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Congress and the Supreme Court's Jurisdiction

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CONGRESS AND THE SUPREME COURT'S JURISDICTION

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I. INTRODUCTION

WHEN A RULING OF THE SUPREME COURT meets with Congressional disfavor there are several remedies available to Congress. If the decision is not on a constitutional level, a later statutory enactment will suffice to reverse or modify the ruling. If, however, the Court's decision is an interpretation of a constitutional mandate, such as the requirement of the fourteenth amendment that legislative districts be apportioned according to population,[1] then a statute could not reverse the decision because the statute itself would be subject to that constitutional mandate as defined by the Court.

The obvious method of reversing a Supreme Court interpretation of the Constitution is by constitutional amendment. But amending the Constitution is a long and problematic process.[2] Furthermore, the Constitution should be as compact a document as possible. If constitutional amendments became the common response to objectionable rulings by the Supreme Court, the Constitution would soon resemble a code of legislation in its length and complexity.

The disadvantages of the amendment process, however, may be avoided by the exercise of Congress' power to withdraw particular subjects from the appellate jurisdiction of the Supreme Court and from the original as well as appellate jurisdiction of the lower

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1. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

2. *See* U.S. CONST. art. V. A constitutional amendment may be proposed by either a two-thirds majority of both houses of Congress or a resolution adopted by the legislatures of two-thirds of the states. *Id.* The amendment, to become effective, must then be ratified by the legislatures of three-fourths of the states. *Id.*

The most recent amendment to the Constitution, the twenty-sixth amendment, which lowered the voting age to 18, was ratified in 1971, three months after it was submitted to the states. In contrast, the proposed equal rights amendment, submitted to the states on March 22, 1972, has failed after over ten years to be ratified by the required number of states.

federal courts. This technique, which has been sparingly used and is not widely understood, offers a chance to restrain excesses of judicial power on the part of the Supreme Court without altering the basic charter of our government.

Congress' power to control lower federal court jurisdiction stems from article III of the United States Constitution, which provides: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." [3]

Congress' power to make exceptions to Supreme Court jurisdiction also comes from article III, which in pertinent part states: "[T]he Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." [4]

II. JURISDICTION OF THE LOWER FEDERAL COURTS

There is no question but that Congress has the power to define or even entirely eliminate the jurisdiction of the lower federal courts.[5] Indeed, as Chief Justice Harlan F. Stone stated:

> All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority

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3. *Id.* art. III, § 1. Article III, in pertinent part, reads as follows:

> Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .
>
> 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 other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id. art. III.

4. *Id.* art. III, § 2. For the text of this section, see note 3 *supra.*

5. *See* Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850). In *Sheldon,* the assignee of a mortgage bond brought an action in federal court to recover on the bond. *Id.* at 442. Diversity of citizenship existed between the assignee and the mortgagor, but not between the assignor-mortgagee and the mortgagor. *Id.* at 440-41. *See generally* 28 U.S.C. § 1332 (1976). Although recognizing that article III could allow such an action in a federal court, the Court concluded that "courts created by statute can have no jurisdiction but such as the statute confers." 49 U.S. (8 How.) at 448. The Court noted that the result might have been different had the lower courts been created by the Constitution itself, but since there was no such constitutional basis for jurisdiction, the federal courts are bound by the jurisdictional limits set by Congress. *Id.*

> to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.[6]

The Supreme Court has often acquiesced in Congress' use of its power to withdraw particular subjects from the jurisdiction of the lower federal courts. For example, in *Lauf v. E.G. Shinner & Co.*[7] the Court affirmed the congressional divestiture of lower federal court jurisdiction to issue injunctions in labor disputes.[8] In *Lockerty v. Phillips*[9] the court allowed the lower federal courts to be divested of jurisdiction to hear civil actions arising under the Emergency Price Control Act of 1942.[10]

It must be emphasized that the withdrawal of lower federal court jurisdiction does not deprive a litigant of the right to bring his federal claim. State courts are available and adequate forums for vindication of rights created by federal law in the event of a divestiture of lower federal court jurisdiction. State courts are bound to apply federal law by the supremacy clause,[11] and thus there is no danger that federal rights will be diluted. Indeed, for almost the first century of the Republic, the only courts with general jurisdiction over all actions arising under state or federal law were the state courts. Even with the creation by Congress of

6. Lockerty v. Phillips, 319 U.S. 182, 187 (1943), *citing* Kline v. Burke Constr. Co., 260 U.S. 226 (1922); McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813).

7. 303 U.S. 323 (1938).

8. 303 U.S. at 329-30. *See generally* 29 U.S.C. § 101 (1976).

9. 319 U.S. 182 (1943).

10. *Id.* at 186-88. *See generally* Comment, *Congressional Power over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples,* 49 N.Y.U. L. REV. 131 (1974).

11. *See* U.S. CONST. art. VI, cl. 2. The text of the supremacy clause is as follows:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

federal question jurisdiction in 1875,[12] the lower federal courts had concurrent jurisdiction with the state courts. Such is the situation today.

III. APPELLATE JURISDICTION OF THE SUPREME COURT

Beyond a doubt, therefore, Congress may withdraw particular subjects from the jurisdiction of the lower federal courts.[13] The more interesting issue, however, is the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court. This remedy has been urged from time to time with respect to various issues, such as legislative apportionment,[14] obscenity [15] and others.[16] Currently, there is before Congress legislation which would remove the Court's appellate jurisdiction in cases involving prayer in public schools [17] and abortion.[18] However, none of these attempts at removing Supreme Court jurisdiction from any of these controversial issues has become law. Whatever the merits of the existing Supreme Court rulings in any of these areas, this discussion is concerned only with the existence and extent of Congress' power to withdraw the Court's appellate jurisdiction over particular subjects.

A. *The Intent of the Exceptions Clause*

The exceptions clause of article III, section 2, provides that "the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." [19] The clause was intended, according to Alexander Hamilton, to give "the national legislature . . . ample authority to make such *exceptions,* and to prescribe such regula-

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thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. For a discussion of whether state courts would be bound by existing Supreme Court precedents in the event of a withdrawal of Supreme Court jurisdiction, see notes 89 & 90 and accompanying text *infra.*

12. Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470 (1875).

13. *See generally* Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U. PA. L. REV. 45 (1975).

14. *See, e.g.,* H.R. 11926, 88th Cong., 2d Sess. (1964).

15. *See, e.g.,* S. 4058, 90th Cong., 2d Sess. (1968).

16. *See, e.g.,* S. 450, 96th Cong., 1st Sess. (1979) (provides greater discretion for Supreme Court review—eliminates automatic review by the Supreme Court); S. 438, 96th Cong., 1st Sess. (1979) (eliminates Supreme Court jurisdiction in school prayer cases).

17. *See, e.g.,* S. 1742, 97th Cong., 1st Sess. (1981).

18. *See, e.g.,* S. 1741, 97th Cong., 1st Sess. (1981).

19. U.S. CONST. art. III, § 2.

tions as will be calculated to obviate or remove" the "inconveniences" which might arise from the powers given in the Constitution to the federal judiciary.[20] Much of the debate surrounding the adoption of the clause centered upon the Framers' concern that a supreme court would exercise appellate powers to reverse jury verdicts on issues of fact.[21] Although this possibility was the most troubling to the Framers, the congressional power conferred by the clause is clearly much broader. This is evident in the language of article III, section 2, which gives the Supreme Court "appellate jurisdiction, both as to Law and Fact." [22] As Hamilton observed:

> The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been preserved to the Supreme Court, and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all cases referred to them, but subject to any exceptions and regulations which may be thought advisable; that this appellate jurisdiction does, in no case, abolish the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.[23]

Thus, in purposefully restricting the original jurisdiction of the Court to very narrow issues, and providing for congressional

20. THE FEDERALIST No. 80, at 559 (A. Hamilton) (H. Dawson ed. 1863). *See also id.* No. 81.

21. *See* Levy, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U. INTRA. L. REV. 178, 180-81 (1966). *See also* Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3 (1973).

Professor Brant argues that the sole purpose of the exceptions clause was to permit Congress to limit the Supreme Court's appellate review of factual issues. *Id.* at 11. For a discussion of the state and federal convention debates concerning the exceptions clause, see 5 J. ELLIOT, THE DEBATES IN THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 483 (2d ed. 1836); 1 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION 221 (1911); J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 530-39 (A. Koch ed. 1966).

22. U.S. CONST. art. III, § 2.

23. THE FEDERALIST No. 81, at 571 (A. Hamilton) (H. Dawson ed. 1863).

exceptions to the Court's appellate jurisdiction, the Framers intended Congress to have a broad check over potential "inconveniences" caused by an abuse of the Court's power.

B. *The "Negative Pregnant" Doctrine: The Supreme Court Will Exercise Only Appellate Jurisdiction Explicitly "Granted" by Congress*

The power of Congress contained in article III, section 2, was broadly interpreted by the Supreme Court, so that a specific grant of appellate jurisdiction by Congress was construed to imply that such jurisdiction was excluded in all other cases. This "negative pregnant" doctrine was enunciated by Chief Justice Marshall in *United States v. More*,[24] where the Court held that it had no criminal appellate jurisdiction because none had been expressly granted by Congress. The claimant in *More* sought review by the Supreme Court of his criminal conviction, noting that article III granted the Court appellate jurisdiction over law and equity. Reasoning that because Supreme Court appellate jurisdiction over criminal cases was neither specifically excluded by the Constitution nor specifically regulated by Congress, More argued that the Court had jurisdiction over his case. The Court, however, rejected this argument, concluding that the Constitution was not totally controlling in matters of Supreme Court jurisdiction. Although the Court's appellate jurisdiction may have been prescribed in the Constitution, the Court held that Congress' power to regulate jurisdiction must be understood to prohibit the exercise of jurisdiction unless Congress had explicitly granted it to the Court. Speaking for the *More* Court, Chief Justice Marshall stated that "as the jurisdiction of the Court has been described [in the Constitution], it has been regulated by Congress and an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described." [25]

24. 7 U.S. (3 Cranch) 159 (1805).

25. *Id.* at 172. Marshall compared Congress's ability to control Supreme Court jurisdiction with its power to determine the "amount in controversy" requirement, stating:

> Thus, the appellate jurisdiction of this court, from the judgments of the circuit courts, is described affirmatively; no restrictive words are used. Yet, it has never been supposed, that a decision of a circuit court could be reviewed, unless the matter in dispute should exceed the value of $2,000. There are no words in the act, restraining the Supreme Court from taking cognizance of causes under that sum; their jurisdiction is only limited by the legislative declaration, that they may re-examine the decisions of the circuit court, where the

Marshall further explained that the exceptions clause did not merely give Congress the power to make exceptions to the Supreme Court's jurisdiction, but it also implicitly mandated that the Supreme Court possessed only that jurisdiction specifically granted by Congress. Marshall stated:

> When the Constitution has given Congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise; and Congress, under that power, has proceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. And this court is as much bound by an implied as an express exception.[26]

It is interesting to note that criminal cases were not appealable to the Supreme Court until 1891. This was simply because until then Congress had not specified that they could be so appealed. With regard to its power to review criminal cases, the Supreme Court noted: "The appellate jurisdiction of this court rests wholly on the acts of Congress." [27]

This broad interpretation of Congressional control over Supreme Court jurisdiction was first advanced in 1796 by Chief Justice Ellsworth, who had been a member of the Constitutional Convention's Committee on Detail which drafted the exceptions clause.[28] In *Wiscart v. D'Auchy*,[29] Ellsworth said:

> "The constitution, distributing the judicial power of the U.S., vests in the Supreme Court, an original as well

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matter in dispute exceeds the value of $2,000. This court, therefore, will only review those judgments of the circuit court of Columbia, a power to re-examine which, is expressly given by law.

Id. *See generally* 28 U.S.C. §§ 1331, 1332 (1976).

26. 7 U.S. (3 Cranch) at 170. *See also Ex Parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1863). The *Vallandigham* Court applied the "negative pregnant" doctrine, stating: "[A]ffirmative words in the Constitution, declaring in what cases the Supreme Court shall have jurisdiction must be construed negatively as to all other cases." *Id.* at 252.

27. United States v. Sanges, 144 U.S. 310, 319 (1892). *See also* United States v. Cross, 145 U.S. 571 (1892); *Ex Parte* Bigelow, 113 U.S. 328 (1885).

28. The Convention's Committee on Detail also included John Rutledge, Edmund Randolph, Nathaniel Gorham, and James Wilson. *See* Merry, *Scope of the Supreme Court's Appellate Jurisdiction: The Historical Basis,* 47 MINN. L. REV. 53, 57 (1962).

29. 3 U.S. (3 Dall.) 321 (1796). It is interesting to note that of the six judges on the *Wiscart* Court, two of them—James Wilson and Oliver Ellsworth—were members of the 1787 Committee on Detail which drafted the exceptions clause. *See* note 28 *supra.* Ellsworth and William Patterson, another member of the *Wiscart* Court, drafted the Judiciary Act of 1789. *See* Brant, *supra* note 21, at 13.

> as appellate jurisdiction. . . . Here, then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of appellate jurisdiction, is simply, whether Congress has established any rules for regulating its exercise." [30]

In 1810, in *Durousseau v. United States*,[31] Chief Justice Marshall again emphasized that the Court is bound by implied exceptions to its appellate jurisdiction, so that, in effect, it can exercise jurisdiction only where expressly granted by Congress:

> 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 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. They have not, indeed, made these exceptions in express terms. They have not declared, that the appellate power of the Court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.
>
> The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent. It is upon this principle, that the court implies a legislative exception from its constitutional appellate power, in the legislative affirmative description of those powers.[32]

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30. 3 U.S. (3 Dall.) at 327. *Wiscart* involved the Supreme Court's competency to review findings of fact of a trial court sitting without a jury. *Id.* at 321-22. Justice Wilson's dissent argued that the Court's constitutional jurisdiction provided for a limited form of factual review. *Id.* at 325 (Wilson, J., dissenting). The majority concluded, however, that all appellate powers of the Court, including review of factual issues, must be expressly granted by Congress. *Id.* at 327.

31. 10 U.S. (6 Cranch) 307 (1810).

32. *Id.* at 313-14. Marshall's views, after *More* and *Durousseau*, appeared to be that:

Similarly, when Chief Justice Taney spoke to the issue in *Barry v. Mercein*,[33] he said: "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." [34]

C. *The McCardle Case*

Prior to *Ex Parte McCardle* [35] in 1868, the Supreme Court was never called upon to decide the validity of an act of Congress which made a specific exception to its appellate jurisdiction. McCardle, a Mississippi editor, was imprisoned by the federal reconstruction authorities on account of seditious statements he had made. Seeking a writ of habeas corpus, McCardle asked the federal circuit court to rule that his detention was invalid. When his petition was denied he appealed to the Supreme Court under a statute which specifically permitted such appeals.[36] After the Supreme Court

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(1) Congress has a wide discretion in legislating exceptions to the constitutional jurisdiction of the Court; (2) if Congress does not exercise that discretion the Court retains its full constitutional jurisdiction; [and] (3) if Congress exercises the discretion by specifying the cases to which the jurisdiction extends, those cases not designated are impliedly excepted.

Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 177 (1960).

33. 46 U.S. (5 How.) 103 (1847). *Barry* involved Supreme Court review of a lower court's denial of a writ of habeas corpus in a child custody case. *Id.* at 118-19. The appellant's estranged wife lived with the couple's daughter in New York, while the appellant, a British citizen, lived in Canada. *Id.* at 104, 119. The lower court, reasoning that the value of custody of the child was not quantifiable in monetary terms, determined that it had no jurisdiction over the case since the requisite $2,000 amount in controversy was not present. *Id.* at 119. The Supreme Court affirmed, concluding that since its jurisdiction could only be based upon review of a lower court decision, it had no jurisdiction to issue the writ. *Id.* at 119-20.

34. *Id.* at 119. *See also* St. Louis, I.M. & S. R.R. v. Taylor, 210 U.S. 281 (1908); United States v. Bitty, 208 U.S. 393 (1908); Colorado Cent. Consol. Mining Co. v. Turck, 150 U.S. 138 (1893); United States v. Cross, 145 U.S. 571 (1892); National Exch. Bank v. Peters, 144 U.S. 571 (1892); United States v. Sanges, 144 U.S. 310 (1892); United States v. Bigelow, 113 U.S. 328 (1885); United States v. Young, 94 U.S. 258 (1876); Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250 (1865); *Ex Parte* Vallandigham 68 U.S. (1 Wall.) 243 (1863); Forsyth v. United States, 50 U.S. (9 How.) 570 (1850).

35. 74 U.S. (7 Wall.) 506 (1868). *See generally* Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973).

36. 74 U.S. (7 Wall.) at 507. The United States Constitution provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2. For an historical account of the development of the writ, see Van Alstyne, *supra* note 35, at 233-36.

heard argument on the case and while the Court was deliberating, Congress, fearing an unfavorable decision, enacted a statute repealing that part of the prior statute which had given the Supreme Court jurisdiction to hear such appeals from the circuit court.[37] The Court, in confronting for the first time the issue of a positive congressional exception to its appellate jurisdiction, dismissed the appeal for want of jurisdiction, even though the case had already been argued and was before the Court.

The Court first discussed and reaffirmed Marshall's "negative pregnant" doctrine.[38] The Court noted, however, that the exceptions clause provides not only for implicit divestiture of Supreme Court appellate jurisdiction, but also for the more specific and direct explicit exceptions to jurisdiction. The Court stated:

> The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirma-

37. 74 U.S. (7 Wall.) at 508. The repealed statute, designed to assure quick release of Union sympathizers held in southern jails after the Civil War, provided that federal courts were empowered to grant writs of habeas corpus "in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." *Id.* at 507. The statute provided for appeals to the federal circuit courts and to the Supreme Court. *Id.*

38. *Id.* at 513. Although the negative pregnant doctrine was inapplicable to the facts of the case, the Court reaffirmed its validity, stating:

> It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.
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> The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau v. The United States,* particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." . . .
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> "They [the Congress] have described our jurisdiction affirmatively," . . . and this affirmative description has been understood to imply a "negation of the exercise of such appellate power as is not comprehended within it."
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> The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

Id. at 513-14. For further discussion of the negative pregnant doctrine, see notes 24-34 and accompanying text *supra.*

> tion of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.
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> We are not at liberty to inquire into the motives of the legislature. 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. . . . Without jurisdiction the court cannot proceed at all in any case. Jurisdiction is 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 case. And this is not less clear upon authority than upon principle.[39]

It is true that the statute upheld in *McCardle* did not bar the Supreme Court from reviewing all habeas corpus cases. Rather, it only barred review sought under the 1867 statute which had provided one avenue of review of such cases from the circuit court. The Supreme Court retained the habeas corpus review power which had been given it by the Judiciary Act of 1789 and which Congress had chosen not to withdraw. Chief Justice Chase observed for the Court in *McCardle*:

> It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.
>
> Counsel seems to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus,* is denied. But this is an error. The act of 1868 does not affect the jurisdiction which was previously exercised.[40]

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39. 74 U.S. (7 Wall.) at 514. One commentator has stated: "Though more than a century old, *McCardle* still stands as the leading case regarding the extent to which Congress may use the exceptions clause to oust the Court of its appellate power even as to the substantive constitutionality of acts of Congress." Van Alstyne, *supra* note 35, at 232.

40. 74 U.S. (7 Wall.) at 515. Professor Van Alstyne argued that the alternative basis in the Judiciary Act of 1789 for the issuance of a writ of habeas corpus supports a narrow reading of *McCardle*. *See* Van Alstyne, *supra* note 35, at 258. The limited reading of *McCardle* advocated by Professor Van Alstyne is that the decision was based not upon Congress' exceptions clause power, but rather upon Congress' power to enact and repeal

Later in that same year, the Court made this distinction in *Ex parte Yerger*.[41] On facts very similar to *McCardle*, Yerger requested the Supreme Court to issue its own writ of habeas corpus to the circuit court, as authorized by the Judiciary Act of 1789. The Supreme Court, in an opinion written by Chief Justice Chase, the author of the *McCardle* opinion, held that the 1868 statute had left untouched the Supreme Court's power to issue a writ of habeas corpus to a lower court as provided in the Judiciary Act of 1789.[42] However, there was no indication in *Yerger* that the Court would not have upheld an act withdrawing appellate jurisdiction in all habeas corpus cases from the Court. Although the Court in *Yerger* indicated that such a result would not lightly be presumed and that such a statute would be narrowly construed,[43] the Court acknowledged that it was within Congress' power. When discussing the power of Congress to limit jurisdiction, as evidenced by the Repealer Act of 1868, the *Yerger* Court noted:

> The effect of the act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.
>
> It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed; but it is not to be presumed that an act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms.[44]

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jurisdictional statutes. *Id.* at 249-50. Thus, as Professor Van Alstyne interpreted *McCardle*, the Repealer Act only eliminated a right of access conferred upon a special class of litigants rather than effect a general withdrawal of Supreme Court jurisdiction. *Id.* at 250. Consequently, neither the constitutional right to habeas corpus nor the statutory provisions of the Judiciary Act of 1789 were involved. *Id.* at 251-54. Professor Van Alstyne concedes, however, that *McCardle* is the leading decision in an unwavering line of cases acknowledging the powers of Congress to withdraw jurisdiction through the exceptions clause. *Id.* at 255.

41. 75 U.S. (8 Wall.) 85 (1868).

42. *Id.* at 105. The Court stated that the 1868 repealer statutes "do not purport to touch the appellate jurisdiction conferred by the Constitution, or to except from it any cases not excepted by the Act of 1789. They reach no act except the act of 1867." *Id.*

43. *Id.* at 103. The Court cautioned that to except all habeas corpus jurisdiction would "greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction." *Id.*

44. *Id.* at 104.

D. *The Klein Case*

Four years later, in *United States v. Klein*,[45] the Court had occasion to spell out an important limitation to Congress' power under the exceptions clause. *Klein* is the only Supreme Court decision ever to strike down a statute enacted under the exceptions clause. The claimant in *Klein*, who had been a Confederate, sued in the Court of Claims to recover the proceeds from the sale of his property seized and sold by the Union forces. Because he had received a full presidential pardon for his Confederate activities, the Court of Claims ruled in his favor. If he had not received a pardon, the governing statute would have prevented his recovery. While the appeal of his case was pending before the Supreme Court, Congress enacted a statute which provided that whenever it appeared that a judgment of the Court of Claims had been founded on a presidential pardon, without other proof of loyalty, the Supreme Court should have no further jurisdiction of the case. The statute further declared that every pardon granted to a suitor in the Court of Claims which recited that he has been guilty of any act of rebellion or disloyalty, shall, if accepted by him in writing without disclaimer of those recitals, be taken as conclusive evidence of such act of rebellion or disloyalty and his suit shall be dismissed.[46] While declaring the statute unconstitutional, the Supreme Court expressly reiterated that Congress does have the power to deny appellate jurisdiction "in a particular class of cases":

> Undoubtedly the legislature has complete control over the organization and existence of that [Supreme] court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. *If it simply denied 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.*
>
> But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We have already decided that it was

45. 80 U.S. (13 Wall.) 128 (1872).

46. *Id.* at 143-44.

> our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or acceptance, summarily made on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.
>
> It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.
>
> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.
>
> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. *What is this but to prescribe a rule for the decision of a cause in a particular way?* [47]

The statute in *Klein* attempted to dictate the outcome of a particular class of cases, under the guise of limiting the Court's jurisdiction. The Court lost jurisdiction only when the Court of Claims judgment was founded on a particular type of evidence, that is, a pardon. The statute further prescribed that the effect of the pardon would be such that the recitals in the pardon of acts of rebellion and disloyalty would be conclusive proof of those acts. This was an intrusion upon the judicial process and an effort to dictate the rules to be used in deciding cases.[48] Moreover,

47. *Id.* at 145-46 (emphasis added).

48. *Id.* at 145-46. That *Klein* was an assertion by the Court of the independence of the judiciary has been recognized by the commentators. *See,*

the statute in *Klein* intruded upon the President's pardoning power by attempting "to deny to pardons granted by the President the effect which this court had adjudged them to have." [49] In these major respects the statute involved in *Klein* was wholly different from a statute simply withdrawing appellate jurisdiction over a certain class of cases. As the Court said in the *Klein* case itself: "There could be no doubt that a denial of the right of appeal in a particular class of cases" would be within Congress' power under the exceptions clause.[50]

E. *Supreme Court Statements Since 1872*

Since *Klein,* the Supreme Court has not had occasion to further define the limits of the exceptions clause. In *The Francis Wright* case,[51] the Court upheld a statute under which the appellate jurisdiction of the Supreme Court in admiralty cases was limited to determination of questions of law rather than of issues of fact. Chief Justice Waite in his opinion for the Court said that:

> 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 use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues or law nor fact shall be retried in cases where the value of the matter in dispute is less than $5,000. The general power to regulate implies power to regulate in all things. The whole of a civil law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is matter of legislative discretion, not of constitutional right.[52]

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e.g., Ratner, *supra* note 32 at 181; Note, *The Nixon Busing Bills and Congressional Power,* 81 YALE L.J. 1542, 1557 (1972).

49. 80 U.S. (13 Wall.) at 145. The Court wrote: "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147.

50. *Id.* at 145.

51. 105 U.S. 381 (1881).

52. *Id.* at 386. The Court again analogized Congress' power to control Supreme Court appellate jurisdiction with Congress' ability to establish a

In his opinion Chief Justice Waite 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.*" [53] Statements of several individual justices in the intervening years reinforce this conclusion. Justice Frankfurter, in his dissenting opinion in *National Insurance Co. v. Tidewater Co.*,[54] 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*.[55]

In *Glidden v. Zdanok*,[56] while discussing the power of Congress over Supreme Court appellate jurisdiction, Justice Harlan stated:

> Congress has on occasion withdrawn jurisdiction from the Court of Claims to proceed with the disposition of cases pending therein, and has been upheld in so doing by this Court. . . . But that is not incompatible with the possession of Article III judicial power by the tribunal affected. Congress has consistently with that article withdrawn the jurisdiction of this Court to proceed with a case then *sub judice, Ex parte McCardle* . . . ; its power can be no less when dealing with an inferior federal court. . . . For as Hamilton assured those of his contemporaries who were concerned about the reach of power that might be vested in a federal judiciary, "it ought to be recollected that the national legislature will have ample authority to make such exceptions, and to prescribe such regulations

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minimum amount in controversy as a prerequisite to federal court jurisdiction. *Id.* *See* note 25 *supra*. The Court noted that there was no right to appellate review by the Supreme Court, since it is "a matter of legislative discretion, not of constitutional right." 105 U.S. at 386. *See also* Luckenback S.S. Co. v. United States, 272 U.S. 533, 536-37 (1926).

53. 105 U.S. at 385 (emphasis added).

54. 337 U.S. 582 (1949).

55. *Id.* at 655 (Frankfurter, J., dissenting) (citations omitted). *See also* Luckenback S.S. Co. v. United States, 272 U.S. 533, 536 (1926). *See generally* Brant, *supra* note 21, at 28; Merry, *supra* note 28, at 53.

56. 370 U.S. 530 (1962).

> as will be calculated to obviate or remove [any] . . . inconveniences." [57]

Justice William O. Douglas, in his dissent in *Glidden,* expressed some doubt about the continuing vitality of *Ex parte McCardle.* Referring to Justice Harlan's opinion in *Glidden,* Justice Douglas said:

> First, that opinion cites with approval *Ex parte McCardle,* . . . in which Congress withdrew jurisdiction of this Court to review a *habeas corpus* case that was *sub judice,* and then apparently draws a distinction between that case and *United States v. Klein,* . . . where such withdrawal was not permitted in a property claim. There is a serious question whether the *McCardle* case could command a majority view today. Certainly the distinction between liberty and property (which emanates from this portion of my Brother Harlan's opinion) has no vitality even in terms of the Due Process Clause.[58]

In his concurring opinion in *Flast v. Cohen,*[59] in 1968, however, Justice Douglas appeared to have resolved his doubts in favor of the continued vitality of *McCardle*: "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of Section 2, Article III." [60]

F. *The Meaning of the Exceptions Clause*

In summary, the exceptions clause is clear, unambiguous, and unqualified. The decisions of the Supreme Court and the state-

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57. *Id.* at 567-68 (citations omitted). Justice Harlan did note that Congress' authority to limit Supreme Court jurisdiction was not boundless, stating:

> The authority is not, of course, unlimited. In 1870, Congress purported to withdraw jurisdiction from the Court of Claims and from this Court on appeal over cases seeking indemnification for property captured during the Civil War, so far as eligibility therefor might be predicated upon an amnesty awarded by the President, as both courts had previously held that it might. Despite *Ex parte McCardle,* the Court refused to apply the statute to a case in which the claimant had already been adjudged entitled to recover by the Court of Claims, calling it an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case.

Id. at 570, *citing* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

58. 370 U.S. at 605 n.11 (Douglas, J., dissenting) (citations omitted).

59. 392 U.S. 83 (1968).

60. *Id.* at 109 (Douglas, J., concurring), *citing* Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868).

ments of its justices have expressly recognized the plain meaning of the clause as conferring upon Congress' broad powers to limit the Court's jurisdiction. Indeed, this power has been so expansively interpreted by the Court that an exception will be implied in cases where Congress has not specifically "granted" appellate jurisdiction to the Court.

III. OBJECTIONS TO THE EXERCISE OF POWER UNDER THE EXCEPTIONS CLAUSE: THE "ESSENTIAL ROLE" ARGUMENT

The text of article III, section 2, explicitly and unmistakably gives to Congress the power to withdraw certain subjects from the Supreme Court's appellate jurisdiction. The obvious reading of the entire text of article III is that this power was given to Congress, not capriciously, but as an integral part of a system of checks and balances. Through the exceptions clause, Congress was given the power, in Hamilton's words "to obviate or remove" the "inconveniences" arising from the judicial power.[61] It has been argued, however, that the power of Congress under the exceptions clause is limited by the very nature of the constitutional system and of the judicial power. It has been urged by Professor Henry Hart that the exceptions "must not be such as to destroy the essential role of the Supreme Court in the constitutional plan." [62]

Professor Hart's test creates the difficulty of determining what is the Supreme Court's "essential role." [63] In addition, that test would make the Court itself the final arbiter of the extent of its powers. Despite the clear grant of power to Congress in the exceptions clause, no statute could deprive the Court of its "essential role"; but that role would be whatever the Court said it was. It is hardly in keeping with the spirit of checks and balances, however, to imply such virtually unlimited power into the Constitution. If the Framers intended 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.

Furthermore, the "essential role" test was advanced by Professor Hart in response to the suggestion that Congress could satisfy

61. THE FEDERALIST No. 80 (A. Hamilton).

62. *See* Hart, *The Power to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953). *See also* Ratner, *supra* note 32, at 200-01.

63. *See* Merry, *supra* note 28, at 54-57; Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 906 (1982).

the exceptions clause by removing all but a "residuum of jurisdiction," for example, by withdrawing appellate jurisdiction in "everything but patent cases." [64] Whatever the cogency of Professor Hart's "essential role" test would be to a wholesale withdrawal of jurisdiction, if it were ever attempted by Congress, his test cannot properly be applied to narrowly drawn withdrawals of jurisdiction over particular types of cases.[65]

If Congress were to make such wholesale "exceptions" to the Court's appellate jurisdiction, so that there was little or nothing left of that jurisdiction, it could be plausibly argued that such a wholesale withdrawal of jurisdiction was not the making of "exceptions" at all and therefore was not authorized under the exceptions clause.[66] The decision in such a case would have to be made by the Supreme Court, and a constitutional crisis could result if the Court and Congress were to persist in opposed positions on this point. Significantly, however, the persistent support by the Supreme Court for John Marshall's "negative pregnant" theory indicates that even such a wholesale withdrawal of appellate jurisdiction could be constitutional since that theory led to the Court's acceptance of the idea that the Court should exercise appellate jurisdiction only in those cases in which Congress has specifically granted it.

Even if a wholesale withdrawal of appellate jurisdiction from the Supreme Court were to be unconstitutional as an interference with the Court's "essential role," the same could hardly be said of a pin-pointed withdrawal of appellate jurisdiction over a narrowly defined class of cases, such as those involving school prayer or abortion. It could hardly be argued that the "essential role" of the Supreme Court depends on its exercising appellate jurisdiction in every type of case involving constitutional rights. Such a contention would be contrary to the clear language of the exceptions clause and to the consistent indications given by the Supreme Court itself.

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64. *See* Hart, *supra* note 62, at 1364.

65. Professor Hart acknowledges that his "essential role" theory has never been addressed by the Supreme Court, but only because Congress has never attempted a jurisdictional withdrawal audacious enough to justify its application. *See id.* at 1365.

66. Ratner, *supra* note 32, at 169. Professor Ratner argues that Congress' power under the exceptions clause could never be so great as to permit it to divest the Supreme Court of all appellate jurisdiction since, by definition, an exception cannot nullify the general rule that the court "*shall* have appellate Jurisdiction." *Id.* at 169, 171. *See* U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

A. *The Need for Uniformity and Supremacy of Federal Law Arguments*

Professor Hart's theory that the jurisdiction of the Supreme Could could not be limited beyond its "essential role" was later expanded and given definition by Professor Ratner.[67] The essential role of the Court was defined by Ratner as providing for uniformity of federal statutory and constitutional law and the supremacy of federal law over state law.[68] Under the supremacy clause of the Constitution, the Constitution and the laws of the United States "made in Pursuance thereof" are "the supreme Law of the Land." [69] Ratner argued that if the Constitution and federal laws are not uniformly interpreted by one ultimate arbiter—the Supreme Court—the supremacy principle will be reduced to a nullity because the Constitution and the federal law will be at the mercy of local courts. Constitutional rights will mean one thing in one state and something else in another. The result, it is claimed, would be a fragmentation of the Union. As Justice Oliver Wendell Holmes put it: "I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." [70]

Alexander Hamilton expressed a similar concern:

> If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.[71]

It should be remembered, however, that it was Hamilton who argued in the same number of The Federalist that Congress' power

67. *See generally* Ratner, *supra* note 32; Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction,* 27 VILL. L. REV. 929, 941-55 (1982).

68. Ratner, *supra* note 32, at 160.

69. U.S. CONST. art. 6, cl. 2. For the text of the supremacy clause, see note 11 *supra.*

70. O.W. HOLMES, *Law and the Court,* in COLLECTED LEGAL PAPERS 295-96 (1920).

71. THE FEDERALIST No. 80 (A. Hamilton).

under the exceptions clause was a salutary means "to obviate and remove" the inconveniences "resulting from the exercise of the federal judicial power." [72]

The argument that fundamental rights should not be allowed to vary from state to state begs the question of whether there is a fundamental right to uniformity of interpretation by the Supreme Court on every issue involving fundamental rights. The supremacy clause provides that the Constitution and the laws of the United States are the supreme law of the land. The purpose of the clause is to bind the states and their courts to follow the Constitution and federal law. But there is no basis for reading the supremacy clause to require uniformity of interpretation among the states on every issue involving constitutional rights. The exceptions clause is itself part of the supreme law of the land. Judging from what the Supreme Court has said about it over the years, the Court accepts the plain meaning of the exceptions clause. The Court evidently regards the clause not only as an important element of the system of checks and balances but also as granting wide discretion to Congress in exercising power under it. There is, in short, a constitutional right to have the system of checks and balances maintained in working order. Without that system, the more dramatic personal rights, such as speech, privacy and free exercise of religion, could quickly be reduced to nullities. This right to a preservation of the system of checks and balances is itself one of the most important constitutional rights.

If it be contended that the exceptions clause cannot be used to deprive the Supreme Court of appellate jurisdiction in cases involving fundamental constitutional rights, it must be replied that such a limitation can be found neither in the language of the clause nor in its explications by the Supreme Court. Indeed, the Supreme Court's conclusion, prior to 1891, that there was no general right of appeal to the Court in criminal cases, surely involved the denial of the right to appeal in cases involving fundamental constitutional rights.[73] For what constitutional right is more fundamental than the fifth amendment right not to be deprived of life or liberty without due process of law?

When it is argued that Congress cannot take away the Court's jurisdiction to hear appeals involving fundamental rights, it must be remembered that the various rights protected by the Bill of Rights against federal encroachment have been made fully ap-

72 *See* note 61 and accompanying text *supra*.

73. *See* notes 24 & 25 and accompanying text *supra*.

plicable against the state and local governments only through fairly recent constructions by the Supreme Court itself.[74] Until the adoption of the fourteenth amendment in 1868, it was clear that the protections of the Bill of Rights bound only the federal government.[75]

For nearly a century, the Supreme Court correctly interpreted the fourteenth amendment so as to restrict the states only to a limited extent.[76] As Justice John Marshall Harlan described this rule:

> [O]ur function in reviewing state judgments under the Fourteenth Amendment is a narrow one. We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. We can inquire only whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power. The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our concepts of 'ordered liberty.' [77]

Only in fairly recent years has the Supreme Court held that the states are uniformly bound by all the protections of the Bill of Rights as those protections are interpreted by the Supreme Court.[78] In the process, the Court has implied and defined new constitutional rights in various areas, such as abortion and school prayer. These rights are innovative creations of the Supreme Court itself.[79]

The argument that the Supreme Court cannot be deprived of jurisdiction to hear appeals when they involve rights which the Court has itself created, is an exercise in bootstrap jurisprudence. It would make the Supreme Court not only supreme, but also

74. *See, e.g.,* Roe v. Wade, 410 U.S. 133 (1973) (abortion); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Griswold v. Connecticut, 381 U.S. 479 (1965) (access to contraceptives); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination).

75. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

76. *See* R. BERGER, GOVERNMENT BY JUDICIARY (1977), ch. 8. *See also* McClellan, *Congressional Retraction of Federal Court Jurisdiction Over the Reserved Powers of the States: The Helms Prayer Bill and a Return to First Principles,* 27 VILL. L. REV. 1019, 1024 (1982).

77. Roth v. United States, 354 U.S. 476, 501 (1957) (Harlan, J., concurring).

78. *See, e.g.,* Malloy v. Hogan, 378 U.S. 1 (1964).

79. *See, e.g.,* Roe v. Wade, 410 U.S. 133 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Engel v. Vitale, 370 U.S. 421 (1962).

absolutist in some of the most sensitive areas of our lives. Clearly, the exceptions clause was designed to empower Congress to prevent such a result.[80]

There are those who believe that it would be unwise for Congress to exercise its exceptions clause power even with respect to a single, narrowly drawn class of cases. But doubts as to the wisdom of the exercise of a power cannot be translated into a denial of the existence of the power. The members of Congress are entitled to form their own judgments as to the wisdom of exercising the exceptions clause power in specific instances. The views of those who doubt the wisdom of that exercise are to be seriously considered. However, Congress' power to limit Supreme Court jurisdiction is clearly affirmed in the Constitution itself. Those who are convinced that it is prudent and necessary to withdraw appellate jurisdiction from the Supreme Court in specified matters ought not to be intimidated by those who wrongly contend that Congress does not even possess that power.

It should be noted, however, that Congress, in its exercise of the exceptions clause power, is not liberated from other constitutional prohibitions which restrict all its actions. It would seem clear that Congress could not withdraw from the lower federal courts or from the appellate jurisdiction of the Supreme Court, jurisdiction, for example, "in any case where a Baptist shall be" a plaintiff or an appellant. This would be unconstitutional, not because the exceptions clause power is limited in itself, but because of a specific prohibition, elsewhere in the Constitution, which restricts the exceptions power, the commerce power and every other power of Congress. The religion of the appellant has nothing to do with the nature of the case. Congress is forbidden by the first amendment to prohibit appeals by Baptists or Jews—or to prohibit their engaging in interstate commerce, or to in any other way infringe the free exercise of religion. This does not mean, however, that there is any restriction on Congress' power to exclude classes of cases, as determined by the nature of the case, from the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court.

It might be argued that the withdrawal of lower federal court and Supreme Court appellate jurisdiction in, for example, abortion cases would be an unconstitutional denial of a remedy for viola-

80. *See* Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965). Professor Wechsler sees the purpose of the exceptions clause as to enable Congress to "strike at what it deems [to be] judicial excess." *Id.* at 1005.

tions of the right of reproductive privacy which the Supreme Court has declared to be a fundamental right in relation to abortion.[81] But this argument is without merit because the withdrawal of jurisdiction would leave untouched the right of recourse to the state courts. These courts are no less obligated to enforce constitutional rights than are the federal courts.[82]

Nor could it be soundly argued that the withdrawal of jurisdiction in abortion cases would amount to a denial to a class—pregnant women who desire to have abortions—of the equal protection of the laws which is implicitly guaranteed by the fifth amendment.[83] The equal protection guarantee, whether the explicit one in the fourteenth amendment or the implicit one in the fifth, forbids only "purposeful discrimination." [84] Such purposeful discrimination could only readily be found in a withdrawal of jurisdiction in cases where discrete and well-defined groups were precluded from access to the Court. For instance, a statute which withdrew jurisdiction only in those cases where "Baptists or blacks" were parties could be found to be purposefully discriminatory. It is true, however, that proof of purposeful discrimination can be shown by evidence of the disproportionate impact of the law on the suspect class in question.[85] The withdrawal of lower federal court and Supreme Court appellate jurisdiction would diminish—but not abolish—the legal remedies available to pregnant women who seek abortions. It could hardly be contended, however, that discrimination against that class of women would be the purpose of such a withdrawal in the way that discrimination against Baptists would be the purpose of a withdrawal of jurisdiction in cases brought by Baptists. The withdrawal of jurisdiction in abortion cases would be prompted instead by other purposes: First, to restore legal remedies to unborn children who have been decreed to be non-persons by the Supreme Court [86] and, second, to curtail the Supreme Court's continual excursion beyond its proper role in abortion cases. The purposes of such legislation, then, would be to vindicate the rights of a minority who are wholly deprived of rights by their definition

81. Roe v. Wade, 410 U.S. 133 (1973).

82. *See* U.S. CONST. art. VI.

83. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

84. *See, e.g.,* Mobile v. Bolden, 446 U.S. 55, 66 (1980); Washington v. Davis, 426 U.S. 229 (1976).

85. *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 253, 266 (1977).

86. *See* Roe v. Wade, 410 U.S. 133 (1973).

as non-persons, and to vindicate the separation of powers and the system of checks and balances.

Those who would deny to Congress the power to make exceptions to the appellate jurisdiction of the Supreme Court would be well advised to follow the course of Justice Owen J. Roberts. In 1949, as a retired Supreme Court Justice, he proposed a constitutional amendment to protect the Court against Congressional tampering with its appellate jurisdiction. His position was straightforward. He did not pretend that the power so clearly conferred by the exceptions clause was somehow not there. Rather, he proposed to remove that power by constitutional amendment.[87] His analysis and reasons are instructive:

> Why did they [the Framers] then leave it to Congress to regulate the appellate jurisdiction of the Court? I think they did not envisage any such large federal judiciary as we have today. The federal judiciary was rather in the background—that is, the lower judiciary. The theory was that constitutional questions would arise in state courts and then an appeal would come to the Supreme Court from a decision of a state court on a constitutional question.
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> There came into play state pride, the states' rights feeling, and another feeling that since Anglo-Saxons prize the jury system, giving the Supreme Court appellate jurisdiction as to matters of law and fact would give it the opportunity to overturn jury verdicts, [and] jury decisions. . . . The best compromise that could be made in the situation was to leave to Congress the right to define the appellate jurisdiction of the Supreme Court.
>
> You know what the result of that has been. The appellate jurisdiction of the Supreme Court depends upon the judiciary acts—the original Judiciary Act passed in the first session of Congress and the amendments that have been adopted to it since—and Congress has set forth in what cases the Supreme Court can entertain an appeal.
>
> Very early the Court was faced with the question whether it has a general appellate jurisdiction, modified by what Congress had said on the subject. Chief Justice Marshall, in two decisions, said that was not the way to read the Constitution. He said that the Congress and the judiciary acts, having set forth in which cases the Supreme Court might have jurisdiction on appeal, impliedly pro-

87. Roberts, *Fortifying the Supreme Court's Independence,* 35 A.B.A.J. 1 (1949).

vided that it should not take jurisdiction in any other class of cases.

That is the settled law and I think it is right. It remains, therefore, so far as we can see, that Congress could affect the Court's powers, just as President Roosevelt could have in his way, unless there was a popular uprising that would frighten them out of doing what they threatened to do." [88]

IV. EFFECT OF A WITHDRAWAL OF SUPREME COURT APPELLATE JURISDICTION

Unlike a constitutional amendment, withdrawal of the Supreme Court's appellate jurisdiction over a particular matter would not actually reverse the Court's rulings on the subject.[89] If Congress were to withdraw the Supreme Court's appellate jurisdiction in school prayer cases, for example, that action would leave undisturbed the existing Supreme Court cases in that area. Lower federal courts—if Congress had not removed their jurisdiction over the issue as well—and state courts could regard themselves as bound by those decisions as the last authoritative expression of the meaning of the first amendment, even though the Supreme Court could no longer rule on the subject. The withdrawal of jurisdiction would thus be a limited response to an erroneous Supreme Court decision, and would have no permanent impact on the Constitution. If experience showed the withdrawal to be unwise, it could be readily repealed by a statute. Furthermore, an exercise of the exceptions clause power is forseeable only in matters in which the Supreme Court's interpretations are so at variance with the sense of Congress and the nation as to be regarded as usurpations. The school prayer decisions, whatever else one may think of them, are a classic example of judge-made law through which the Supreme Court, by its own decree, has virtually amended the Constitution.

Most proposals to withdraw Supreme Court jurisdiction in school prayer and abortion cases would also withdraw those cases from the jurisdiction of lower federal courts. If, for a time, state courts were allowed to make their own decisions in cases involving

88. *Id.* at 2-3.

89. *But see* Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction,* 27 VILL. L. REV. 929, 936-38 (1982). Professor Ratner argues that it is the power of the Supreme Court to reverse decisions of the lower courts that binds the lower courts. Thus, once the Court's appellate jurisdiction is excised, the lower courts, both federal and state, would constitutionally be free to interpret the Constitution as they saw fit. *Id.* at 937.

school prayer, no great hardship would result. Presumably, at least some of those courts would hold themselves bound by the Supreme Court's decisions even though that Court could no longer rule on the subject. Even so, there would at least be no opportunity for the Court to further extend its errors. For example, in cases where supporters of the school prayer decisions sought to extend them to outlaw evangelization efforts by individual students outside of class time, those state courts would be apt to show a greater measure of prudence than the Supreme Court has sometimes shown on the subject.

Finally, it may be expected that some state courts would openly disregard the Supreme Court precedents and would decide in favor of allowing school prayer once the prospect of reversal by the Supreme Court had been removed. That result would not be such a terrible thing. It must be remembered that we are talking about Supreme Court decisions which, in the judgment of the elected representatives of the people and the President—or of two-thirds of the Congress overriding his veto—are gravely erroneous and urgently in need of correction. One healthy method of correcting those decisions would be for the people to trust in the state courts for a time and thereby be protected against further excesses in that area on the part of the Supreme Court. In the process, the Court might learn a salutary lesson so that future excursions beyond the Court's proper bounds could be avoided. Finally, because the correction is statutory, rather than by constitutional amendment, the Court's jurisdiction could readily be restored should the need for it become apparent.

The withdrawal of jurisdiction on school prayer has been used as an example in this discussion to illustrate the effects of a withdrawal of jurisdiction. Similar conclusions are appropriate with respect to the withdrawal of jurisdiction in the school busing and abortion cases. In the abortion area, urgency is lent to the issue by the fact that at least 1,500,000 lives are taken by legalized abortion each year in this country.[90] This is equivalent to more than the combined populations of Kansas City, Minneapolis and Miami. While school prayer is a largely symbolic issue, abortion is a life-and-death issue of enormous proportions. In view of its involving of the very right to live, it is a more important issue than school prayer or "busing."

Roe v. Wade held that, whether or not the unborn child is a human being, he is not a "person" for purposes of the fourteenth

90. *See* Chicago Tribune, March 11, 1982, at 8, col. 1.

amendment.[91] The holding is thus the same, in effect, as a pronouncement that an acknowledged human being is a non-person. The case is thus a reincarnation, in a different context, of the principle enunciated in the *Dred Scott* case.[92] One would expect the legal profession to be favorably disposed toward any attempt, of at least arguable validity, to remedy such a ruling and the consequences of it. *Roe v. Wade,* however, has been accepted with equanimity by the organized bar.[93] In addition, the general reaction of the organized bar to the proposals to curb the Supreme Court's appellate jurisdiction over abortion cases as well as on other issues has been strongly negative.[94] However, notwithstanding the bar's general disfavor toward legislation limiting jurisdiction, the life and death urgency of the abortion issue mandates the use of whatever means available to focus attention on, and perhaps bring changes to, the current law on abortion.

V. CONCLUSION

In the eyes of some critics, the proposed Congressional exercise of power expressly given to Congress by the Constitution is viewed as a threat to the Constitution itself.[95] Whatever its outcome, however, the jurisdiction controversy will serve a useful purpose if it illuminates several uncritical assumptions which appear to underly the claim that the jurisdiction limiting proposals are unconstitutional. The most important of the arguments against the use of the exceptions clause power is based on an assumption of judicial exclusivity and supremacy in the interpretation of the Constitution. Implicit in this assumption is a belief that Supreme Court holdings and opinions on constitutional issues have a status equivalent to the language of the Constitution itself and that they

91. 410 U.S. 113, 158 (1973).

92. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

93. For example, the House of Delegates of the American Bar Association resolved in 1978, "[t]hat the American Bar Association supports legislation on the federal and state level to finance abortion services for indigent women." A.B.A. House of Delegates, Summary of Action, August, 1978, 26. The American Bar Association has a history of supporting abortion. "Generally, it would appear appropriate for the American Bar Association, through any or all of its functioning arms, to clearly go on record in support of the principles of personal freedom enunciated in the abortion cases." 1 A.B.A. SEC. INDIVIDUAL RTS. & RESP. 812 (1973).

94. *See, e.g.,* S. Taylor, Jr., *A Worried Bar Fraternity,* New York Times, Jan. 25, 1982, p. 14, col. 1.

95. *See id.*

can be corrected only by a constitutional amendment.[96] What seems to be overlooked is the fact that the Supreme Court can render an unconstitutional decision. In *Erie Railroad Co. v. Tompkins*,[97] for example, Justice Brandeis described *Swift v. Tyson*[98] as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion would make us hesitate to correct." It would be most extraordinary if the Supreme Court, alone among the three branches of government, were incapable of acting unconstitutionally. If the Supreme Court has rendered an unconstitutional decision, why should it be necessary to change the Constitution to rectify the error? In his first inaugural address, Abraham Lincoln stated: "[i]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . 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."[99] Fortunately, the exceptions clause was intended to provide, among other things, a remedy for this problem.

96. It was not until 1958, however, that the Supreme Court itself ventured to say that its interpretation of the Constitution "is the supreme law of the land." *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958).

97. 304 U.S. 64, 79 (1938).

98. 41 U.S. (16 Pet.) 1 (1842).

99. American Historical Documents (Syrett, ed. 1980), 273.