has called the "living Constitution with a vengeance."¹¹⁴ This argument is based on the premise that congressional "control over the Court's appellate jurisdiction has in effect now been repealed by the passage of time and by the recognition that exercise of such power would be in the

109. *Id.* at 404.

110. 80 U.S. (13 Wall.) at 147. *See also* Vaughn, *Congressional Power to Eliminate Busing in School Desegregation Cases*, 31 ARK. L. REV. 231, 244 (1977).

111. 80 U.S. (13 Wall.) at 147.

112. This Article in no way condones Congress' use of power to determine the outcome of any particular judicial proceeding. As James Madison recognized, such a power would clearly make the legislators "advocates and parties to the causes which they determine." THE FEDERALIST, No. 10, at 59 (J. Madison) (J. Cooke ed. 1961).

113. 80 U.S. (13 Wall.) at 145. *See also* Rice, *supra* note 70, at 193-94.

114. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 695 (1976).

truest sense subversive of the American tradition of an independent judiciary."¹¹⁵ C. Herman Pritchett, who is closely identified with this position, argues that while the language of article III, section 2 may have seemed reasonable in 1787, so, too, did choosing a President by indirect election.¹¹⁶ Originally, the Supreme Court was just a few words in an unadopted document; today, however, it is the most respected judicial body in the world and has the authority to determine the constitutionality of acts of Congress.¹¹⁷ Given these changes in conditions, "Congress can no longer claim with good conscience the authority granted by article III, section 2."¹¹⁸

The assertion that new conditions can amend the clear language and intent of the exceptions clause is subject to considerable doubt. Changing circumstances¹¹⁹ and the passage of time may be considered in the interpretation and adaptation of such broadly phrased constitutional provisions as the due process and commerce clauses. These clauses were drafted expansively to allow evolving interpretations as time might require. Neither the language of the exceptions clause nor the debates of the Convention, however, indicate that the framers intended such broad adaptations of article III. Changing circumstances can neither alter nor amend the meaning of clear and unequivocal language in the Constitution.¹²⁰ Even

115. C. PRITCHETT, *supra* note 20, at 122. See also C. PRITCHETT, *THE AMERICAN CONSTITUTION* 35-36 (3d ed. 1977); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 *YALE L.J.* 498, 501-13 (1974).

116. C. PRITCHETT, *supra* note 20, at 122.

117. *Id.*

118. *Id.*

119. Eisenberg, *supra* note 115, at 504.

120. See Redish & Woods, *supra* note 3:

The seventh amendment, for example, provides that in all cases where the "value in controversy" exceeds twenty dollars, the right to a jury trial at common law must be preserved. It might be argued that use of a twenty dollar floor does not today accomplish the framers' goal of precluding a jury trial in minor civil cases, for twenty dollars at the time of the drafting of the seventh amendment meant something quite different from twenty dollars today. But despite such an argument, we could not read an inflationary spiral into the terms of the seventh amendment. The seventh amendment is strict and un-bending in its dictates on this matter. If we are to alter it, even in order to accomplish the framers' goal, we must do so through the amendment process. Similarly, the language and history of article III are so clear that any alteration, even to accomplish the framers' purposes, must come by amendment and

Pritchett recognizes this, at least with respect to the other constitutional feature he regards as anachronistic—indirect election of the President. Thus, rather than contending that the Electoral College has been repealed by history, Pritchett served on and supported the policies of an American Bar Association blue ribbon commission that proposed a constitutional amendment formally abolishing the Electoral College and substituting in its place direct election of the President.¹²¹

Many provisions of the Constitution, of course, are phrased broadly, thus permitting flexible interpretations that adapt the document to changing circumstances. Nonetheless, even when such broad phrasing exists, the goal must be “adaptation *within* the Constitution rather than adaptation *of* the Constitution.”¹²² The terms of article III, however, are not phrased so broadly and no doubt exists as to the framers’ intent. Unless the Court is to be permitted to disregard the outer rational limits of constitutional language—all to protect its role as principal interpreter of that language—the “passage of time theory” cannot be legitimately employed to amend the letter of the exceptions clause.

D. *The “Essential Functions” Argument*

A fourth argument against Congress’ power to curtail the appellate jurisdiction of the Supreme Court is that Congress cannot constitutionally make any exceptions that will destroy what is variously described as the Court’s essential role or function.¹²³ “[T]he [exceptions] clause means ‘With such exceptions and under such regulations as Congress may make, not inconsistent with the essential function of the Supreme Court under this Constitution.’”¹²⁴

not by interpretation in light of “changing circumstances.”

Id. at 74.

121. See N. PEIRCE, *THE PEOPLE’S PRESIDENT* 161 (1968).

122. Wolfe, *supra* note 71, at 301.

123. See, e.g., MINORITY REPORT, *supra* note 33, at 156; Brant, *supra* note 19, at 24; Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585, 594 (1975); Hart, *supra* note 19, at 1365; Ratner, *supra* note 19, at 160-61; Rotunda, *supra* note 3, at 845; Sager, *supra* note 3, at 42-68; White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the “Lessons” of History*, 63 *JUDICATURE* 162, 170 (1979).

124. Ratner, *supra* note 19, at 172. Interestingly, those who make this argument point out that none of the cases cited in support of Congress’ powers under the exceptions clause,

This argument, however, is also fraught with difficulties. It makes the Court itself the final arbiter of the extent of its powers. The argument contends not only that the essential functions of the Court cannot be limited, but also that the Court exclusively, and not the Congress, is to determine what functions are, in fact, essential. This interpretation of the exceptions clause cannot be sustained:

It is hardly in keeping with the spirit of checks and balances to read such a virtually unlimited power into the Constitution. If the Framers intended so to permit the Supreme Court to define its own jurisdiction even against the will of Congress, it is fair to say that they would have made that intention explicit.¹²⁵

Nothing in the text of the exceptions clause or in any Supreme Court opinion addressing this subject suggests that Congress' power under article III, section 2 is limited to making " 'inessential' exceptions."¹²⁶ The distinction between the "essential" and "inessential" functions of the Court is, of course, wholly extraconstitutional. Consequently, those who draw this distinction on the Court's behalf are not limited by the letter of the Constitution but, rather, are free to define the Court and its essential role and functions as they see fit. Not surprisingly, given the absence of any constitutional restrictions (or, more precisely, given their refusal to recognize and abide by any constitutional restrictions), proponents of this interpretation advance and defend a wide variety of definitions. Thus, Henry Hart, who first propounded this argument, defines the essential role of the Supreme Court as serving as a check on the coordinate branches of government to keep them from destroying the Constitution.¹²⁷ Leonard Ratner offers a slightly dif-

including *McCardle*, involves what they would consider an "essential function" of the Supreme Court. *Id.* at 173-81. This fact, however, may attest more to the sense of sound congressional opinion against the wisdom of making such exceptions than to any notion that Congress lacks the power to do so. See Van Alstyne, *supra* note 31, at 257.

125. Rice, *supra* note 70, at 195. For a further discussion of the exceptions clause and its relation to separation of powers and checks and balances, see *infra* notes 140-54 and accompanying text.

126. Van Alstyne, *supra* note 32, at 257.

127. Hart, *supra* note 20, at 1365. See also Brant, *supra* note 20, in which Brant argues that the Court's critical function is to prevent "the destruction or infringement of any of the mandatory requirements of the Constitution." *Id.* at 24.

Hart and Brant appear to believe that only the Supreme Court, through its employment

ferent view, stressing the Court's "essential constitutional functions of maintaining the uniformity and supremacy of federal law."¹²⁸ In contrast, Archibald Cox asserts that the "chief function of the Supreme Court is to protect human rights."¹²⁹ Even more expansively, Paul Brest accords a special role for the Court in promoting "individual rights and decision making through democratic processes."¹³⁰

Although considerable variety exists among these definitions of the Court and its essential role, they share one common element. Central to all formulations of this argument is an activist view of the judiciary. Only through frequent recourse to judicial review will the Court be able to perform the essential functions judicial activists assign to it. Quite naturally, proponents of the essential functions argument see Congress' plenary powers under article III, section 2 as a threat to judicial activism.¹³¹ These proponents, therefore, strive to distort or obscure the letter of the exceptions clause, thereby rendering secure the spirit of judicial review that animates their judicial activism.¹³²

of judicial review, is able to provide protection against the Constitution's destruction. This view ignores the operation of such constitutional mechanisms as separation of powers, bicameralism, staggered elections, federalism, and the multiplicity of interests present in an extended republic. See R. ROSSUM & G. McDOWELL, *THE AMERICAN FOUNDING: POLITICS, STATESMANSHIP, AND THE CONSTITUTION* 6-11 (1981). See also *infra* notes 140-61 and accompanying text. Moreover, even if these other constitutional features were absent, Hart's and Brant's reliance on the judiciary still would be misplaced. As Learned Hand observed:

[T]his much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

L. HAND, *THE SPIRIT OF LIBERTY* 125 (1959).

128. Ratner, *supra* note 20, at 201. See also Sager, *supra* note 3, at 43, 45.

129. Cox, *The Role of Congress in Constitutional Determinations*, 10 U. CIN. L. REV. 199, 253 (1971). See also White, *supra* note 118. White insists that the Court's chief role is serving "as the principal elite institution protecting the people's rights." *Id.* at 170. White goes so far as to argue that the Court should "acknowledge that the source of newly invented rights is not the Constitution but the enhanced seriousness of certain values in our society." *Id.* at 168.

130. Brest, *supra* note 123, at 594. See also J. CHOPER, *supra* note 19; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 226 (1980); Ely, *supra* note 16, at 87.

131. See Brant, *supra* note 20, at 27-28.

132. See Van Alstyne, *supra* note 32:

It does appear to be more than a passing strange argument to suggest that

The incompatibility that proponents of the essential functions argument perceive between the letter of article III and the spirit of judicial review is almost exclusively attributable to the way in which they have defined the essential role and function of the Supreme Court. Their expansive view of what the Court should do obviously is threatened by language that gives to Congress the power to except from the Court's appellate jurisdiction the cases necessary to sustain the Court's activist role.¹³³ This perceived incompatibility, however, can be avoided entirely if the Court's essential role is defined more modestly:

Federal Courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.¹³⁴

This more limited conception of the role of the Court is consistent not only with the actual provisions of the Constitution, but also with Hamilton's original defense of judicial review in *The Federalist*, No. 78¹³⁵ and Chief Justice Marshall's establishment of judicial

because the full evolution of substantive constitutional review may itself have been exogenous to the Constitution, the power of Congress to make exceptions of any appellate jurisdiction described in article III therefore does not extend to such review; as though the power to make exceptions applies to any appellate jurisdiction granted by article III, but not to that judicial power which the Supreme Court simply evolved in the fullness of time.

Id. at 262-63.

133. Their expansive view of the Court's essential role also is threatened by, and in turn threatens, other express constitutional provisions, including the prescribed means for amending the Constitution found in art. V, the delegations of power to Congress found in art. I, § 8, and the enforcement sections of the post-Civil War amendments.

134. Wechsler, *supra* note 14, at 1006. "It is not that the judges are appointed arbiters, and to determine as it were upon application, whether the Assembly have or have not violated the Constitution; but when an action is necessarily brought in judgment before them, they must, unavoidably, determine one way or another." Letter from James Iredell to Richard Spaight (Aug. 26, 1787), *quoted in* R. BERGER, *supra* note 3, at 82-83. *See also* Rice, *supra* note 70: "Whatever the cogency of [the] 'essential role' test would be to a wholesale withdrawal of jurisdiction, if it were ever attempted by Congress, [this] test cannot properly be applied to narrowly drawn withdrawals of jurisdiction over particular types of cases." *Id.* at 195.

135. THE FEDERALIST, No. 78, (A. Hamilton) (J. Cooke ed. 1961).

review in *Marbury v. Madison*.¹³⁶ Moreover, because this interpretation regards the Court's power of judicial review as extending no further than to cases otherwise within its jurisdiction, which jurisdiction is subject to such exceptions as Congress shall make, this interpretation reflects the compatibility of the letter of article III and the spirit of judicial review.¹³⁷

E. *The Separation of Powers/Federalism Argument*

A fifth contention closely related to the essential functions argument is that Congress' power under the exceptions clause is limited by the constitutional principles of separation of powers and federalism.¹³⁸

If Congress also has plenary control over the appellate jurisdiction of the Supreme Court, then . . . Congress [could] by statute profoundly alter this structure of American government. It [could] all but destroy the coordinate judicial branch and thus upset the delicately poised constitutional system of checks and balances. It [could] distort the nature of the federal union by permitting each state to decide for itself the scope of its authority under the Constitution. It [could] reduce the supreme law of the land as defined in article VI to a hodgepodge of inconsistent decisions by making fifty state courts and eleven federal courts of appeal the final judges of the meaning and application of the Constitution, laws, and treaties of the United States.¹³⁹

136. 5 U.S. (1 Cranch) 137 (1803).

137. See Chief Justice Chase's comment in *Ex Parte McCordle*, 74 U.S. (7 Wall.) 515 (1868), *supra* text accompanying note 59. See also *Muskrat v. United States*, 219 U.S. 346 (1911):

The exercise of [judicial review], the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power of the legislative branch of the government.

Id. at 361.

138. Sager describes the separation of powers/federalism argument as a "particular version of the essential function claim." According to this version, the Constitution "contemplates federal judicial supervision of state conduct to ensure state compliance with federal constitutional norms." Sager, *supra* note 3, at 43, 45.

139. Ratner, *supra* note 20, at 157-58. See also *Hearings*, *supra* note 10, at 14 (statement of Leonard G. Ratner).

This contention, too, is flawed, because it rests on a superficial understanding of the political principles of the Constitution.

Those who would limit Congress' power under article III, section 2 stress that use of the exceptions clause constitutes an attack on the status and independence of the Court and thereby jeopardizes the principle of separation of powers.¹⁴⁰ These criticisms are groundless. In our constitutional system, the judiciary is not supposed to be entirely independent; neither is the legislative nor executive branch. Separation of powers does not entail complete independence. The framers did not intend the branches of government to be wholly unconnected with each other;¹⁴¹ rather, the framers sought to create a government in which the branches would be so connected and blended, as to give to each a constitutional control over the others.¹⁴² The framers accomplished this blending "by so contriving the interior structure of the government . . . that its several constituent parts, . . . [are] by their mutual relations, the means of keeping each other in their proper places."¹⁴³ The result is a government consisting of three coordinate and equal branches, each performing a blend of functions, thereby balancing, as opposed to merely separating, powers.¹⁴⁴

The term separation of powers is, in fact, a misnomer. The framers created not so much a government of separated powers as one of "separated institutions sharing powers."¹⁴⁵ This sharing of powers allows the branches to have a "mutual influence and operation on one another. Each part acts and is acted upon, supports and is supported, regulates and is regulated by the rest."¹⁴⁶ Thus, the three branches, including the judiciary, are intended to move "in a

140. See, e.g., *Hearings*, *supra* note 10, at 226-34 (testimony of Edward I. Cutler); C. PRITCHETT, *supra* note 20, at 15; Brant, *supra* note 20, at 28-29; Ratner, *supra* note 20, at 158.

141. THE FEDERALIST, No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).

142. *Id.*

143. THE FEDERALIST, No. 51, at 347-48 (J. Madison) (J. Cooke ed. 1961).

144. As James Wilson declared in the Federal Convention: "The separation of the departments does not require that they should have separate objects but that they should act separately though on the same objects." 2 M. FARRAND, *supra* note 36, at 78. See also R. ROSSUM & G. McDOWELL, *supra* note 127, at 6-11; R. SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 2-7 (1971).

145. R. NEUSTADT, *PRESIDENTIAL POWER* 33 (1960).

146. THE WORKS OF JAMES WILSON 300 (R. McCloskey ed. 1967).

line of direction somewhat different from that, which each acting by itself, would have taken; but, at the same time, in a line partaking the natural direction of each, and formed out of the natural direction of the whole—the true line of public liberty and happiness.”¹⁴⁷

The framers recognized that power is, by nature, encroaching, whether it be legislative, executive, or judicial.¹⁴⁸ They solved the problem of “the encroaching spirit of power”¹⁴⁹ by balancing the powers assigned to each of the three branches so that each branch could effectively check, but not control, the other two. Furthermore, the framers did not give any one branch the authority to decide whether its powers encroached on the others: “[N]one of [the three branches], it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respected powers.”¹⁵⁰

The framers did not consider the judiciary exempt from the operation of these principles, although they did consider the judiciary to be the least dangerous of the three branches because they had given the judiciary the least amount of power.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in its capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.¹⁵¹

147. *Id.*

148. THE FEDERALIST, No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).

149. *Id.* at 333.

150. THE FEDERALIST, No. 49, at 339 (J. Madison) (J. Cooke ed. 1961).

151. THE FEDERALIST, No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

Although the framers regarded the judiciary as having the least capacity, because of the very nature of its functions, to be dangerous, the framers recognized that judicial power could be arbitrary and oppressive. The framers expected that the arbitrary discretion of the courts could be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."¹⁵² Additionally, the framers provided the other branches with powers to check judicial encroachments. Thus, the framers provided for congressional appropriation of money for the judicial branch, presidential appointment and senatorial confirmation of judges, and congressional power to define entirely the jurisdiction of the inferior federal courts. The framers also provided for the impeachment of judges by the House of Representatives and the trial of impeached judges by the Senate—what *The Federalist* called "a complete security" against "the danger of judiciary encroachments on the legislative authority."¹⁵³ Finally, the framers of the Constitution provided the legislative branch with ample authority under article III, section 2, so that if "some partial inconveniences" were to arise as a result of the judicial branch's exercise of its powers, Congress could make such exceptions and prescribe such regulations "as will be calculated to obviate or remove these inconveniences."¹⁵⁴

Thus, the framers never intended for judicial power to be absolute or for the judiciary to be completely independent. Just as they provided checks upon the legislative and executive branches, so too the framers included mechanisms to restrain the judiciary. The exceptions clause was one such mechanism.

Those who contend that Congress' power under the exceptions clause is limited by the constitutional principle of federalism betray an equally superficial understanding of the political principles of the Constitution. They contend, with Leonard Sager, that Congress cannot restrict Supreme Court supervision of state conduct if such supervision is necessary to insure uniform judicial interpretation and state compliance with federal constitutional norms.¹⁵⁵ If

152. *Id.* at 529. See also *THE FEDERALIST*, No. 48, at 334 (J. Madison) (J. Cooke ed. 1961).

153. *THE FEDERALIST*, No. 81, at 545-46 (A. Hamilton) (J. Cooke ed. 1961).

154. *THE FEDERALIST* No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961).

155. Sager, *supra* note 3, at 43. See also Kay, *Limiting Federal Court Jurisdiction: The Unforeseen Impact on Courts and Congress*, 65 *JUDICATURE* 188 (1981); Ratner, *supra* note

the Supreme Court were restricted by Congress in such a manner, such restriction would, they fear, reduce the supremacy clause to a virtual nullity. Sager goes so far as to argue that if the states were not answerable to the Supreme Court, the Constitution would have "little to recommend it over the Articles of Confederation."¹⁵⁶ This view is deficient in a number of particulars.

This view reflects a common misperception concerning the nature of American federalism. The framers relied on federalism, as they also relied on separation of powers and the multiplicity of interests in an extended republic, to achieve their constitutional objectives—the creation and operation of an efficient and powerful guarantor of rights and liberties organized around the principle of qualitative majority rule.¹⁵⁷ The framers sought a "Republican remedy for the disease most incident to the Republican Government."¹⁵⁸ That disease was the tension between majority tyranny and democratic ineptitude.¹⁵⁹ The framers saw the federalism they were creating as contributing to that Republican remedy. Their federalism, however, was not merely a division of power between the national government and the state governments; it was also a blending of federal elements into the structure and procedures of the central government itself.¹⁶⁰ An obvious example of this blending is the mixture into the Senate of the federal principle of equal representation of all the states.¹⁶¹ The framers recognized that this

20, at 158-61.

156. Sager, *supra* note 3, at 48.

157. The principle of qualitative majority rule considers not only the degree of support that a policy receives, but also the quality of the policy itself. See generally R. ROSSUM & G. TARR, *AMERICAN CONSTITUTION: CASES AND INTERPRETATION* (1983).

158. *THE FEDERALIST*, No. 10, at 65 (J. Madison) (J. Cooke ed. 1961).

159. The rival defects of majority tyranny and democratic ineptitude posed seemingly unsurmountable obstacles for constitution-makers, for the more they attempted to overcome majority tyranny by withholding the power to tyrannize, the more they rendered the government inept and powerless, and vice versa.

160. See Diamond, *The Federalist on Federalism*, 86 *YALE L.J.* 1273, 1278-85 (1977).

161. See *THE FEDERALIST*, No. 22 (A. Hamilton) (J. Cooke ed. 1961). In this essay, Hamilton discussed federalism as it was understood until the time of the Federal Convention and described it as characterized by three operative principles:

1. The authority of the central federal government was restricted to the individual state governments and did not reach the individual citizens composing the states. Even this authority, however, was limited; the resolutions of the federal authority amounted to little more than mere recommendations, which the states opted to observe or disregard.

2. The central federal government had no authority over the internal problems of the

principle, when joined with bicameralism and separation of powers, could contribute directly to qualitative majority rule. For a measure to become law, for example a measure controlling the appellate jurisdiction of the Supreme Court, it would have to pass the Senate where, because of the federal principle of equal representation, the presence of a nationally distributed majority and the moderating tendencies associated therewith would be guaranteed.

To the framers, federalism also meant that the same relationship that existed between the citizen and the individual state also would exist, at least with regard to those functions specified in article I, section 8, between the citizen and the centralized national government. This is a crucial difference between the Constitution and the Articles of Confederation, and one which Professor Sager apparently overlooks.¹⁶² Under the Constitution, the national government need not gain the cooperation of a state to regulate the behavior of the state's citizens, for they are also citizens of the United States. In fact, even if a state actively attempted to frustrate the wishes of the national government, the national government, through either legislative or judicial action, could reach the citizenry and hold them personally accountable for their actions. This is a significant difference between the Constitution and the Articles of Confederation: the national government can govern the individual directly and need not rely on the good will or cooperation of state intermediaries.

Similarly, if the Congress, moderated in its judgments by the nationally distributed majorities that are assured by the federal principle of equal representation of all states in the Senate, restricts the appellate jurisdiction of the Supreme Court in a certain subject matter area because Congress has concluded that the Court's decisions in that area have unduly limited the states, Congress' action can hardly be described as placing the supremacy clause in jeopardy. Rather, Congress is simply exercising its power under the exceptions clause to obviate those inconveniences that have arisen as a result of the judiciary's interventions and, in a manner that is

individual states. Its rule was limited primarily to certain external tasks of mutual interest to the member states.

3. Each individual member had an exact equality of suffrage. This equal vote was derived from the equality of sovereignty possessed by each member state.

162. See generally Sager, *supra* note 3, at 45-57.

wholly consistent with the constitutional principle of separation of powers, is determining for the national government what the states may or may not do.

The view that the Congress can limit the appellate jurisdiction of the Supreme Court without jeopardizing federalism is compatible not only with the framers' understanding but also with the actions taken by both Congress and the federal judiciary until well into the twentieth century. Thus, in the Judiciary Act of 1789, Congress did not provide for Supreme Court review of cases in which state courts invalidated state conduct on federal grounds, even if those cases invalidated state conduct under an overly broad reading of federal laws that in turn defeated other federal rights.¹⁶³ In the same Act, Congress also subjected Supreme Court review of civil cases to a jurisdictional amount,¹⁶⁴ a requirement that was not eliminated for all cases involving constitutional issues until 1891¹⁶⁵ and was not abolished with respect to Supreme Court review of all federal questions until 1925.¹⁶⁶ Congress did not provide for Supreme Court review of federal criminal cases until 1802, and then only for review of decisions in which an inferior federal court had divided on a question of law.¹⁶⁷ Congress did not grant general power to the Court to review major federal criminal cases until 1891.¹⁶⁸ Obviously, the opponents of Congress' exercise of its powers under the exceptions clause have placed a premium on the uniformity of constitutional interpretation and Supreme Court supervision of state conduct that has not been shared by either Congress or the Court.

F. *Limits on Congressional Power: The Bill of Rights and Other Constitutional Provisions*

A sixth argument made against Congress' power under the exceptions clause is that this power is limited by the constitutional requirements of article I, section 9 and the Bill of Rights and is

163. Congress did not authorize the Supreme Court to review cases that invalidated state conduct on federal grounds until 1914. See Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

164. See Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 84.

165. Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827-28.

166. Act of Feb. 13, 1925, ch. 229, § 240(a), 43 Stat. 936, 938-39.

167. Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159-61.

168. Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827.

fully subject to review under these and any other constitutional provisions uniformly applicable to all acts of Congress.¹⁶⁹ Those who make this argument draw a parallel between Congress' plenary power under the commerce clause and its plenary power under article III, section 2. For example, just as Congress' power to regulate commerce among the several states is subject to the requirements of the first and fifth amendments,¹⁷⁰ so also is Congress' power to make exceptions. The due process clause of the fifth amendment plays an especially prominent role in this argument. Advocates of this argument view the fifth amendment as guaranteeing litigants an independent judicial hearing of all constitutional claims, thereby limiting Congress' power to make exceptions that will deprive litigants of this hearing and, hence, of the opportunity to petition for the remedies they seek.

Like the other arguments against Congress' power to make exceptions, this argument also is deficient. Those who make this argument are correct, of course, in pointing out that the congressional power at issue is subject to the due process clause and all other constitutional provisions uniformly applicable to acts of Congress. What they fail to consider, however, is that the independent judicial hearing they insist upon need not occur at the Supreme Court level. The requirements of the due process clause can be satisfied fully in the state and lower federal courts, even if Congress were to strip the Supreme Court of its entire appellate jurisdiction. Moreover, because the Supreme Court noted in *Cary v. Curtis*¹⁷¹ that "the judicial power of the United States . . . is . . . dependent for its distribution . . . entirely upon the action of Congress, who possess the sole power . . . of investing [the inferior courts] with jurisdiction . . . in the exact degree and character which to Congress may seem proper for the public good,"¹⁷² it would be constitutionally permissible under the due process clause for Congress

169. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 39 (1978); Hart, *supra* note 20, at 1373; Van Alstyne, *supra* note 70, at 263-64.

170. Since *National League of Cities v. Usery*, 426 U.S. 833 (1976), it appears that Congress' power under the commerce clause is also subject to the dictates of the tenth amendment.

171. 44 U.S. (3 How.) 236 (1845).

172. *Id.* at 245. See also *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); Vaughn, *supra* note 110, at 237-41.

to deny jurisdiction as well to all lower federal courts, provided that state courts retained jurisdiction to hear these matters.¹⁷³ State courts, after all, are bound by the Constitution as the supreme law of the land.¹⁷⁴ Moreover, “[i]n the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.”¹⁷⁵ Thus, apparently nothing less than the total denial of any state judicial form would be subject to successful challenge as a violation of procedural due process.¹⁷⁶

G. *The Prohibition on Unconstitutionally Motivated Withdrawals of Jurisdiction*

Finally, a seventh argument against Congress’ use of the exceptions clause to curtail the Court’s appellate jurisdiction is that congressional actions in this regard cannot be unconstitutionally motivated:

When Congress manipulates jurisdiction in an effort to deny recognition and judicial enforcement of constitutional rights, it has deliberately set itself against the Constitution as the Court understands that document. Comparable behavior on the part of a mayor or police chief would constitute “bad faith,” and so here. Legislative bad faith is a constitutionally impermissible

173. See Berger, *supra* note 14, at 804; Wechsler, *supra* note 13, at 1005. See also Redish & Woods, *supra* note 3. Redish and Woods argue that Congress’ power to deny original jurisdiction to the federal courts and to vest it instead in the state courts is limited by *Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1871), in which the Supreme Court overturned a habeas corpus order by a Wisconsin state court to a federal official ordering the release of an allegedly under-age soldier from the United States Army. The Court reasoned that a state court had no power to interfere with the operations of federal officials. Redish and Woods infer from *Tarble’s Case* that state courts lack jurisdiction to entertain any case that seeks to direct the conduct of federal officials through the use not only of habeas corpus but also of mandamus and injunctive powers. They later admit, however, that “Congress can probably circumvent the difficulties created by *Tarble’s Case* by explicitly authorizing state court jurisdiction over the acts of federal officials.” Redish & Woods, *supra* note 3, at 106. Thus, if Congress wants to preclude all lower federal court jurisdiction, it can do so without raising questions of due process, provided only it clearly authorizes state court review of those cases. See Sager, *supra* note 3, at 80-84.

174. See Wechsler, *supra* note 14, at 1005.

175. Hart, *supra* note 20, at 1401. See also Kay, *supra* note 148, at 186; Taylor, *Limiting Federal Court Jurisdiction: The Unconstitutionality of Current Legislative Proposals*, 65 JUDICATURE 199, 201 (1981).

176. Van Alstyne, *supra* note 32, at 269.

motive, and it offers an independent ground for doubting the constitutionality of jurisdictional legislation.¹⁷⁷

The claim that congressional use of the exceptions clause to displace a disfavored judicial precedent is unconstitutional can be sustained only by embracing the view that the Constitution is merely what the Court says it is. Sager embraces this view,¹⁷⁸ and he fears that “[i]f Congress enacts a selective jurisdictional limitation for cases that concern state conduct, it will be issuing an open, unambiguous invitation to state and local officials to engage in conduct that the Supreme Court has explicitly held unconstitutional.”¹⁷⁹ Appalled by the prospect of such a stratagem, he repeatedly labels it as “tawdry” and “lewd”¹⁸⁰ and as seducing the state judiciary to “malfeasance.”¹⁸¹

This willingness to treat the Constitution as identical with its judicial gloss, however, is problematic. The mere reference to such notorious cases as *Dred Scott v. Sandford*,¹⁸² *Plessy v. Ferguson*,¹⁸³ and *Lochner v. New York*¹⁸⁴ is sufficient to highlight the difficulty. If the Court was correct in its interpretations of the Constitution in these cases, then efforts to overturn these decisions by constitutional amendment, remedial legislation, or subsequent litigation were unconstitutionally motivated. If, however, the Court was mistaken in its interpretations of the Constitution in these cases, then the Constitution is not simply what the Court says it is, and some constitutional means must be available by which to rectify judicial errors.¹⁸⁵ Without such a means, the fate described by Abraham

177. Sager, *supra* note 3, at 76-77. Sager also writes: “Harm to constitutionally protected interests occurs whenever controversial rights are singled out for exclusion from federal jurisdiction. Where the specific circumstances surrounding Congress’ deliberations conspire to send an apparent message of Congressional disapproval of federal judicial doctrine, the harm is exaggerated.” *Id.* at 75. See also Brest, *supra* note 123, at 589-94; Taylor, *supra* note 175, at 202-04.

178. See Sager, *supra* note 3, at 41, 68-69, 72-73, 80, 87.

179. *Id.* at 69.

180. *Id.* at 41, 74, 89.

181. *Id.* at 80. On other occasions, Sager describes the seduction as “bullying.” *Id.* at 26, 64.

182. 60 U.S. (19 How.) 393 (1857).

183. 163 U.S. 537 (1896).

184. 198 U.S. 45 (1905).

185. Ironically, whereas Sager and his like-minded colleagues generally argue that the Constitution is what the Court says it is, they implicitly insist on one exception to this rule:

Lincoln in his First Inaugural Address cannot be avoided:

If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal.¹⁸⁶

Actually, various constitutional means do exist to correct Court misinterpretations; the exceptions clause is but one means of correction.

IV. PRACTICAL LIMITATIONS ON THE WITHDRAWAL OF JURISDICTION

At this juncture, it should be apparent that the various arguments advanced against the exceptions clause are inadequate to accomplish the formidable task of displacing the clear and express words of article III, section 2. Although they are ingeniously cast and earnestly argued, these arguments can be rebutted, and Congress' power to make exceptions to the Court's appellate jurisdiction remains plenary. This conclusion, however, is unacceptable to some constitutional scholars. Irving Brant may be more graphic than most, but he is no more alarmed than many when he writes: "The mind is staggered by the thought of what would result if Congress should pass, and the Supreme Court should bow to, a law prohibiting the review of state court decisions, or cases involving the first or fourteenth amendments."¹⁸⁷ For Brant, the exceptions clause has "become a dagger sharpened by social conflict and pointed at the heart of the Bill of Rights. Time and again Congress has raised this dagger. Only once has it descended, but the menace continues to mount."¹⁸⁸ These misgivings, however, are unfounded,

the Constitution, or at least art. III, § 2, is not what the Court says it is, at least in *Ex Parte McCardle*, 74 U.S. (7 Wall.) 505 (1868).

186. 7 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 3206, 3210 (1897).

187. Brant, *supra* note 20, at 28. See also Merry, *supra* note 20, at 69; Ratner, *supra* note 20, at 158.

188. Brant, *supra* note 20, at 28. The sole "descent" of this congressional "dagger" was the Act of March 27, 1868, ch. 34, 15 Stat. 44, which excised a portion of the Court's appellate jurisdiction.

both because of the practical difficulties that would attend congressional contraction of federal jurisdiction and because of the moderating tendencies of a Constitution structured so that the popular branches can seldom act "on any other principles than those of justice and the general good."¹⁸⁹

The practical difficulties that would accompany withdrawal of jurisdiction are considerable. First, federal courts are essential to the administration of federal law and the enforcement of coercive sanctions and private remedies. If Congress were to withdraw all jurisdiction from the federal courts, save only the Supreme Court's original jurisdiction, the final resolution of virtually all questions of federal law, constitutional and otherwise, would rest with the highest courts of the fifty states. The potential for inconsistency in their resolution of federal questions is so great, and the practical costs of such inconsistency are so high, that Congress is not likely to withdraw all federal jurisdiction, even though it is authorized by article III, section 2 to do so. If, in recognition of these constraints, the Congress decided to curtail only the Supreme Court's appellate jurisdiction, it would find that it had succeeded only in reducing, but by no means eliminating, the potential for national inconsistency. The final resolution of all constitutional questions would then be left to the twelve federal courts of appeal and the probability of inconsistency in their decisions would still remain great.¹⁹⁰ Finally, if the Congress were to exercise its exceptions powers even more exactingly and were selectively to deprive the Supreme Court of jurisdiction to review only particular classes of cases such as busing, school prayer, or abortion, the tradition of *stare decisis* could lead the lower federal and state courts to follow the Supreme Court decisions that originally prompted the congressional contraction:

[The courts] would still be faced with the decisions of the Supreme Court as precedents—decisions which that Court would now be quite unable to reverse or modify or even to explain. The

189. THE FEDERALIST, No. 51, at 353 (J. Madison) (J. Cooke ed. 1961).

190. Wechsler, *supra* note 14, at 1006. It must be remembered, however, that if lack of uniformity among fifty states or twelve circuits concerning constitutional interpretation were to become a problem, congressional withdrawal of jurisdiction could easily be repealed by statute.

jurisdictional withdrawal thus might work to freeze the very doctrines that had prompted its enactment, placing an intolerable moral burden on the lower courts.¹⁹¹

All of this is likely to convince Congress that "the federal system needs federal courts and the judicial institution needs an organ of supreme authority."¹⁹²

These practical difficulties, however, are not great enough either to reassure those fearful of Congress' power under the exceptions clause or to discourage those who would have Congress exercise this power. Sager regards contractions of Supreme Court jurisdiction as "lewd winks" cast by the Congress in the state courts' direction, and he worries that state courts will be seduced to "dishonor federal precedent and refuse to recognize disfavored rights."¹⁹³ Professor Rice inquires: "What will be the practical effect of withdrawing jurisdiction from the Supreme Court and the lower federal courts?"¹⁹⁴ His answer, which employs the school prayer issue as an example, is hardly comforting to Sager:

Unlike a constitutional amendment, such a withdrawal would not reverse the Supreme Court's rulings on school prayer. Presumably, at least some state courts would strictly follow those decisions as the last authoritative Supreme Court pronouncement on the subject. But a new law would ensure that the Court received no opportunity to further extend its errors.

. . . .

It may be expected, however, that some state courts would openly disregard the Supreme Court precedents and decide in favor of school prayer once the prospect of reversal by the Supreme Court had been removed. But that result would not be such a terrible thing. . . . [because state courts merely would be reversing] . . . Supreme Court decisions which . . . would appear so erroneous as to be virtually usurpations.

. . . .

[B]ecause a statute rather than a constitutional amendment is involved, the Court's jurisdiction could readily be restored

191. *Id.*

192. *Id.* at 1007. See also J. CHOPER, *supra* note 20, at 54.

193. Sager, *supra* note 3, at 41, 68.

194. Rice, *supra* note 70, at 197.

should the need for it become apparent.¹⁹⁵

Although the practical difficulties attending jurisdictional contractions may or may not prove reassuring, those fearful of Congress' power to make exceptions should take considerable comfort in the fact that the Constitution is so designed and constructed as to render remote the prospect that Congress will exercise this expressly granted power either frequently or fully. Congress has only once succeeded in passing legislation excising a portion of the Court's appellate jurisdiction,¹⁹⁶ and this occurred in the post-Civil War period against a Court whose last exercise of judicial review was in the notorious *Dred Scott v. Sandford*¹⁹⁷ decision and whose membership included several justices who were on public record as believing that the Reconstruction program was unconstitutional.¹⁹⁸ Moreover, this excision was carried out neither with a meat-ax nor even with Brant's "dagger,"¹⁹⁹ but with a scalpel; Congress eliminated only one procedure for Supreme Court review of the question at issue, but left an alternate review procedure untouched. Congress historically has acted quite responsibly toward the Court. It has abused neither its ability to make exceptions nor its other powers to curb the Court.²⁰⁰ Such historical respect for the functions of the Court is hardly accidental.

V. CONCLUSION

The framers of the Constitution recognized that a dependence on the people and on their representative institutions was essential in a democratic republic. They nevertheless were aware of the need

195. *Id.*

196. Act of March 27, 1868, ch. 34, 15 Stat. 44.

197. 60 U.S. (19 How.) 393 (1857).

198. See Van Alstyne, *supra* note 32, at 233-44. See also 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 193 n.1 (1922).

199. See *supra* text accompanying note 188.

200. The exceptions clause is not the only means by which Congress can attempt to curb the Court. For example, Congress also has power to impeach the justices; to destroy the Court's effectiveness by substantially increasing or reducing the size of its membership; to limit tenure either through constitutional amendment or statutory inducements; to reduce or eliminate staff support for the Court; to refuse salary increases for the justices in inflationary times; to require extraordinary majorities to invalidate statutes; and to require that the justices file seriatim opinions in all cases. See W. MURPHY, CONGRESS AND THE COURT 63 (1962). See also R. STEAMER, THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT (1971).

for precautions to insure that the people not only ruled, but that they ruled well.²⁰¹ One of the precautions upon which they relied was an independent judiciary exercising the traditional form of judicial review as articulated in *The Federalist*, No. 78²⁰² and as instituted in *Marbury v. Madison*,²⁰³ thereby keeping the representative branches "within the limits assigned to their authority."²⁰⁴

The framers were well aware, however, that this precaution posed a potential threat to the political rights of the Constitution. In this regard, the Court was the least dangerous of the three branches, but it too could annoy and injure the rights and liberties of the people.²⁰⁵ The Court also had to be restrained, even as it was used to restrain others. One means by which the framers sought to restrain the Court was by granting to Congress the power to make exceptions to the Court's appellate jurisdiction. The framers did not fear that Congress would abuse this power, unrestrained as it was by judicial review, for they had set in place against the tyrannical tendencies of the Congress a variety of auxiliary precautions, including separation of powers, checks and balances, bicameralism, staggered elections, federalism, and the moderating effect of a multiplicity of interests present in an extended republic.

For nearly two centuries, these precautions have worked exceedingly well. The Congress has acted responsibly, and the Court, ever mindful of the consequences that might be visited upon it if it were to attempt to substitute its pleasure for that of the legislative body,²⁰⁶ generally has resisted the temptation to act as "a bevy of Platonic Guardians."²⁰⁷ There is every reason to believe that these precautions will continue to work well, provided only that the letter of the Constitution—which is, after all, the very source of these precautions—remains central and governing in the minds of those who study and practice the law, and is not subordinated by them

201. THE FEDERALIST, No. 51, at 349 (J. Madison) (J. Cooke ed. 1961). These precautions would help to insure that the government would always reflect "the permanent and aggregate interests of the community." THE FEDERALIST, No. 10, at 57 (J. Madison) (J. Cooke ed. 1961).

202. THE FEDERALIST, No. 78 (A. Hamilton) (J. Cooke ed. 1961).

203. 5 U.S. (1 Cranch) 137 (1803). See generally Wolfe, *supra* note 122, at 293-99.

204. THE FEDERALIST, No. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961).

205. *Id.* at 522.

206. *Id.* at 526.

207. L. HAND, THE BILL OF RIGHTS 73 (1965).

to the activist view which distills the very essence of the judicial role and constitutional legitimacy from the spirit of judicial review.