Constitution, Congress, and Court: On the Theory, Law, and Politics of Appellate Jurisdiction of the United States Supreme Court

By LELAND E. BECK

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Introduction

Since the founding of the Republic, relations between the United States Congress and the Supreme Court often have exhibited the institutional tension and occasional conflict embodied in the constitutional and political doctrines of separation of powers and the system of checks and balances. Any understanding of the constitutional relationship between Congress and the Court must begin with the premise that this tension is essential to the functioning of the government; that it is not only accepted, but expected. The variety of tensions and conflicts are exemplified in the confirmation and attempted impeachment of justices; the judiciary's procedure, remedies, and jurisdiction; and the legitimacy, scope, and application of the doctrine of judicial review.[1] This article will undertake the exposition of one constitutional question of current tension and potential conflict between Congress and the Court: whether the exceptions and regulations clause authorizes Congress to preclude the Supreme Court from adjudicating particular constitutional claims by excepting those cases from the Court's appellate jurisdiction.[2]

Establishing the contours of the Court's appellate jurisdiction is as obtuse a process as establishing the original jurisdiction is acute. The appellate jurisdiction is conceptualized in the Constitution, while the

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1. Examples of each of these types of tension are included in the conceptual level discussion at notes 30-57 and accompanying text *infra*.

2. The elements of this question are discussed at notes 6, 21-25 and accompanying text *infra*.

original jurisdiction is enumerated. The relevant portions of the jurisdiction clauses of article III provide:

> 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 . . . .
>
> 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.[3]

Had the Framers unequivocally provided for the Court's appellate jurisdiction, or had they unequivocally provided the Congress with plenary power to determine affirmatively the Court's appellate jurisdiction, there would be little room for political concern. Instead, the Court's appellate jurisdiction was only facially outlined, with at least facial authority in Congress to except from that jurisdiction.

Jurisdiction over cases arising under the Constitution is the predicate for the development of the misnomered doctrine of "constitutional causes of action" under the Fourth Amendment,[4] the Fifth Amendment's due process clause,[5] and the Eighth Amendment's cruel and unusual punishment clause, among others.[6] Substantial scholarly commentary exists over the scope of constitutional causes of action, but consideration of congressional limitation of that concept has been limited.[7] Thus far, commentary on constitutional causes of action has not reached the idea of excepting particular causes of action from the Court's appellate jurisdiction as a means of regulating the causes of action.

Debate on the jurisdictional predicate to the judicial enforcement of constitutional rights, however, has drawn the attention of Congress

3. U.S. CONST. art. III, §§ 1-2.

4. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

5. *See, e.g.*, Davis v. Passman, 442 U.S. 228 (1979).

6. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980). Interest here is limited to causes and cases arising directly under the Constitution, not correlative statutes, *e.g.*, 42 U.S.C. § 1983 (1976); 28 U.S.C. §§ 1331, 1343 (1976, as amended 1980).

7. Literature concerning *Bivens*-type actions, for example, has consistently focused on the scope of the remedy, not the jurisdictional predicate for the case. Presumably, jurisdiction lies only under 28 U.S.C. § 1331 (1976, as amended 1980) in cases involving state or federal officer defendants, and under § 1346 in suits against the United States.

in the form of excepting from the Court's jurisdiction certain species of cases. Since 1956, over one hundred proposals to restrict the Court's jurisdiction can be found in the *Congressional Record*, although many are mere reintroductions or variations of previous bills. Only three have received serious consideration by either the House or the Senate. The first proposal responded to a series of Court decisions curbing some of the excesses of McCarthyism.[8] The second proposal responded to the reapportionment decisions.[9] The third proposal focuses on the contemporary debate concerning prayer in the public schools and the efficacy of *Engel v. Vitale*[10] and *Abington School District v. Schempp*.[11]

Like its predecessors, the school prayer proposal[12] is a response to

8. *See, e.g.*, Watkins v. United States, 354 U.S. 178 (1957); Service v. Dulles, 354 U.S. 363 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Cole v. Young, 351 U.S. 536 (1956); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956). *See also* S. 2646, 85th Cong., 1st Sess. (1957); *Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearings before the Subcomm. to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Comm. on the Judiciary*, 85th Cong., 1st & 2d Sess. (1957, 1958) [hereinafter cited as *1958 Senate Hearings*]; S. REP. No. 1586, 85th Cong., 2d Sess. (1958). *Cf.* H.R. 10775, 85th Cong., 2d Sess. (1958). S. 2646 would have removed Supreme Court jurisdiction over cases involving contempts of Congress, federal employee security separations, state "subversive activities" programs, teacher employment and "subversive activities" control, and state bar admissions. Certain of these exceptions would be only statutory, while others, because of the nature of the claim, could only be characterized as constitutional. The Senate passed a modified version of the bill, but the proposal died on a point involving its germaneness to new language in a conference committee report. *See generally* W. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS (1962); C. PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957-1960 (1961).

9. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). *See also* H.R. 11926, 88th Cong., 2d Sess. (1964); H.R. Res. 893, 88th Cong., 2d Sess., 110 CONG. REC. 20213-301, 21236 (1964). H.R. 11926 was introduced by Congressman Tuck in 1964 to remove all cases involving the apportionment or reapportionment of state legislatures from both the Supreme Court's and the inferior federal courts' jurisdiction. After an acrimonious debate, the bill was passed. This bill is not as well-known as the "stay" bill which was introduced, modified, and passed by the Senate. Both bills died in the Senate when a move to invoke cloture on the Conference Report failed by a substantial margin. *See generally* McKay, *Court, Congress and Reapportionment*, 63 MICH. L. REV. 255 (1964).

10. 370 U.S. 421 (1962).

11. 374 U.S. 203 (1963).

12. On April 5, 1979, Senator Helms proposed an amendment to the Department of Education organic bill that would remove school prayer issues from the Court's jurisdiction. This amendment was subsequently attached to a bill that would have provided broader discretion for the Court to handle its docket. Both were passed in the Senate, but the Supreme Court jurisdiction bill languished in the House Judiciary Committee and died at adjournment. *See* S. 450, 96th Cong., 1st Sess., 125 CONG. REC. 3057-58 (1979). *See also Prayer in Public Schools and Buildings: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice, House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980). At the beginning of the 97th Congress, Senator Helms and Congressman Crane

a perceived erroneous interpretation of the Constitution by the Court. Unlike its predecessors, however, which responded to unentrenched and limited Court interpretations, this proposal is a reaction against the long-term development of constitutional standards under the establishment clause.[13] Even as the school prayer proposal was being delayed by the House Judiciary Committee near the end of the Ninety-sixth Congress,[14] the Court summarily decided *Stone v. Graham*,[15] which declared the display of the Ten Commandments in all Kentucky public classrooms unconstitutional, even though it contained a statement of secular purpose and even though it was financed by private contributions to the state treasury in accordance with state law.[16] During the Ninety-seventh Congress, debate on limiting the judiciary's jurisdiction and remedial powers in abortion, busing, and school prayer cases flourished.[17] The contemporary debate is also distinguishable because it is

reintroduced the proposal. S. 481, 97th Cong., 1st Sess. (1981); H.R. 865, 97th Cong., 1st Sess. (1981).

13. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980); New York v. Cathedral Academy, 434 U.S. 125 (1977); Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Wheeler v. Barrera, 417 U.S. 402 (1974); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Lemon v. Kurtzman, 411 U.S. 192 (1973) (*Lemon II*); Lemon v. Kurtzman, 403 U.S. 602 (1971) (*Lemon I*); Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Board of Educ. v. Allen, 392 U.S. 236 (1968). This is not the first attempt to nullify, alter, or obviate past decisions in this area. *See School Prayers: Hearings Before the House Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964) (constitutional amendments); *School Prayer: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966) (constitutional amendments). An attempt to catalogue the introductions and reintroduction of constitutional amendments and simple legislation in this area has, in light of limited space, not been undertaken.

14. *See* note 11 *supra*.

15. 449 U.S. 39 (1980).

16. *Id.* at 42-43.

17. *See Constitutional Restraints upon the Judiciary, Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981); *The Fourteenth Amendment and School Busing, Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) (S. 528, S. 1005, S. 1147, S. 1760, *infra* note 19); *The Human Life Bill, Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) (S. 158, *infra* note 19); *School Desegregation, Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981). During the first half of the second session of the 97th Congress, the Senate passed a provision to limit the remedial power of the federal courts in school desegregation cases by prohibiting orders that would require busing pupils more than 10 miles round trip or more than 30 minutes per day beyond the nearest school that offered the classes in which the pupil was matriculating, as part of the Department of Justice Appropriations Authorization Act, Fiscal Year 1982. S. 951, 97th Cong., 2d Sess. § 2 (1982) (as passed the Senate). The need to reconcile this bill with a House-approved version was obviated by the passage of a continuing resolution funding the Department of Justice for the

part of a broader congressional debate. The school prayer proposal has been the prototype for bills[18] to limit jurisdiction and relief in abortion and school desegregation cases as well.[19] Test cases will inexorably follow passage of any school prayer, abortion, or busing proposal, given the emotion committed to their debate. Thus, Congress and the Court may have begun in earnest to travel the road from constitutional tension to constitutional conflict.

This political history has elicited responsive, if fragmented, scholarly literature on the scope of the exceptions and regulations clause.[20]

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remainder of the fiscal year. H.R.J. Res. 409, 97th Cong., 2d Sess., Act of Mar. 31, 1982, Pub. L. No. 97-161.

18. The language of these school prayer bills, S. 481, 97th Cong., 1st Sess. (1981), H.R. 865, 97th Cong., 1st Sess. (1981), provides an excellent legislative prototype. In order to cover other areas of cases arising under the Constitution, only the direct object need be changed. S. 481 and H.R. 865 both provide, in pertinent part:

"§ 1259. Appellate Jurisdiction; limitations

"(a) Notwithstanding the provisions of section 1253, 1254, and 1257 of this chapter the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of any act interpreting, applying or enforcing a State statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings. . . ."

"§ 1363. Limitations on jurisdiction

"Notwithstanding any other provision of law, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1259 of this title." This is precisely what has been done with H.R. 869, 97th Cong., 1st Sess. (1981), a bill to limit the Supreme Court's and inferior courts' jurisdiction over the assignment of children to public schools. *See* note 19 *infra*.

19. *See, e.g.*, in the 97th Congress, 1st & 2d Sess. (1981): H.R. 72, 326, 408, 865, 989, 1335, 2347, 4756, S. 481, 1742 (Supreme Court and inferior courts, jurisdiction, prayer); H.R. 311, § 106 (Supreme Court, jurisdiction, prayer and qualification of teachers); H.R. 867 (Supreme and inferior courts, jurisdiction, abortion); S. 583 (Supreme Court and inferior courts, remedies, abortion); H.R. 73, 900, 3225, S. 158, 1741 (inferior courts, remedies, abortion); H.R. 869 (Supreme Court and inferior courts, jurisdiction, school desegregation); H.R. 340, 761, 1079, 1180, 2047, 3332, 5200, S. 528 (Supreme Court and inferior courts, remedies, school desegregation); S. 1647, 1743, 1760 (inferior courts, remedies, school desegregation). Additional bills exist on such diverse topics as equal protection (sex discrimination) in draft registration and *habeas corpus*. The classification of bills here does not necessarily coincide with the perceptions of their authors. For example, the language of S. 158, § 2, is couched in terms of "jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment," which is remedial in character, not jurisdictional. *See* notes 21-23 *infra*.

20. Berger, *Congressional Contraction of Federal Jurisdiction*, 5 WIS. L. REV. 801 (1980); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3 (1973); Forkosch, *The Exceptions and Regulations Clause of Article III & A Person's Constitutional Rights: Can the Latter be Limited by Congressional Power under the Former?*, 72 W. VA. L. REV. 238 (1970); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Lenoir, *Congressional Control Over the Appellate Jurisdiction of the Supreme Court*, 5 U. KAN. L. REV. 16 (1956); Levy, *Congressional Power over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22

In contrast, illuminating the scope of this article requires the statement of several *caveats*. First, this article is concerned only with the appellate jurisdiction of the Supreme Court. Thus, contemporary bills on inferior federal court consideration of, for example, abortion issues, while germane to a discussion of the political context, will not be considered. The appropriate authority for the disposition of these questions is the power of Congress to ordain and establish inferior federal courts under article III, section 1, and article I, section 8, clause 9 (the inferior courts clause), not a power over the Supreme Court under the exceptions and regulations clause.[21] Second, this article addresses only questions of subject matter jurisdiction. Thus, issues of remedy, such as the busing remedy and the *Bivens*[22] damage remedy, are germane only to contextual discussion.[23] Third, the scope of this article is lim-

N.Y.U. INTRA. L. REV. 178 (1967); 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, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 ARIZ. L. REV. 229 (1973); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965); Note, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U. PITT. L. REV. 99 (1958); Comment, *Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity?*, 1969 DUKE L.J. 291 [hereinafter cited as Comment, *Obscenity*]; Comment, *Congressional Power Over Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U. INTRA. L. REV. 178 (1967).

See generally Symposium on Limiting Federal Court Jurisdiction, 65 JUDICATURE 177 (1981). *See also* Fite & Rubenstein, *Curbing the Supreme Court—State Experiences and Federal Proposals*, 35 MICH. L. REV. 762 (1937); Martig, *Congress and the Appellate Jurisdiction of the Supreme Court*, 34 MICH. L. REV. 650 (1936); Nagel, *Court-Curbing Proposals in American History*, 18 VAND. L. REV. 925 (1965); Richter, *A Legislative Curb on the Judiciary*, 21 J. POL. ECON. 281 (1913); Stumpf, *Congressional Response to Supreme Court Rulings: The Interrelation of Law and Politics*, 14 J. PUB. L. 377 (1965). *Cf.* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed 'Human Life' Legislation*, 68 VA. L. REV. 333 (1982); Redish & Woods, *Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975).

21. The inferior courts clause of article III, § 1, along with the restrictions imposed by the Bill of Rights and the Fourteenth Amendment, is a distinct authority, separable from the exceptions and regulations clause of article III, § 2, clause 2, which concerns the appellate jurisdiction of the Supreme Court. On numerous occasions, however, the question of the Supreme Court's jurisdiction has been discussed in terms of practice consequent to the powers of the inferior courts clause. For clarity of analysis, this article is restricted to the authority establishing the Supreme Court under article III and seeks to avoid the folly of confusing the Supreme Court with the inferior courts.

22. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

23. Jurisdiction is a separable issue from either procedure or remedy. It must be noted, however, that the use of jurisdiction, procedure, and remedy as means of controlling activities of the federal courts (historically in the context of inferior federal courts) has often

ited to "exceptions" from jurisdiction. It must be remembered that the exceptions and regulations clause has two distinct, yet interrelated, parts and may be considered as two clauses. By the term "exception," it is generally understood[24] that a *part* is removed or excluded from the *whole*, removing the entirety of that part of the whole. In the context of constitutional claims, an exception must preclude the Court from entertaining the claim. A regulation, on the other hand, does not take away or preclude—it merely sets order or method to the process of doing a thing.[25] Fourth, this article considers only the question of excepting those cases in which constitutional, not merely statutory, rights are claimed.

Although the language of the exceptions and regulations clause does not provide any "plain meaning," several initial interpretations of the clause are summarized here and detailed later.[26] By linguistic modification, the reading implicit in the congressional proposals is that "the supreme Court shall have appellate jurisdiction . . . with such Exceptions . . . as the Congress shall make." This reading relates the "exceptions" component directly to the appellate jurisdiction of the Court. An alternative reading relates the "exceptions" component directly to the law and fact clause. This reading might be extended to exclusivity, *i.e.*, exceptions *solely* related to the law and fact clause, leaving the jurisdiction of the Court beyond congressional action.[27] These two readings appear to represent polar extremes—either complete or non-

blurred the distinctions between them, and, indeed, the distinctions themselves have changed over time. For example, the provision of the Norris-LaGuardia Act, Act of Mar. 23, 1932, ch. 229, 47 Stat. 70, which restricts the district courts from issuing injunctions in labor disputes, was initially referred to as a jurisdictional limitation but is now referred to as a remedial restriction. This distinction may not be important in light of the restriction of this article to the Supreme Court, since there have been no attempts to restrict remedies available to the Court or to limit its remedial power jurisdictionally. The analytic framework proposed is one composed of six discrete questions: (1) Supreme Court jurisdiction; (2) Supreme Court procedure; (3) Supreme Court remedies; (4) inferior court jurisdiction; (5) inferior court procedure; and (6) inferior court remedies. Within this framework, this article is concerned only with question (1).

24. Modern common-sense definitions, as well as technical definitions, comport with those of the Framers. *See* Ratner, *supra* note 20, at 168-71. There seems to be no need to delve into the definitional development of these terms again.

25. To be oversimplistic, exceptions may be best illustrated in jurisdictional terms, while regulations are exemplified by procedure and remedies. This illustration, however, does not recognize that there clearly are procedural and remedial exceptions and jurisdictional regulations; further, the illustration tends to confuse the sources of congressional power over the Supreme and inferior courts with the effects of congressional concern with the latter. The discussion of the history of congressional consideration of the federal courts will illustrate this complexity of ideas.

26. *See* text accompanying notes 212-27, *infra*.

27. *See* Merry, *supra* note 20.

existent congressional authority over the Supreme Court's appellate jurisdiction. Such extremes of interpretation, however, illustrate only that diagrammatical analysis is inconclusive. A variety of middle grounds may be derived, principally from the interplay with other clauses of the Constitution and the Bill of Rights. For example, the exceptions and regulations clause, together with the inferior courts clause, may be interpreted to authorize Congress to place appellate jurisdiction in inferior federal courts.[28] These clauses also may be, and indeed have been, interpreted to authorize Congress to make the Court's original jurisdiction concurrent with such inferior federal courts, just as the inferior courts clause has been interpreted to allow the original jurisdiction of the inferior federal courts to be concurrent with the jurisdiction of state courts.[29] In light of the possible multiple readings of the exceptions and regulations clause, particularly when read in conjunction with the inferior courts clause, the only thing that is clear about the "plain meaning" of the exceptions and regulations clause is that there is nothing plain at all.

Accordingly, this article is confined to the narrow question of the validity of the interpretation of the exceptions and regulations clause that would authorize Congress to except particular constitutional claims from the Supreme Court's appellate jurisdiction. Although there are a multitude of questions concerning the regulatory powers of Congress, the powers over the processes and remedies available to the Court, and the entire existence of inferior courts, this article undertakes to explore a limited but important and volatile issue. It focuses on that issue from several angles. First, the article stresses the conceptual framework of the issue by examining the tensions within theories of constitutional jurisdiction, judicial review, the doctrine of separation of powers, and the system of checks and balances. Second, the article develops a historical perspective from the Federal Convention of 1787, the state ratifying conventions, and the initial amendments to the Con-

28. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80; 28 U.S.C. §§ 41-48 (1976). *Contra* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 546-626 (1831).

29. Ames v. Kansas *ex rel.* Johnson, 111 U.S. 449 (1884); Börs v. Preston, 111 U.S. 252 (1884); Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 78; 28 U.S.C. § 1351 (Supp. 1980). The converse theory has also been proposed that Congress had authority to make cases within the appellate jurisdiction original in the Supreme Court. *See generally Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 169-70 (1969) (testimony of Mr. Van Alstyne) [hereinafter cited as *1969 Hearings*]; Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 30-33; Comment, *Obscenity, supra* note 20, at 294-95. General federal question jurisdiction naturally devolved to the state courts of general jurisdiction by congressional omission in the organization of the inferior federal courts.

stitution. Third, this strain is continued with a review of the implementation of the Constitution by the Congress and the Court through the formative period, the Great Insurrection, and the more contemporary substantive regulation of the federal courts. Finally, the article applies the precedents and principles discerned to the current question of the constitutionality of excepting from the Court's appellate jurisdiction particular classes of cases arising under the Constitution.

I. Conceptual Framework

Underlying the political and constitutional discussion of the instant question are conceptual differences of opinion and theory. In considering the detail of legislative and judicial interpretation under the exceptions and regulations clause, the conceptual framework will be a constant reference. Four concepts will be useful: constitutional jurisdiction, the legitimacy of judicial review, the doctrine of separation of powers, and the system of checks and balances.

The theory of constitutional jurisdiction simply suggests that the source of the Supreme Court's appellate jurisdiction is the Constitution itself. If the vesting of judicial power affirmatively grants jurisdiction without action by the Congress and the President, or if it contemplates only mandatory action by the political branches of government, a more restrictive view of the exceptions and regulations clause of article III is warranted than if jurisdiction is dependent on an affirmative discretionary action. If the Supreme Court's appellate jurisdiction is not self-executing, *i.e.*, its source is statutory authority, some congressional and executive action is necessary and a liberal view of the exceptions and regulations clause would be warranted. Accepting that premise, the next logical question is whether, and to what extent, that action is mandatory, and thus merely ministerial.

The Constitution commences each article with an organic clause stipulating authority and the mandatory nature of that authority, with certain modifications based on the branch organized.[30] From the beginning of the Federal Convention of 1787, the term "jurisdiction" was used with regard to the judiciary in the senses of both organization and

30. *Compare* art. I, § 1, cl. 1 *and* art. II, § 1, cl. 1 *with* art. III, § 1, cl. 1. The phrases in articles I and II that "all legislative Powers herein granted shall be vested in a Congress of the United States" and "The executive Power shall be vested in a President of the United States of America," compare favorably with the article III notion that "[T]he judicial Power of the United States, shall be vested in one supreme Court," as an affirmative organic grant. By contrast, the organizational structure and detail of articles I and II are conspicuously absent from article III. Those omissions have been consistently considered a delegation to Congress of the power to reorganize the judiciary.

authority.[31] The displacement of the term "jurisdiction" by the broader word "power" in the organic and authority clauses[32] came in marked stages during the Convention.[33] In the major debate on the authority of the judiciary, Doctor Johnson proposed the "arising under this Constitution" clause, with Madison agreeing on the assumption that the clause was limited to judicial cases and with the understanding that the clause was self-executing.[34] The state ratifying conventions debated the jurisdiction of the Court in strident terms, a fact which gives further support to the notion that the jurisdictional language was complete.[35] Contemporaneous external sources, such as the *Federalist Papers*, also appear to have been operating under the assumption that the Constitution itself was a grant of effective jurisdiction.[36]

Be that as it may, the practice of Congress and the Court under the Constitution has been markedly different. The First Congress, in the

31. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20 (J. Madison May 29, 1787) (M. Farrand ed. 1937) [hereinafter cited as RECORDS and accompanied by a parenthetical indicating the source, action, and date]. *See* 3 RECORDS 593-94 (App. C: Note on the "Virginia Plan.") In dealing with the *Records*, it should be kept in mind that a compilation was not published until 1911. History has suffered greatly from its absence until that late date. As Farrand has noted, 1 RECORDS xi-xxv, Madison's widely utilized notes are replete with amendments made over 40 years after the fact. *See* note 121 *infra*.

32. The term "judicial power" is a broader term than "jurisdiction." It encompasses not only the authority to hear and determine cases, but a certain power over its processes deriving from the inherent power of a court, especially in a coordinate branch.

33. The first deviation from the use of "jurisdiction" appears in the report of the Committee on Detail as a means of providing symmetry to the organic clauses utilizing the term "power." *Compare* 2 RECORDS, *supra* note 31, at 177, 185 *with id.* at 186 (Madison, *Report of the Comm. on Detail*) (August 6th). In this posture, the draft organized the judiciary under "power" and enumerated and divided the "jurisdiction" of the Supreme Court. Nonetheless, the term "jurisdiction" appears in both the authority subsection and the original and appellate jurisdiction subsections. *Id.* Note also that the judicial authority did not include cases "arising under" the Constitution. In the major debate on the judiciary, the style of the authority clause beginning in § 6 of article III was changed from "jurisdiction" to "the judicial Power." 2 RECORDS, *supra* note 31, at 430, 431 (Madison), 425 (Journal) (Aug. 27th). This change arguably broadened the scope of § 2 in the areas of procedure and remedies, but it appears doubtful that this alteration was intended to be more than a stylistic change.

34. 2 RECORDS, *supra* note 31 at 430, 431 (Madison), 425 (Journal) (Aug. 27th), *quoted in full in* text accompanying note 73 *infra*. The other alteration, adding cases in which the United States was a party, further indicates that the Convention understood that the Constitution alone was the source of authority to hear and determine cases. *Id.* *See* text accompanying note 72 *infra*.

35. The conceptualization of the Court's jurisdiction as embodied in the Constitution did not arise directly, but was the product of a clear debate on subordinate questions which presumed that fact. *See* notes 70-85 and accompanying text *infra*.

36. THE FEDERALIST No. 80, at 499-500 (A. Hamilton) (B. Wright ed. 1961). For a compilation of essays questioning the efficacy of the Constitution, see THE COMPLETE ANTI-FEDERALISTS (H. Storing ed. 1981).

Judiciary Act of 1789,[37] vested legislative jurisdiction to hear appeals[38] from the highest state courts and the inferior federal courts in many of, but by no means all, the cases and controversies contemplated in the Constitution.[39] The Court never has been squarely faced with the choice of taking jurisdiction that is provided under the Constitution but not by statutes, although Chief Justice Ellsworth,[40] Chief Justice Marshall,[41] and Justice Story[42] each had occasion to support the concept in dicta. Even as Justice Story penned his *Commentaries*,[43] debate on this issue was in decline and has only recently been resurrected.[44]

The historical question of constitutional jurisdiction poses a fundamental problem, however, given the lack of a concept of desuetude in American law. If the jurisdiction of the Court flows directly from the Constitution and remains extant though unexercised, the scope of the exceptions and regulations clause may be interpreted more narrowly in light of the Court's mere statutory, as contrasted with constitutional, past exercise of power. On the other hand, if the question of

37. Judiciary Act of 1789, ch. 20, §§ 13-14, 25, 1 Stat. 73.

38. "Appeal" is used here in the generic, nontechnical sense.

39. For example, legislative jurisdiction to hear criminal appeals from inferior federal courts was not vested until 1891, and then only by the confluence of judicial interpretation and subsequent legislation. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655 (providing Supreme Court appeal in all cases of conviction of crime, the punishment of which is death, tried before any court of the United States); *In re* Classen, 140 U.S. 200 (1891) (writ of error issued by the Court where the conviction for the crime occurred before the act of March 3, 1891, but sentencing was imposed thereafter); Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826 (providing for direct appeal to the Supreme Court in specific cases regarding jurisdiction or constitutionality). The gap between the constitutional jurisdiction theory and legislative vesting has occurred only in the instance of cases arising under statutes and, indeed, was not fully closed until 1980, 28 U.S.C. § 1331 (Supp. 1980), although some residual difference may remain.

40. Chief Justice Ellsworth indicated that the Court's jurisdiction flowed directly from the Constitution, even though this dictum appears contrary to his authorship of the Judiciary Act of 1789. Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) (discussed at notes 140-44 *infra*).

41. Chief Justice Marshall took a self-execution stand with regard to the original jurisdiction of the Court in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), but took the contrary stand in Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-17 (1810), suggesting that while the Constitution grants appellate jurisdiction, an exception from that jurisdiction could be inferred from a lack of statutory jurisdiction affirmatively granted—a position consistent with the Judiciary Act of 1789. *See* text accompanying notes 146-50 *infra*.

42. Justice Story took a more radical stance on the question than did Chief Justices Marshall or Ellsworth. He asserted not only that the Court's jurisdiction flowed directly and completely from the Constitution, but that if Congress created inferior federal courts, those courts as well would automatically be vested with the full panoply of constitutional jurisdiction. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 374 (1816).

43. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

44. *See, e.g.*, Sager, *supra* note 20, at 23-25.

constitutional jurisdiction has died for lack of exercise, so too may have the power of Congress to except constitutional questions from the Court's jurisdiction. In short, constitutional jurisdiction cannot be divorced from the question of the power of Congress under the exceptions and regulations clause.

The second conceptual point focuses on judicial review. Unlike constitutional jurisdiction, the concept of judicial review has been exercised by the Court on numerous occasions—sparingly at first, but more frequently in recent years.[45] During the formative and middle periods of constitutional history, the legitimacy of the concept was widely debated.[46] The search for evidence of the Framers' intent and understanding of the concept has proven to be a frustrating endeavor. The concept was not stated explicitly in the Convention of 1787 or in the state ratifying debates, but was implicit in the rejection of the Council of Revision.[47] In response to early declarations of unconstitutionality,

45. At last count, the Court had invalidated 105 acts of Congress, 908 state statutes, and 101 municipal ordinances as contrary to the Constitution. J. KILLIAN, CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION S272, S275, S291, S293 (1972 & Supp. 1978). The first direct exercise of judicial review to void an act of Congress was Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); the second was Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (voiding the "Missouri Compromise"). *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, *further opinion*, 158 U.S. 601 (1895) (overruled by the 16th Amendment in 1913 (income taxation)); Oregon v. Mitchell, 400 U.S. 112 (1970) (reversed, in part, by the 26th Amendment in 1972 (age of suffrage)). *Compare* Hammer v. Dagenhart, 247 U.S. 251 (1918), *with* J. KILLIAN, *infra*, at 52. Once only circumspectly applied, the doctrine now has an active role in the Court's decisions.

46. The classic works on the subject are C. BEARD, THE SUPREME COURT AND THE CONSTITUTION (A. Westin ed. 1962), and Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). *See also* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); E. CORWIN, COURT OVER CONSTITUTION (1938); W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953). Alan Westin has compiled an extensive bibliography on the subject through 1962 in the reissue of Beard's volume. C. BEARD, *supra*, at 133-49.

47. Numerous ideas were circulated during the Convention regarding the formation of a "Council of Revision," to be composed of the President and "a convenient number of the Judiciary," for the purpose of deciding whether congressional enactments should become law. 1 RECORDS, *supra* note 31, at 97-98 (Madison), 109 (Pierce) (June 4th); 2 RECORDS, *supra* note 31, at 71-72 (Journal), 73-80 (Madison) (July 21st). The Council of Revision developed into the President's veto power under article I, § 7, clause 2. Madison records Luther Martin's objection to judicial participation in the veto in this way: "And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative." 2 RECORDS, *supra* note 31, at 76 (Madison) (July 21st). Madison also notes, "Mr. Gerry doubts whether the Judiciary ought to form a part of [a Council of Revision], as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality." 1 RECORDS, *supra* note 31, at 97 (Madison)

Congress was petitioned to limit the Court's authority to review federal and state enactments, but no formal action was ever taken to that end.[48] It is not the province of this article to debate the broad contours of the concept, but merely to note the more limited scope of contemporary debate. Although contemporary debate over the Court's jurisdiction is, as before, a response to the Court's exercise of judicial review, the thrust of the debate is currently directed toward overturning, obviating, or circumventing the rules laid down in particular decisions.

The importance of reintroducing the idea of judicial review here is that, while there may not be a concept of desuetude in American law, there is clearly a concept of legitimation in American politics. While the debate on judicial review will surely continue, the concept has been all but fully legitimized in the structure of American government. The proposals to limit the Court's appellate jurisdiction run counter to this strain of legitimation.

The third and fourth conceptual points are interrelated. Separation of powers and the system of checks and balances must be considered respectively as methods of animating the structure of government and of insuring the existence of liberty. While the ideas of separation of powers and checks and balances can be traced to Plato and Aristotle, the Framers were specifically influenced by Montesquieu's *L'Esprit des Lois*.[49] The doctrine of separation of powers does not demand that the functions of each branch be completely separate from the others, but rather that certain fundamental functions cannot be usurped from one branch by another.[50] The concept of separation of powers has been fleshed out by the Court in notable instances of the President exercising

(June 4th). Pierce recorded, "Mr. King was of opinion that the Judicial ought not to join in the negative of a Law, because the Judges will have the expounding of those laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution." *Id.* at 109 (Pierce) (June 4th).

48. The most famous attacks were probably the Kentucky and Virginia Resolutions of 1798, passed after stay laws were struck down and as Virginia's response to the Court accepting jurisdiction over Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). *See* 1 THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1-24 (1971) [hereinafter cited as 1 HOLMES DEVISE]; J. GOEBEL, 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 651-52 (1922).

49. C. MONTESQUIEU, L' ESPRIT DES LOIS (1748).

50. As Madison posed the doctrine, "It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security

a legislative function or the Congress exercising an executive function.[51] The most notable case for the instant purpose involved a usurpation of both executive and judicial power by the Congress.[52] Proper functioning of the doctrine of separation of powers, however, relies on the interdependence of the various departments of government as expressed through the operation of the system of checks and balances.

The most common examples of the system of checks and balances can be found in the division of the war powers and the spending powers—in short, the sword and the purse. In terms of its impact on the Court, the system of checks and balances has had a very finite history. Only on two occasions has the House attempted to impeach a sitting justice; neither attempt was successful.[53] The Senate has, however, rejected nominees to the Court on numerous occasions, including the rejection of John Rutledge as Chief Justice after a recess appointment and after he had sat on two terms of the Court.[54] The rejection of a nominee reflects more fully the tripartite nature of the federal government because rejection affects the capacity of a president to contribute philosophy to the Court rather than creating direct conflict between Congress and the Court. Similarly, Congress has altered the number of justices in order to grant or to deny a president vacancies on the Court.[55] Finally, Congress has had an impact on the Court by altering the duties of the justices[56] and the terms of the Court.[57]

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for each, against the invasion of the others. What this security ought to be, is the great problem to be solved." THE FEDERALIST, *supra* note 36, No. 48, at 343 (J. Madison).

51. *E.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Myers v. United States, 272 U.S. 52 (1926).

52. United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), discussed at notes 181-89 and accompanying text *infra*. *See generally* A. VANDERBILT, THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 98-114 (1953).

53. 14 ANNALS OF CONG. 726-63 (House), 81-676 (Senate) (1804) (attempted impeachment of Chase, J.); HOUSE COMM. ON THE JUDICIARY, 91ST CONG., 2D SESS., FINAL REPORT BY THE SPECIAL SUBCOMM. ON H. RES. 920 (1970) (proposed impeachment of Douglas, J.).

54. *See* J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 42-43, 385 (1953); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 127-39 (1922); 1 THE HOLMES DEVISE, *supra* note 48, at 748 n.120.

55. Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73 (six); Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89 (five; never implemented); Act of Mar. 2, 1802, ch. 8, § 1, 2 Stat. 132 (repealing Act of Feb. 13, 1801); Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420-21 (seven); Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176 (nine); Act of Mar. 3, 1863, ch. 50, 12 Stat. 794 (ten); Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209 (seven); Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44 (nine).

56. The circuit-riding duties are the best remembered changes. *See generally* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 4-55 (1928).

57. Act of Feb. 13, 1801, ch. 4, § 1, 2 Stat. 89; Act of Mar. 2, 1802, ch. 8, 2 Stat. 132.

The contemporary proposals to limit the Court's jurisdiction have clearly been conceived as a check on the Court. The perception of proponents of the contemporary debate is that the exceptions and regulations clause, besides extending to the question of jurisdiction—particularly jurisdiction over cases arising under the Constitution—is a proper method for the Congress to check what Congress perceives as improvident exercises of judicial review. Whether or not the Framers considered this proposition as flowing from their handiwork is of utmost importance.

II. The Constitutional History of the Exceptions and Regulations Clause

The Federal Convention of 1787, the state ratifying conventions, and the contemporaneous amendments to the Constitution must all be reviewed in order to understand the purpose and intent of the exceptions and regulations clause. Little of the material presented in this part could be considered as new, but this basic material is essential in order to draw useful conclusions.

A. The Federal Convention of 1787

The exceptions and regulations clause is first recognizable in the report of the Committee on Detail, but much previous discussion during the Convention animated the clause. The original Virginia Resolutions submitted by Edmund Randolph on May 29th included several notable points: (1) more than one supreme tribunal might be established; (2) inferior courts were to be chosen by the Congress; and (3) the jurisdiction of both of these courts was enumerated, including "questions which may involve the national peace and harmony."[58] During the first debate, several of the specific jurisdictional clauses were stricken, and the resolution was reduced to general principle.[59] The task of detailing the jurisdiction of the judiciary was to be delegated to the Committee on Detail.[60]

58. 1 RECORDS, *supra* note 31, at 21-22 (Madison: Randolph's resolutions) (Journal) (May 29th). Particular attention should be paid to the manner in which Farrand has assembled the *Records*, including changes that Madison made in his notes late in life and discrepancies between recorders. Bearing that in mind, Farrand's *Records* remain the best, and in many instances the only, source of information on the Constitution's development.

59. *Id.* at 211 (Journal), 220 (Madison) (June 12th), 232 (Madison), 231 (Journal), 233 (Yates) (June 13th). Farrand notes that Madison's entry of June 13th appears to be an instance of Madison revising the Journal 40 years later.

60. *Id.* at 238 (Yates) (June 13th).

On June 15th, William Paterson presented alternative resolutions, called collectively the New Jersey Plan, which were based in part on previously accepted versions of Randolph's resolutions; however the general tenor was toward a federal league of sovereign states and a revision of the Articles of Confederation. Paterson's resolution dealing with the judiciary proposed that there be one supreme tribunal and that it have a specified, limited jurisdiction, both original and appellate.[61] Paterson's proposal was rejected, but parts of it would later reappear. On this scanty basis, in marked contrast to the detailed resolutions and debates on the legislature and executive, the Committee on Detail was erected.[62]

1. The Committee on Detail

Only a few documents survive to illuminate the construction of article III within the Committee on Detail; only three appear useful. The first document, in outline form, provides:

> 7. The jurisdiction of the supreme tribunal shall extend
> 1. to all cases, arising under laws passed by the general Legislature . . . and,
> 3. to *such* other cases, as the national legislature may assign, as involving the national peace and harmony, . . .

The outline then enumerates many of the jurisdictions of article III:

> But this supreme jurisdiction shall be appellate only, except in Cases of Impeachmt. & those instances, in which the legislature shall make it original, and the legislature shall organize it . . . .
> 8. The whole or a part of the jurisdiction aforesaid according to the discretion of the legislature may be assigned to the inferior tribunals, as original tribunals.[63]

In exercising its delegated authority, the Committee on Detail reverted to many of the enumerations previously discussed in the Convention. The delegation of the division of jurisdiction between the Supreme and inferior courts is "new" in this document. At this point, the choice of making appellate jurisdiction original and delegating trial jurisdiction to the inferior courts is the only recognizable concern of the Committee.

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61. *Id.* at 244 (Madison, Paterson's resolutions) (June 15th).

62. 2 *id.* at 97 (Journal), 106 (Madison) (July 24th). The Committee on Detail was composed of Edmund Randolph of Virginia, John Rutledge of South Carolina, James Wilson of Pennsylvania, Oliver Ellsworth of Connecticut, and Nathanial Gorham of Massachusetts. All of these men were involved with the later ratification and implementation of the Constitution.

63. *Id.* at 146-47 (Committee on Detail, IV); 4 *id.* at 47-49 (Corrections).

The second document may be no more than an extract of the Paterson resolutions, but to such an extract Wilson appears to have appended a new idea: "[a]n appeal for the Correction of all Errors both in Law and Fact."[64] The third document, apparently late in the Committee's work, presents a more complete picture:

> The Jurisdiction of the Supreme [National] Court shall extend to all Cases arising under Laws passed by the Legislature of the United States; . . . In Cases of Impeachment, Cases affecting Ambassadors other public Ministers & Consuls, and those in which a State shall be a Party, this Jurisdiction shall be original. In all the other Cases beforementioned, it shall be appellate, with such Exceptions and under such Regulations as the Legislature shall make. The Legislature may assign any part of the Jurisdiction above mentd.,—except the Trial of the Executive—, in the Manner and under the Limitations which it shall think proper to such inferior Courts as it shall constitute from Time to Time.[65]

The next-to-last sentence appears to be a new version of the predecessor language giving Congress authority to make the appellate jurisdiction original. The last sentence clearly indicates that Congress may assign jurisdiction to the inferior federal courts. If the meaning of the provisions overlapped, the question remains why two separable delegations were made. Thus the first appearance of the clause allows only a narrow interpretation. The law and fact clause is also conspicuously absent. The division of appellate jurisdiction between the Supreme and inferior federal tribunals would appear to be a consistent interpretation to this point in development. It was also during the initial constructions of a constitution and deliberations of the Committee on Detail that the authority to constitute inferior courts was enumerated in the legislative article for the first time.[66]

The report of the Committee on Detail was the basis for future discussion. The relevant provision of the Committee's report was in the following terms:

> Sect. 3. The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and

64. 2 RECORDS, *supra* note 31, at 157 & n.15 (Committee on Detail, VII).
65. *Id.* at 172-73 (Committee on Detail, IX).
66. *Id.* at 136 (Committee on Detail, III), 144 (IV), 168 (IX).

> between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.[67]

The Convention took up the provisions of the report of the Committee on Detail *seriatim*. On August 17th, during debate on the powers of the legislative branch, the Convention agreed to the establishment of inferior courts.[68] An additional charge was given to the Committee on Detail on August 20th: To consider whether "The Jurisdiction of the supreme Court shall be extended to all controversies between the U. S., and an individual State, or the U. S. and the Citizens of an individual State."[69]

2. *The Debate on the Judiciary*

The records of the main debate on the jurisdiction of the federal courts, held on August 27th, pose a singular problem: Many of the amendments are noted only in the technical linguistic sense, without notation of discussion and debate. The first amendment added the law and equity clause over the objection that the powers of common law courts and chancery courts, as known at that time, should not be consolidated into a single court system.[70] After considerable debate on what eventually became the good behavior and diminution clauses, the Convention reached the formal questions of jurisdiction.[71] The proposition that the United States should be able to sue in its own courts was accepted when the Convention specifically added to the jurisdictional

67. *Id.* at 186 (presumably Madison's copy) (Aug. 6th). While the report is substantially the same as document IX from the Committee, it is necessary to set it out in full in order to follow the various changes.

68. *Id.* at 315 (Madison) (Aug. 17th).

69. *Id.* at 342 (Madison), 335 (Journal) (Aug. 20th).

70. *Id.* at 428 (Madison), 422 (Journal) (Aug. 27th). The objection reflected the contemporary state of judicial systems while the accepted motion established the idea of perhaps the first unified court system.

71. *Id.* at 428-30 (Madison), 423 (Journal) (Aug. 27th). In addition, the question of jurisdiction over impeachment of national officers was raised but postponed. *Id.* at 430 (Madison), 423 (Journal) (Aug. 27th). Eventually, the trial of impeachments would be shifted to the Senate, with the Chief Justice presiding in cases of impeachment of the President. U.S. CONST. art. I, § 3.

enumeration of controversies to which the United States was a party.[72]

The next amendment considered by the Convention has created the most substantial debate about the scope of the federal courts' authority and is a premise to this article. As Madison reports the debate:

> Docr. Johnson moved to insert the words "this Constitution and the" before the word "laws."
>
> Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.
>
> The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.[73]

At this point in the Convention, the exceptions and regulations clause had been postulated by the Committee on Detail as applicable only to statutes and past treaties. The entire jurisdictional section would soon be brought up without discussion of the applicability of the clause.

After agreeing as to a conforming amendment on future treaties, Secretary Jackson's Journal of the Convention (Journal) and Madison's notes record events differently. Only the Journal records a reduplication of the jurisdiction of the federal courts to hear cases in which the United States was a party, but both the Journal and Madison's notes agree that the Convention again postponed the impeachments clause.[74] The Journal entries continue:

> It was moved and seconded to agree to the following amendment.
>
> "In all the other cases beforementioned original jurisdiction shall be in the Courts of the several States but with appeal both as to Law and fact to the courts of the United States, with such exceptions and under such regulations, as the Legislatures shall make."
>
> The last motion being withdrawn,
>
> It was moved and seconded to amend the clause to read:

72. 2 RECORDS, *supra* note 31, at 430 (Madison), 423 (Journal) (Aug. 27th).

73. *Id.* It is also important to note that in this brief exchange, the Convention sets the stage for the classic debates on the doctrines known under the rubric of standing, ripeness, mootness, political questions, and advisory opinions. *See generally* J. KILLIAN, *supra* note 45, at 633-69. This mere fragment of debate also fertilizes the contemporary question of the Court's power to independently enforce its own remedies. In this light, further study of the remedial aspect of the "constitutional causes of action" can be found in the constitutional history, although the Supreme Court has not consciously done so. *See* Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents, 403 U.S. 338 (1971).

74. 2 RECORDS, *supra* note 31, at 423 (Journal), 431 (Madison) (Aug. 27th).

> "In cases of impeachment, cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, this jurisdiction shall be original. In all the other cases before mentioned it shall be appellate both as to law and fact with such exceptions and under such regulations as the Legislature shall make"
>
> which passed in the affirmative
>
> It was moved and seconded to add the following clause to the last amendment.
>
> "But in cases in which the United States shall be a Party the jurisdiction shall be original or appellate as the Legislature may direct"
>
> (To strike out the words "original or" Ayes—6; noes—2)
>
> which passed in the negative.[75]

This attempt to amend the report to utilize definitively the state courts as trial courts was broader than the language being amended. It would have delegated even cases arising under the Constitution to state courts for trial, with an appeal to the federal court if Congress did not except those cases from the federal jurisdiction. The amendment that the Convention did adopt contained a narrower division of when the Supreme Court shall have original or appellate jurisdiction, and it provided for a delegation to Congress, which, in context, would be limited to establishing that division.

Professor Farrand has inserted a notation from the voting record that a motion to strike the words "or original" from the last motion was successful, but concedes that he so placed the motion "merely because it is the only place that it seems to fit in the proceedings."[76] The Journal then records that the last quoted motion was defeated.[77] That last motion would have made explicit the delegation of authority to decide when cases in which the United States was a party would be within the original or appellate jurisdiction.

Madison's notes record that at some point during this debate (in all likelihood during the consideration of the second motion, the only motion affecting the product thus far), the Convention was confronted with the "law-fact" and "common-civil" distinctions. Madison's notes provide the only illumination of the debate and genesis of the question:

> Mr. Govr. Morris wished to know what was meant by the words "In all cases before mentioned it (jurisdiction) shall be appellate with such exceptions &c," whether it extended to matters

75. *Id.* at 424-25 (Journal) (Aug. 27th).

76. *Id.* at 424 & n.3 (Farrand's organization). This organizational problem will recur in the *Records*, but is specifically mentioned here because there is no corroboration from Madison's notes in this case, contrasted with such corroboration in other cases of interest.

77. *Id.* at 424-25 (Journal) (Aug. 27th).

> of fact as well as law—and to cases of Common as well as Civil law.
>
> Mr. Wilson. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals [under the Articles of Confederation] had he said been so construed.
>
> Mr. Dickinson moved to add after the word "appellate" the words "both as to law & fact["] which was agreed to nem: con:[78]

It appears implicit from the discussion that neither Morris, Wilson, nor Dickinson saw a connection between the exceptions and regulations clause and the "cases arising under this Constitution" language that had previously been added. In the questions posed by Morris, the concerns were explicit; Wilson responded directly to them. The motion by Dickinson appears to be an attempt to make the choice vested in Congress over questions of law and fact explicit, yet assumes Wilson's answer that "law" includes both common and statutory law. Dickinson's amendment does not appear in Secretary Jackson's Journal; the defeated amendment that would have expressly authorized legislative determination of whether cases in which the United States was a party would be original or appellate does not appear in Madison's notes. The defeat of a motion, of course, does not carry the weight of the passage of a motion in determining intent. The discussion of power to except cases from the Court's jurisdiction focused on the distinctions between law (civil and common) and fact; it did not relate to the question on which both the Journal and Madison agree—that the Convention had included cases arising under the Constitution within the ambit of the Court's jurisdiction.

Madison's notes and Secretary Jackson's Journal are in agreement that the next motion was to delete "The jurisdiction of the Supreme Court" and insert in lieu thereof "The Judicial Power."[79] In yet another inconsistency, however, the Journal records the approval of a motion deleting the phrase "this jurisdiction shall be original" and inserting the familiar "the supreme Court shall have original jurisdiction," yet no trace of the motion appears in Madison's notes.[80]

In one of the more telling negative actions, the Convention defeated a motion that would have disposed entirely of the exceptions and regulations clause and replaced it with the affirmative: "In all the

78. *Id.* at 431 (Madison) (Aug. 27th).

79. *Compare id.* at 425 (Journal) *with id.* at 431 (Madison) (Aug. 27th). This illustrates the vexing problem of a lack of convention on such details as capitalization, much in the same vein as the lack of convention on punctuation, which has been illustrated continuously.

80. *Id.* at 425 (Journal) (Aug. 27th).

other cases before mentioned the Judicial power shall be exercised in such manner as the legislature shall direct."[81] Had the motion been accepted, the authority of Congress to regulate the method of the federal courts (both Supreme and inferior) would have been clear, and the question of excepting from jurisdiction would have been foreclosed. The defeat of the proposed amendment, however, ought not to be construed to foreclose exceptions from jurisdiction, even though it appears consistent with the previous discussions of the law (civil and common) and fact. An even more specific interpretation of this rejection flows from the next, unanimous action of the Convention—striking from the end of the section: "The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time."[82] The Convention's rejection of a specific delegation of power to divide jurisdiction between the Supreme and inferior courts, of course, cannot be cited as conclusive evidence that the Convention did not wish the Congress to have that power; the rejection may have been because the Convention felt it was mere surplusage. Nevertheless, the discussion until then had been focused on jurisdiction over statutory and common law, and this particular language was so all-inclusive that it undoubtedly would have specifically given Congress power to divide jurisdiction over cases arising under the Constitution. Thus, the rejection of such language and its effect, though not conclusive of the point, cannot be ignored. It is evidence that the Convention did not wish to extend congressional authority over the jurisdiction of the Supreme Court to cases arising under the Constitution.

The Convention continued to amend article III for the remainder of August 27th. The Journal records the conforming addition of a law and equity clause preceding the "arising under" language, but Madison fails to record the motion.[83] The Journal and Madison's notes agree that the last substantive motion of the day was the addition of cases of "citizens of the same state claiming lands under grants of different States."[84]

One final amendment was made to the jurisdiction section on August 28th. In order to "prevent uncertainty" as to whether the Supreme

81. *Id.* at 425 (Journal), 431 (Madison) (Aug. 27th). Madison appears to have copied this entry from the published Journal before publishing his notes.

82. *Id.* The language is from 2 RECORDS, *supra* note 31, at 186-87 (presumably Madison's copy of the report of the Committee on Detail) (Aug. 6th).

83. *Id.* at 425 (Journal) (Aug. 27th).

84. *Id.* at 425 (Journal), 431 (Madison) (Aug. 27th).

Court alone or the whole judicial power that might be created would have appellate jurisdiction, the subject pronoun and verb of the clause were struck and "The supreme Court shall have appellate jurisdiction" was substituted.[85] This change, in itself, can be construed as merely conforming the style of the sentence to that of the preceding sentence detailing the original jurisdiction of the Court. If Madison's attribution of purpose is to be taken seriously, however, the change was a specific delineation of the Court's jurisdiction.

The question of jurisdiction of the Supreme Court arose only one more time before the draft constitution, as amended, was committed to the Committee on Style, and that motion—to include land claims between the states and the United States under the treaty of peace with Great Britain—was defeated.[86] Professor Farrand's compilation of the amended report provides the following text:

> Sect. 3. The Judicial Power shall extend to all cases both in law and equity arising under this Constitution and the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting Ambassadors, other Public Ministers and Consuls; to all cases of Admiralty and Maritime Jurisdiction; to Controversies to which the United States shall be a party, to controversies between two or more States (except such as shall regard Territory and Jurisdiction) between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects. In 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 beforementioned the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Legislature shall make.[87]

The report of the Committee on Style, while not differing markedly in terms from its charge, made improvements on the enumeration of jurisdiction. As to the original jurisdiction clause, the stylization was nominal, and as to the appellate jurisdiction clause, the stylization may have been detrimental:

> In cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction,

85. *Id.* at 434 (Journal), 437 (Madison) (Aug. 28th).
86. *Id.* at 434 (Journal), 465 (Madison) (Aug. 30th).
87. *Id.* at 565, 576 (Farrand's Compilation).

> both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.[88]

The division of jurisdiction was complete with the exception of a return to the archaisms of capitalization and certain punctuation styles. It is important to reiterate that the problems of "plain meaning" are the product of the Committee on Style, not an intentional substantive set of amendments.[89]

One final attempt was made to include a provision for the right to a jury in civil cases, but the motion was defeated, according to Madison's notes, after it was suggested that the nature of a jury trial varied among the states.[90] In this form, the Constitution was approved and forwarded to the Continental Congress, and then to the states for ratification or rejection.

B. The State Ratifying Conventions

The ratifying conventions in the thirteen states provided a forum for the discussion of the Constitution and for the final decision as to whether the proposed document would become the frame of national government. Although in some respects the ratifying conventions provide the major explanations of the terms and meaning of the Constitution, this is not the case for the exceptions and regulations clause. Convention debate on the clause, to the extent that it exists, is of a very limited scope.

The explanation by Wilson, quite probably the author of the clause, to the Pennsylvania Convention warrants substantial quotation:

> In two cases the Supreme Court has original jurisdiction—that affecting ambassadors, and when a state shall be a party. It is true it has appellate jurisdiction in more, but it will have it under such restrictions as the Congress shall ordain. I believe that any gentleman, possessed of experience or knowledge on this subject, will agree that it was impossible to go further with any safety or propriety, and that it was best left in the manner in which it now stands.
>
> "*In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact.*" The jurisdiction as to fact may be thought improper; but those possessed of information on this head see that it is necessary. We find it essentially necessary from the ample experience we have had in the courts of admiralty with regard to captures. Those gentlemen who, during the late war, had their vessels retaken,

88. *Id.* at 601 (Committee on Style, Madison's copy).

89. *See* notes 27-28 and accompanying text *supra*.

90. 2 RECORDS, *supra* note 31, at 628 (Madison) (Sept. 15th).

> know well what a poor chance they should have had when those vessels were taken in their states and tried by juries, and in what a situation they would have been if the Court of Appeals [under the Articles of Confederation] had not been possessed of authority to reconsider and set aside the verdicts of those juries. Attempts were made by some of the states to destroy this power; but it has been confirmed in every instance.
>
> There are other cases in which it will be necessary; and will not Congress better regulate them, as they rise from time to time, then could have been done by the Convention? Besides, if the regulations shall be attended with inconvenience, the Congress can alter them as soon as discovered. But any thing done in Convention must remain unalterable but by the power of the citizens of the United States at large.
>
> I think these reasons will show that the powers given to the Supreme Court are not only safe, but constitute a wise and valuable part of the system.[91]

This is the extent of Wilson's remarks on the subject, and these remarks appear only in the context of the arduous debate over the need for protection of the right to a civil jury trial and appellate review of jury-found facts. General Charles Pinckney addressed the problem in similar terms before the South Carolina Ratifying Convention.[92] These two references comprise the entire recorded discussion of the exceptions and regulations clause before the state ratifying conventions of those states participating in the ratification of the Constitution (as contrasted with states affirming the Constitution after ratification was, by its terms, complete).[93]

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91. 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 493-94 (1836) (Pa., Wilson (C), Dec. 7, 1787) [hereinafter cited as DEBATES and accompanied by a parenthetical indicating the debate cited, the speaker, whether the speaker was a member of the Federal Convention of 1787 (indicated by (C)), and the date of the remarks]. Over the formation of the Republic, a number of individuals played multiple roles, and it is important to stress the continuity or fragmentation of their opinions.

92. 4 DEBATES, *supra* note 91, at 306-08 (S.C., C. Pinckney (C), Jan. 18, 1788).

93. There is at least a theoretical methodological concern for this strict classification of the various State Conventions. On June 21, 1788, New Hampshire became the ninth state to ratify the Constitution. 34 JOURNALS OF THE CONTINENTAL CONGRESS 281 (1937 (July 2, 1788)) [hereinafter cited as Js. CONT. CONG.]; 2 DOCUMENTARY HISTORY OF THE CONSTITUTION, 141-44 (1902) [hereinafter cited as DOC. HIST.]. By the terms of article VI of the Constitution, the ratification of New Hampshire was sufficient to make the Constitution operative as among the states that had ratified it: Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, and New Hampshire. Presumably a consistent, intrinsic, constitutive history ends here. The remainder of state convention debates would normally be treated as extrinsic aids to interpretation, similar to after-enactment commentary. However, a number of problems were evident even at that time. For one, New York was the seat of the Continental Congress, and the State of New York had not yet ratified the Constitution. Virginia was also seen as politically necessary to

The argument of need for a guarantee of a right to a jury trial in civil cases was raised numerous times during the other state conventions. Almost invariably, the response to this argument was that the variation of trial practice before the state courts—and within the state court systems of law, chancery, and admiralty—would not lend to the development of a uniform rule for the inferior federal courts and that therefore the Congress should be free to determine and redetermine the manner of civil trials.[94] Nonetheless, the proposal found its way into the pleadings of at least four states for amendments to the Constitution.[95]

The Virginia and North Carolina State Conventions are the most extensively reported, and these debates illuminate a variety of concerns about the federal judiciary. As already noted, the primary concern of the state debates in this area was the guarantee of a civil trial by jury and the appellate review of jury-found facts, but there are also references within those debates to perceived problems regarding the accessibility of a centralized court, the oppressive appeals of small or frivolous claims,[96] and, on one occasion, the detail of jurisdiction over a state as a party defendant.[97]

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the efficacy of the new government. Virginia convened its convention on June 2, 1788, and ratified the Constitution on June 25, 1788, 3 DEBATES, *supra* note 91, at 1, 653. Thus, Virginia's Convention straddles the date of actual ratification of the Constitution for the relevant states, but there is no indication on the record that the Virginians were aware of that fact. *But cf. id.* at 617-18 (Madison (C), June 24, 1788) (reference to failure if only eight states ratify). The North Carolina Convention commenced on July 21, 1788, and neither ratified nor rejected the Constitution prior to adjournment on Aug. 2, 1788. 4 DEBATES, *supra* note 91, at 34, 251. That convention was aware before it adjourned that the question before it was that of joining the union rather than that of ratifying the Constitution. *Id.* at 208 (N.C., Spaight (C), Aug. 2, 1788). Eventually, North Carolina joined the union after the government had been formed and had become operational. Thus, while methodologic problems are posed by including the Virginia and North Carolina debates as intrinsic aids to interpretation, the historical circumstances appear to outweigh the difficulties of methodologic inconsistency, and those debates are therefore included.

94. 2 DEBATES, *supra* note 91, at 488 (Pa., Wilson (C), Dec. 7, 1787); 3 DEBATES, *supra* note 91, at 518-20 (Va., Pendleton, June 19, 1788), 524 (Mason (C)), 534 (Madison (C)), 540-42 (Henry) (June 20, 1788); 4 DEBATES, *supra* note 91, at 141-42 (N.C., Johnston, July 28, 1788), 146 (Iredell), 157 (Davie) (July 29, 1788), 166 (Iredell), 306-08 (S.C., Pinckney (C, Jan. 18, 1788).

95. Massachusetts' 8th Resolution, 2 DOC. HIST., *supra* note 93, at 95; New Hampshire's 7th and 8th Resolutions, *id.* at 143; New York's 14th Resolution, *id.* at 193; Virginia's 11th Resolution and 14th Proposed Amendment, 3 DEBATES, *supra* note 91, at 653, 660-61.

96. Many of the more detailed arguments were during the North Carolina debates which led to a decision to neither ratify nor reject. *See, e.g.*, 4 DEBATES, *supra* note 91, at 143 (N.C., M'Dowall), 144 (Spaight (C)), 144-45 (Iredell), 147-48 (Iredell), 151 (Bloodworth), 154-55 (Spencer), 164 (Maclaine), 165-66 (Iredell), 170-71 (Iredell) (July 28, 1788).

97. In one of the more interesting colloquies, Patrick Henry claimed that a state was subject to being hailed before the Supreme Court as a defendant; John Marshall opposed

Patrick Henry, though not a member of the Federal Convention, argued in a flourish of oratory to the Virginia Convention that: (1) Civil trial by jury was abolished by neglect in drafting the Constitution; (2) Congress could not alter the jurisdiction of the Supreme Court under the pretense of authority of the exceptions and regulations clause (arguing partially in the vein of the concept of constitutional jurisdiction);[98] (3) such a law, being contrary to the Constitution, would be a nullity and that judges would so declare in conformity with the concept of judicial review;[99] and (4) under the enumeration of original jurisdiction, a state could be hailed before the Court as a defendant.[100] Marshall, also not a member of the Federal Convention, rose later to rejoin Henry on the issue of interpretation of the exceptions and regulations clause and argued that the clause answered his first point:

> What is the meaning of the term *exception*? 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. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people. Who can understand this word, *exception*, to extend to one case as well as the other?[101]

Marshall's response to Henry is clearly founded on the expressed attitude of Henry that the clause had no effect, but Marshall's interpretation does not sweep far in the opposite direction. Marshall's particular concern is to rebut Henry's statement on jury trials and appeals as to fact. Marshall engaged in Henry's technique of hyperbole in reinforcing the concept of judicial review and in stating that Congress had plenary authority over the Court's jurisdiction. This becomes clearer when Marshall continues by drawing analogy to the Virginia practice in civil jury trials and appeals of facts.[102] Others entered limited remarks on the use of the exceptions and regulations clause for the security of civil jury trials and jury-determined facts where Congress deemed appropriate, further supporting the limited nature of Mar-

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this notion, saying that a state could only be a party plaintiff before the Supreme Court. 3 DEBATES, *supra* note 91, at 545 (Va., Henry), 555 (Va., Marshall) (June 20, 1788). *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); U.S. CONST. amend. XI (1796). This would appear to be a case of Henry winning the battle and Marshall winning the war by changing the rules.

98. *Compare* 3 DEBATES, *supra* note 91, at 540-41 (Va., Henry June 20, 1788) *with* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 28, *and* notes 21-32 and accompanying text *supra*.

99. *See* notes 40-45 and accompanying text *supra*.

100. 3 DEBATES, *supra* note 91, at 540-42, 546 (Va., Henry, June 20, 1788).

101. *Id.* at 560 (Va., Marshall, June 20, 1788).

102. *Id.* at 561.

shall's comment.[103] Whatever the state of Marshall's and Henry's knowledge of the proceedings of the Federal Convention, the positions staked out at the Virginia Convention appear more rhetorical than substantive.

The North Carolina Convention considered the question of the exceptions and regulations clause in the context of the administrative concerns for a centralized court and the attendant problems of small or frivolous claims, exacerbated by the concern for the right to a jury trial in civil cases and the finality of jury-found facts.[104] Although these debates were probably the best recorded of the state conventions, no light is shed on the jurisdictional question.

The New York Convention convened and adjourned without mentioning or interpreting the exceptions and regulations clause; however, the *Federalist Papers*, addressed to those delegates through a public, yet anonymous, medium, approached the subject several times.[105] Although Hamilton had left the federal Convention before the judicial article was discussed, his discussion of jurisdiction in essay No. 80 sounds in the Constitution alone as the source of authority and is followed by a cursory review of the clause:

> From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconvenience should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that 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. The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a general principle, which is calculated to avoid general mischiefs and to obtain general advantages.[106]

This broad approach is limited in essay No. 81 by a discussion of the particular flaw that Hamilton perceived Congress might remedy: the division of jurisdiction among the Supreme and inferior courts, should the latter be established, and the question of the "abolition" of trial by

103. *Id.* at 546-50 (Va., Pendleton, June 20, 1788), 572-73 (Randolph (C) June 21, 1788).

104. *See* note 96 *supra*.

105. The New York Convention convened on June 17, 1788, and adjourned *sine die* on July 26, 1788. 2 DEBATES, *supra* note 91, at 205-414. The *Federalist*, *supra* note 36, appeared in New York newspapers between October 17, 1787 and April 4, 1788, over the famous pseudonym. Essays No. 78-85, the essays relevant here, did not appear until a publication of a second volume of collected essays on May 28, 1788.

106. THE FEDERALIST, *supra* note 36, No. 80, at 505-06 (A. Hamilton).

jury in civil cases.[107] Language is often politically turned in the *Federalist* rather than legally refined, and here the broad language is limited by its contextual discussion, and particularly by the conclusion that Hamilton reaches:

> The amount of the observations hitherto made . . . 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 reserved 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, both 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.[108]

Hamilton's view would appear to be narrowly confined to the authority to hear and determine, and particularly redetermine, facts found by a jury, as well as the authority in certain cases to hear and determine facts initially in the Supreme Court as a trial court. There is no indication that Hamilton, in a series of essays designed to indicate how narrow the respective powers of the proposed government should be in order to better secure acceptance, needed to brush a broad picture of legislative power over the judicial power, especially since the legislative was considered the more controversial of the two powers to be granted. Additionally, the responsiveness of the essays to specific complaints about the proposed Constitution reinforces the notion that the exceptions and regulations clause was understood as a particularly narrow authority. As in the ratifying debates, discussion of the exceptions and regulations clause was tuned to narrow, yet major, concerns, several of which were reconsidered and altered soon after the consummation of the Constitution.

C. Reconsiderations: The Seventh and Eleventh Amendments

Concern over the right to jury trials in civil cases and the finality of jury-found facts surfaced repeatedly during the state ratifying conventions and during the ratifiers' pleas to the Continental Congress and the First Congress for alteration of the Constitution. It is thus not surprising that the First Congress took up the question of a right to jury

107. *Id.* No. 81, at 512 (A. Hamilton).
108. *Id.* at 513-14.

trial in civil cases almost immediately, delaying consideration of the overall organization of the judiciary.[109]

The ascension of the right to a jury trial in civil cases from statutory to constitutional[110] status made three important changes. First, obviously, a major objection to the Constitution was laid to rest. Second, Congress relinquished a substantial amount of control over the federal courts, a concession that, over time, has all but disappeared with the displacement of common with statutory law. Third, control of jury trials, at least at common law, and the review of jury findings were vested in the courts as interpreted at that time and were thereafter frozen. Congress retained authority over statutory, admiralty, and equitable proceedings, while common law questions were relegated to common law. The Court has defined the right to a jury trial as "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law."[111]

The effect of the Seventh Amendment on the scope of the exceptions and regulations clause was finite. The concern for the right to a jury trial in civil cases and the finality accorded jury-found facts in the Federal Convention and the state ratifying conventions suggests that the exceptions and regulations clause applied directly to the law and fact clause. It has been suggested that the right to a jury trial was the primary, if not conclusive, purpose for the exceptions and regulations clause, and further that the Seventh Amendment obviated the exceptions and regulations clause completely.[112] Congressional concern for the mode of amendment of the Constitution may have resulted in the

109. 1 ANNALS OF CONG. 443 (Madison, (C), Va.) (introducing resolutions for amendment to Constitution, June 8, 1789). *See* note 96 *supra*. Adoption of the final version of the 7th Amendment by Congress made consideration of several provisions of the bill under consideration to reorganize the judiciary unnecessary.

110. U.S. CONST. amend. VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

111. Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1856). The right to a jury trial exists in civil cases as it existed "under the English common law when the Amendment was adopted." Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830). Two recent cases illustrate the breadth of the right—a landlord/tenant case and a discrimination in rental housing case brought under federal law: Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974). Congressional power to vest the fact-finding function under statute in an administrative body does not violate the 7th Amendment. Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977).

112. *E.g.*, Merry, *supra* note 20.

language of the law and fact clause not being altered and the Seventh Amendment being appended,[113] but this does not stand as a barrier to the interpretation; the substance must be considered separately from the means used to alter the effect of the Constitution, even if the means makes the interpretation more difficult. To suggest that Congress intended to repeal the exceptions and regulations clause interpretation of the law and fact clause ignores the variety of other concerns evident in the debates of the Federal Convention and the state ratifying conventions, as well as contemporaneous congressional action to regulate the processes and remedies of the judiciary. The Seventh Amendment no doubt altered congressional power under the exceptions and regulations clause insofar as jury trials and appellate review of facts in common law cases were concerned, but an interpretation of the amendment that emasculates the clause entirely is not tenable.

The Seventh Amendment did not reach jurisdiction as closely as did the Eleventh Amendment.[114] The exchange between Henry and Marshall during the Virginia Convention was shortly replayed by the Court in *Chisholm v. Georgia*,[115] and within a decade by Congress and the states.[116] The Eleventh Amendment may be viewed as a complex defensive pleading because of the restriction it places on the manner in which the Court may construe and effectuate its power. Such a construction of the Amendment is in stark contrast to the possible alternative available to Congress, namely, the elimination of the constitutional jurisdiction of the Court to hear and determine cases in which a state is a party defendant. Still more important was the congressional approval of the amendment as a determination that it could not except such cases from the jurisdiction of the Court by simple legislative means. Had Congress been satisfied that a repeal of a legislative grant or an affirmative jurisdictional exception of cases in which a state was a party defendant would have been sufficient to overrule *Chisholm*, the more onerous process of constitutional amendment would not have

113. A preliminary decision was made by Congress that the Constitution should be amended by supplementation rather than deletion or modification of existing language. 1 ANNALS OF CONG. 743 (Aug. 13, 1789). This decision has remained in effect throughout the history of the Republic and has contributed to numerous constitutional debates besides the current focus of this article.

114. U.S. CONST. amend XI: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The 11th Amendment was ratified in 1795, but for reasons unknown, ratification was not announced until 1798. *See* note 45 *supra*.

115. 2 U.S. (2 Dall.) 419 (1793).

116. 4 ANNALS OF CONG. 30-31 (Jan. 14, 1794), 476-78 (Mar. 4, 1794) (proposed).

been necessary. Congressional desire to put the question, once and presumably for all time, beyond its own unratified power, much in the vein of the Seventh Amendment, nominally militates against this interpretation.[117]

The problem of interpretation has not been answered by the Court or by Congress, although each for its part has recognized that the interpretive aspect is important. The interpretation of when a state is a real party in interest has led to numerous decisions by the Court, but once it has been ascertained that a state is the real party in interest, each case has been dismissed for want of jurisdiction.[118] The Court has also held that the Eleventh Amendment is limited by other amendments.[119] Congress' use of the rigorous course of constitutional amendment, rather than statutory exception, suggests that Congress did not believe it had the power to make such an exception to the Court's jurisdiction by statutory means. This inference is suggested by congressional actions on several other occasions as well.[120]

D. Lessons from the Constitutional History

The draft Constitution and its development provide one of the classic problems of interpretation—the record as it is known today is incomplete, inconsistent, and ambiguous. What seems clear from both the language and the development of the Constitution is Congress' broad authority over the inferior federal courts' jurisdiction. Less clear, but still stated with conviction, is the authority of Congress to decide what the scope of jurisdiction of inferior federal courts and the Supreme Court will be with regard to particular statutory provisions, and though not discussed in the development of the Constitution, this would also apply to treaties, given the structure of treaties within the law and their method of amendment by statute. Also supportable in the history of the Convention is the notion that Congress may divide

117. The problem of ascribing legislative intent to congressional silence is perhaps insoluble. The most telling example of this problem lies in the propounding of the 14th Amendment. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY (1969).

118. The Court will "look behind and through the nominal parties on the record, to ascertain who were the real parties to the suit." *In re* Ayers, 123 U.S. 443, 490 (1887). *See generally* J. KILLIAN, *supra* note 45, at 1277, 1279 (collected cases).

119. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment"). The limitation of one clause by another must be intentional, however. *See* Craig v. Boren, 429 U.S. 190 (1976) (equal protection under 14th Amendment limits authority of states to control alcoholic beverages under the 21st Amendment).

120. *See* note 45 *supra*.

the jurisdiction of the Supreme Court in terms of whether it will be original in cases where it would otherwise be appellate, but that suggestion has not been accepted. The lack of discussion in the Convention of 1787 on whether or not Congress should have the power to except cases arising under the Constitution from the Supreme Court's appellate jurisdiction, particularly in light of the Convention having established the jurisdiction over such cases and having entertained multiple considerations of statutory or common law and fact, suggests, albeit inconclusively, that the exceptions and regulations clause was not intended to reach so far.

The state ratifying conventions reinforce the notion that detailed problems of the right to a jury trial and appellate review of jury facts, as well as a variety of administrative concerns about a centralized court and procedure, animated the discussions of the exceptions and regulations clause. When jurisdiction was formally considered in the ratifying conventions, it was viewed as flowing directly from the Constitution. The only limitations that the ratifiers perceived to be within the ambit of Congress dealt with statutory and common law or fact distinctions. It does not appear that jurisdiction over cases arising under the Constitution was ever questioned in ratifying or acceptance debates, nor does the concept of judicial review appear to be other than embraced.

Finally, the first relevant modifications to the Constitution dealt with preserving the right to jury trials in civil cases—the primary concern over the judicial article during ratification—and with limiting jurisdiction over cases to which a state was a party, a particular construction of the judicial power. The Seventh Amendment limited congressional power to determine the right to jury trials in common law cases by removing that power to the judiciary in accord with the common law. This alteration impedes only one interpretation of the exceptions and regulations clause, and then only at common law. It does not dispose of all exceptions and regulations clause questions. The Eleventh Amendment restricted the construction of the judicial power to exclude cases in which a state was defendant to an out-of-state private party. This alteration was of very limited effect despite the wealth of case law it has spawned. The key to interpreting the exceptions and regulations clause, however, is posed in the implicit question of why Congress would proceed along the more difficult route of amendment if a statutory exception would have sufficed.

In sum, the constitutional history does not support a purpose or intent on the part of the Framers or ratifiers that the exceptions and

regulations clause reaches questions of jurisdiction to hear cases arising under the Constitution. The first Congresses, in amending the Constitution, also do not evidence such an intent. To the contrary, the constitutional history shows a more limited scope of congressional authority under the exceptions and regulations clause.

III. Congress, the Court, and Implementation of the Constitution

The history of the Constitution can be divided for purposes of this article into three substantial divisions: the Formative Era, running roughly from 1789 through the publication of the *Journal*, *Debates*, and Madison's notes to about 1850;[121] the Great Insurrection and its aftermath, running from about 1850 through about 1880; and the era of developing substantive regulation of the federal courts, from appoximately 1880 to the present. The development during those periods of statutory jurisdiction and decisional statements, both *ex cathedra* and dicta, present a wide range of policy and constitutional views.

A. The Formative Era

Congressional consideration of proposed amendments to the Constitution and legislation to organize the judiciary overlapped in both time and substance. The right to a civil trial by jury and the mandate against appellate review of facts are additions to the Constitution that must be understood within the framework of contemporaneous congressional actions to organize and regulate the judiciary. During the

121. It should be remembered that the proceedings of the Convention were, with few minor exceptions, held in unviolated secrecy. The Journal was committed to the President for such disposition as the Continental Congress might deem appropriate. George Washington transferred the Journal to the Department of State in 1796, and it was published in 1819 for the first time. Yates' notes were published in a politically edited form in 1808 as an attack on Madison and were formally published shortly after the appearance of the Journal. Madison's voluminous and detailed, although often postured, notes were not published until 1840, after his death. Many other writings, including the drafts of the Committee on Detail, were not assembled until Farrand published the first edition of the *Records* in 1911, or until publication of the second edition in 1937. Farrand, *Introduction* to 1 RECORDS, *supra* note 31, at xi-xxv. These documents were preceded by both Luther Martin's Letter, 1 DEBATES, *supra* note 91, at 344, and THE FEDERALIST, *supra* note 36. Elliot's *Debates* of the ratifying conventions were compiled and first published in 1830, with a second edition issued in 1836. The point of such publication and disclosure history—aside from its use in documenting the personal histories of the Framers, ratifiers, members of congress, and justices during the formative period—was that only political debate and personal recollections were available to each writer in considering the purpose and intent of the Convention. Thus, understanding the role that each individual played in the formative era is of great value in evaluating what that individual has said in interpreting the Constitution during that period.

First Congress, the Senate appointed a committee to draft a bill to organize the judiciary. The bill was reported on June 12, 1789, and debate commenced on June 22nd.[122] After debate and alteration, the bill passed the Senate and was referred to the House on July 17th.[123]

Madison had proposed resolutions in the House to amend the Constitution in June, and debate was commenced on August 14th.[124] Several amendment proposals overlapped provisions of the Senate-passed judiciary bill; consideration of the latter was therefore postponed.[125] The House agreed to amendment resolutions on August 22nd and referred them to the Senate.[126] House consideration of the judiciary bill was again postponed while the Senate altered the amendment resolutions.[127] Only after the Senate passed the resolutions did the House take up the judiciary bill.[128] The Judiciary Act of 1789 was signed on September 24th, one week after the Bill of Rights was referred to the states.[129]

Details of several sections of the Judiciary Act of 1789 would have provided a useful record of legislative purpose and intent, but such records, common to the processes under which Congress today operates, were embryonic at best in 1789.[130] Warren's review of the Judiciary Act of 1789 appears to be the only attempted reconstruction of the process, and his conclusions generally reach only the subject of the

122. 1 ANNALS OF CONG. 18 (Committee appointed, Apr. 7, 1789), 47 (bill reported, Lee, (C), June 12, 1789). (There are two different editions of *Annals of Congress*. The edition used here bears the running head "History of Congress." The other edition bears the running head "Debates in Congress." Page citations to "History" do not correspond with material in "Debates.") The Committee originally included four members of the Federal Convention and their respective state ratifying conventions: Ellsworth of Connecticut, Paterson of New Jersey, Bassett of Delaware, and Few of Georgia.

123. *Id.* at 48 (debate commenced, June 22, 1789), 50 (recommitted, July 13, 1789), 51 (passed, July 17, 1789).

124. *Id.* at 439-40 (Va., Madison (C), June 8, 1789), 745 (debate begun, Aug. 14, 1789).

125. *Id.* at 685-90 (July 20-21, 1789); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 111 (1923).

126. 1 ANNALS OF CONG. 808 (Aug. 24, 1789). *See generally* Warren, *supra* note 125.

127. 1 ANNALS OF CONG. 812-14 (Aug. 24, 1789). *See generally* Warren, *supra* note 125.

128. 1 ANNALS OF CONG. 826 (Aug. 29, 1789). *See generally* Warren, *supra* note 125.

129. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

130. For example, there was substantial debate during the early years of the Republic as to whether the federal courts' jurisdiction extended to common law crimes. This was settled in the negative in United States v. Hudson, 7 U.S. (11 Cranch) 32 (1807). Nevertheless, there was argument to the contrary even after the decision. *See* F. SERGEANT, A DISSERTATION OF THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES (1824). Warren suggested that the Court may have been unaware of contrary legislative intent to the effect that the courts were expected to exercise such jurisdiction. Warren, *supra* note 125, at 51.

newly established inferior courts' jurisdiction.[131] The alteration of jurisdiction during this process has only been noted in the form of documentary changes (similar to the documentation of the Committee on Detail), but none of the changes with respect to the Court's appellate jurisdiction appear to be significant.[132]

Section 25 of the Act provides for statutory appellate jurisdiction of the Court over judgments of state courts of last resort:

> [W]here is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, . . . or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.[133]

It does not appear on the face of the statute that all constitutional questions are included, but the Act provides for inclusion of all cases in which the supremacy of federal law has been denied in the state court of last resort or when a right claimed under a federal authority has been denied, thereby including all cases in which federal constitutionality might be raised and not effected.[134] Where a federal or state stat-

131. "The broad pro-Constitution men took the position that Congress had no power to withhold from the Federal Courts which it should establish any of the judicial power granted by the Constitution. On this point, they were forced to yield; for the Congress withheld from the Federal Courts much of the jurisdiction which it might have bestowed under the Constitution. On the other hand, the narrow pro-Constitution men were anxious to give to the Federal Courts as little jurisdiction as possible and to leave to the State Courts, in the first instance, jurisdiction over most of the Federal questions, subject to Federal revision through the appellate power of the United States Supreme Court. On this point, this faction also was forced to yield. The result was a compromise." Warren, *supra* note 125, at 67-68.

132. *See generally id.*

133. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85. The provision goes on to detail the process of review by the Supreme Court, including a requirement, in the form of a limitation, that the error assigned appear in the record below.

134. Congress appears to have been concerned with the denial of the validity of a congressional enactment, the validity of a state enactment against a claim of supremacy or constitutionality, and the denial of a personal claim or right granted under the Constitution, laws, or treaties of the United States. This suggests that Congress has seen fit to exclude from the Court's jurisdiction, cases where supremacy and uniformity are not abridged. The continuing concern of Congress—often manifested in the defeat of proposals to alter this ostensibly self-executing constitutional balance—appears to lie in Congress' belief that it

ute was attacked as repugnant to the Constitution and a state court of last resort held the statute unconstitutional, the Court would not have jurisdiction under the first or second clause to hear a claim that a federal or state statute had been improperly declared invalid. This incompleteness was not corrected until 1914,[135] but these same questions might have been brought before the Court under the third clause on the theory that the validation of a statute under the Constitution is a *claimable* denial of an equivalent constitutional right to be free of the statute. If a state were to set up a defense to such an attack on the basis of a constitutional right under the third provision (the decision being against that right), review in the Supreme Court is quite possible, but this view apparently has never been tested.[136] No parallel problem existed in cases in which the United States was the defendant because the state courts could not compel the superior authority of the United States to appear. Thus, insofar as review of judgments of state courts of last resort are concerned, the statute appears to provide review for the full panoply of constitutional questions. This suggests that all cases arising under the Constitution *could* have been brought to the Supreme Court *if properly pleaded or defended*.

The provisions for inferior federal court jurisdiction were more complex and posed substantial statutory exceptions, which consequently were also exceptions to the Supreme Court's appellate jurisdiction. The lack of Supreme Court jurisdiction to review circuit court decisions on statutory questions in criminal cases prior to 1891 is the most obvious example;[137] however, the writ of *habeas corpus* would lie to review all jurisdictional questions, including all questions of the con-

was fully implementing the provisions of article III. This suggestion comports with such concepts as the independent state grounds for state court decisions, which the Court will not review.

135. The alteration of the section was a direct result of Ives v. South Buffalo Ry. Co., 201 N.Y. 271 (1911), which was perceived to be nonappealable. "Federal right had been vindicated, not denied. Under the existing appellate jurisdiction there was no way of reviewing the *Ives* result by the Supreme Court. When, shortly after, the Supreme Court of Washington upheld the constitutionality of a similar statute, the demand for review by the Supreme Court was intensified by a wide-spread feeling that, in practice, constitutionality turned on geography." F. FRANKFURTER & J. LANDIS, *supra* note 56, at 195. The result was Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

136. *Ives*, 201 N.Y. 271 (1911), posed a particularly good opportunity to make this form of argument. The State of New York not only has an interest in the constitutionality of its laws, but has a constitutional claim, which is not that the law violates the due process clause, but rather that the invalidation violates the right of the state to enact laws under its police power. Of course, this is mere speculation, for if the argument had been asserted, the results are unreported.

137. *See* note 38 *supra*.

stitutionality of the court's process.[138]

More notable was a possible gap in admiralty jurisdiction, which appears to extend not only to statutory questions, but, because of the way the statute operated, to constitutional questions that might also arise. Jurisdiction in admiralty cases included an escalating jurisdictional amount, together with a choice of appeal or writ of error in certain cases from the district to the circuit courts, with the possibility of a loss of jurisdiction if counsel were to commit an error in judgment.[139] The fundamental difference between the writ of error and appeal illustrates the potential for a tactical error that could preclude taking an

138. The writ of *habeas corpus* is provided for by implication from the restriction on its suspension in article 1, § 9, clause 2 of the Constitution. Applying the English practice, § 14 of the Judiciary Act of 1789 provides that the writ may issue to contest the authority of confinement on a writ or other process, or the jurisdiction of the court to try a criminal offense, but not to review the judgment of conviction by a proper court. This reading is confirmed by *Ex parte* Bollman, 4 U.S. (8 Cranch) 75 (1807). An oft-cited dictum appears in Chief Justice Marshall's (Va., 1st Cong.) opinion: "As preliminary to any . . . [decision] of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States." *Id.* at 93. This dictum can be read as embracing the principle of constitutional jurisdiction, strictly statutory jurisdiction or neither of these. As the Court in *Ex parte Bollman* found that it had statutory jurisdiction, there was no need for it to determine whether jurisdiction existed otherwise. *See also* United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818) (via certified questions). In United States v. More, 7 U.S. (3 Cranch) 159 (1805), a conviction under indictment at common law was brought up by writ of error from the Circuit Court for the District of Columbia and was dismissed. On its face, the dismissal may have been the result of (1) the Court exercising its discretion due to the unsettled nature of the common law crimes, (2) the civil nature of the writ of error, making its pleading in a criminal case improper, or (3) the position of the circuit court as a possible article I court under the territory clause of § 8, clause 17. *See also* Palmore v. United States, 411 U.S. 389 (1973); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). *See generally* F. FRANKFURTER & J. LANDIS, *supra* note 56, at 109-20; Ratner, *supra* note 20, at 195-201.

139. Section 9 of the Judiciary Act of 1789 grants the district courts, exclusive of the state courts, admiralty and maritime jurisdiction over waters accessible from the ocean by ships of 10 tons loaded. Section 21 of the Act provides that an appeal will lie from final judgments of the district courts in admiralty and maritime cases where the amount in controversy exceeds $300. It is not clear whether a writ of error would lie in cases exceeding $50, but not exceeding $300, under the general civil actions provisions of § 22. Section 22 also provides the Supreme Court with jurisdiction to review by writ of error cases in which the circuit court had issued a writ of error and the amount controverted exceeded $2000. There does not appear to be a specific jurisdictional provision for the Supreme Court to hear admiralty cases other than by way of general civil cases. Thus, if the navigability jurisdictional requirement is met, (1) district court decisions in which the amount controverted does not exceed $50 are final, (2) decisions in which the amount controverted exceeds $50 but not $300 might have been reviewable by the circuit court by way of writ of error, and (3) decisions in which the controverted amount exceeds $300 may be taken to the circuit court by writ of error or appeal. If the appeal route is chosen, there is apparently no further review possible in the Supreme Court. There appears to be no distinction whether the question raised is one of treaty, of statute, or of constitutional magnitude.

admiralty case to the Supreme Court. That difference is described by Chief Justice Ellsworth in *Wiscart v. D'Auchey*:[140]

> An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact as well as the law, to a review and retrial: but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law. Does the Statute observe this obvious distinction? I think it does.[141]

The jurisdictional amount is a product of the recurrent problem of appellate review of facts. Even here, there is no express exception from the Court's appellate jurisdiction of cases arising under the Constitution, but only of cases in which particular sums have not been alleged or proven, or in which the tactical decisions of counsel have been erroneous.[142]

Wiscart, a diversity rather than an admiralty case, was the first of many cases in which the Court has discussed its appellate jurisdiction. *Wiscart* involved an equity suit to enforce a judgment against petitioner to compel transfer of title. After the equity decree, Wiscart appears to have transferred the real estate and other effects that could have been used to satisfy the judgment. D'Auchey acquired a judgment in the circuit court, and Wiscart petitioned the Supreme Court by writ of error, appending the decree and a statement of fact from the court below. The issue for decision was whether such a statement of fact was conclusive as to its contents, and, although its relevancy is unclear, whether such a statement is conclusive when the evidence is attached. Answering both points in the affirmative and providing for Judge Wilson's dissent on the latter point, Chief Justice Ellsworth stated:

> The constitution, distributing the judicial power of the *United States*, vests in the Supreme Court, an original as well as an appellate jurisdiction. The original jurisdiction, however, is confined to cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. In all other cases, only an appellate jurisdiction is given to the court; and even the appellate jurisdiction is, likewise, qualified; inasmuch as it is given "with such exceptions . . . as the Congress shall make." 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 an appellate jurisdiction; and if the rule is provided, we cannot depart from it.

140. 3 U.S. (3 Dall.) 321, 327 (1796).

141. *Id.* at 327.

142. For example, failure to plead the jurisdictional amount in the inferior court was fatal to review by writ of *habeas corpus*. Barry v. Mercein, 46 U.S. (5 How.) 103 (1847). *Barry* is also noted for its dicta on jurisdiction of the Supreme Court.

> The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?[143]

Chief Justice Ellsworth went on to distinguish the civil law appeal from the common law writ of error, as well as admiralty from civil actions. He then returned to the regulation of appellate jurisdiction:

> It is observed, that a writ of error is a process more limited in its effects than an appeal: but whatever may be the operation, if an appellate jurisdiction can only be exercised by this court conformably to such regulations as are made by the Congress, and if Congress has prescribed a writ of error, and no other mode, by which it can be exercised, still, I say, we are bound to pursue that mode, and can neither make, nor adopt another. The law may, indeed, be improper and inconvenient; but it is of more importance, for a judicial determination, to ascertain what the law is, than to speculate upon what it ought to be.[144]

Chief Justice Ellsworth's experience with the Federal Convention of 1787, the Connecticut Ratifying Convention, and the First Congress, in which he apparently authored the Judiciary Act of 1789, led him to conclude that the exceptions and regulations clause clearly extends congressional control to the question of appellate review of facts, and perhaps generally to the regulation of the Court's procedure. In *Wiscart*, however, the question was not one of jurisdiction to hear and determine the case, or to hear and determine a constitutional claim; rather, the issue was the extent to which the record may be brought up to redetermine factual background. Insofar as *Wiscart* involved a question of congressional regulation of the Court's process, the Chief Justice's remarks might appear to be *ex cathedra*; however, as *Wiscart* did not involve the question of the Court's jurisdiction, the Chief Justice was issuing mere dicta about jurisdiction.

Another important Supreme Court case of the era concerning the original jurisdiction of the inferior federal courts contains useful statements about Supreme Court jurisdiction. *Durousseau v. United States*[145] arose on a question of the scope of the jurisdiction of the District Court for New Orleans. That court had been given the same jurisdiction as the District Court for Kentucky under Section 10 of the Judiciary Act of 1789, which also provided that the District Court for Kentucky had circuit court jurisdiction. The questions before the Court were whether the district court had jurisdiction and, if so, what methods of review were available for decisions of that court. Marshall

143. 3 U.S. (3 Dall.) at 327 (Ellsworth, C.J. (C, Conn., 1st Cong.)).
144. *Id.* at 328.
145. 10 U.S. (6 Cranch) 307 (1810).

accepted the notion of the constitutional jurisdiction of the Supreme Court, but then suggested that the affirmative statutory recitation of the Court's jurisdiction worked a negative implication of exception of all other jurisdiction, even though other jurisdiction was enumerated by the Constitution.[146] Later in the opinion, however, Chief Justice Marshall indicated that this would be an argument of convenience, and reached the opposite conclusion in attempting to determine the law controlling the jurisdiction of the lower federal courts, and in particular the jurisdiction of the court below:

> It would be difficult to conceive an intention in the legislature to discriminate between judgments rendered by the district court of Kentucky, while exercising the powers of a district court, and those rendered by the same court while exercising circuit powers, when it is demonstrated that the legislature makes no distinction

146. "It is contended that the words of the constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by congress; and that if the court had been created without an express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever.

"The force of this argument is perceived and admitted. Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court as ordained by the constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. 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.

"Thus, a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of 2,000 dollars. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value, and implies negative words.

"This restriction, however, being implied by the court, and that implication being founded on the manifest intent of the legislature, can be made only where that manifest intent appears. It ought not to be made for the purpose of defeating the intent of the legislature." 10 U.S. (6 Cranch) at 313-15 (Marshall, C.J. (Va., 1st Cong.)).

> in the cases from their nature and character. Causes of which the district courts have exclusive original jurisdiction are carried into the circuit courts, and then become the objects of the appellate jurisdiction of this court. It would be strange if, in a case where the powers of the two courts are united in one court, from whose judgment an appeal lies, causes, of which the district courts have exclusive original jurisdiction, should be excepted from the operation of the appellate power. It would require plain words to establish this construction.[147]

Chief Justice Marshall went on to pose the question in an argumentative, if not rhetorical, form, but in doing so he undercut the value of his original statement and introduced the foundation of one of the more prominent contemporary theories on the power of Congress under the exceptions and regulations clause:

> [C]an it be conceived to have been the intention of the legislature to except, from the appellate jurisdiction of the supreme court, all the causes decided in the western country, except those decided in Kentucky? Can such an intention be thought possible? Ought it to be inferred from ambiguous phrases?
>
> The constitution here becomes all important. The constitution and the laws are to be construed together. It is to be recollected that the appellate powers of the supreme court are defined in the constitution, subject to such exceptions as congress may make. Congress has not expressly made any exceptions; but they are implied from the intent manifested by the affirmative description of its powers. It would be repugnant to every principle of sound construction, to imply an exception against the intent.
>
> This question does not rest on the same principles as if there had been an express exception to the jurisdiction of this court, and its power, in this case, was to be implied from the intent of the legislature. The exception is to be implied from the intent, and there is, consequently, a much more liberal operation to be given to the words, by which the courts of the western country have been created.
>
> It is believed to be the true intent of the legislature to place those courts precisely on the footing of the court of Kentucky, in every respect, and to subject their judgments, in the same manner, to the revision of the supreme court. Otherwise the court of Orleans would, in fact, be a supreme court. It would possess greater and less restricted powers than the court of Kentucky, which is, in terms, an inferior court.[148]

In order to understand Chief Justice Marshall's reasoning fully, it must be remembered that he was a member of the House of Representatives that passed the Judiciary Act of 1789, and therefore approached the

147. *Id.* at 315-16.
148. *Id.* at 317-18.

Act with noticeable prejudice. Since the Court ultimately accepted jurisdiction in the case, however, Chief Justice Marshall's remarks on exceptions from the Court's jurisdiction are somewhat beside the point.

Implication of an affirmative power has been accepted on a number of occasions to justify the exercise of that power, but implication of a negative power or restriction has neither been so widely accepted nor based on so little precedent.[149] Chief Justice Marshall cited neither congressional nor judicial precedent in *Durousseau*. In a conflict between express constitutional language and its negative implication, the latter may not be relied upon for the destruction of the former. Thus, Chief Justice Marshall's conclusion that an implied exception to jurisdiction is to be found from the affirmative statutory enumeration of jurisdiction does not necessarily follow from the affirmative jurisdiction that he accepts under the Constitution and from the specification of statutory jurisdiction. In any event, the question of exception from the Court's jurisdiction was no more before Chief Justice Marshall in *Durousseau* than it was before Chief Justice Ellsworth in *Wiscart*. The question in *Durousseau* rested on jurisdiction of an inferior (and perhaps territorial) court and the consequences flowing from the determi-

149. The most obvious example of implication of affirmative power lies in the necessary and proper clause. U.S. CONST. art. I, § 8, ¶ 18. The elasticity of the clause is illustrated in Chief Justice Marshall's classic formula: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). The Constitution also provides substantial bases for inherent powers in each of the branches of the government, for example, the power of Congress to investigate, Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503-07 (1975); executive privilege, United States v. Nixon, 418 U.S 683, 703-13 (1974); and the inherent power of the courts to admit and disbar attorneys, *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378-79 (1867). Negative power, or prohibition, is conversely more narrowly construed. For example, the power of national supremacy has received substantial elucidation over the years, but, as Justice Black observed, no single standard has controlled review under this power to negative: "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the lights of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. . . . Our primary function is to determine whether, under the circumstances of this particular case, [a particular] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Whatever the verbiage, the ultimate test is simply stated: "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

nation of the inferior jurisdiction.[150]

In neither case was the Court faced with an inexorable conflict between its constitutional or statutory jurisdiction to hear cases arising under the Constitution and an express exception from that jurisdiction by the Congress; yet two conclusions can be drawn from *Wiscart* and *Durousseau*. First, Congress had clearly *regulated* the process of the Court, both as a statutory matter and in amendment to the Constitution. Congress had also regulated the structure and functions of the inferior federal courts. Second, Congress did not create an *exception* to jurisdiction to hear cases arising under the Constitution. Language in *Wiscart* and *Durousseau* to the contrary is mere dicta. It is possible that statutory jurisdictional requirements may have deterred counsel from presenting the Court with an appeal or writ of error that, though arguably within the constitutional framework, clearly fell outside the statutory framework. It is also possible that counsel may have been deterred from presenting the Court with an implied exception from the Court's jurisdiction. Those possibilities, however, do not show that the Congress had the power to except such cases; rather, they merely confirm that counsel failed to raise the arguments.[151]

In summary, the actions of Congress must be noted for what Congress did *not* do during the formative period. On numerous occasions, the exercise of judicial review resulted in calls to repeal the Court's jurisdiction or to limit it in a prescribed manner, but none of these

150. The disposition of the case on the matter of inferior court jurisdiction, while it has obvious implications for the Court's jurisdiction, is quite independent from the latter question. True, an appellate court cannot be appellate without an inferior trial court, but at the same time, lack of jurisdiction in the inferior court goes only to the capacity to bring the suit below. Many of the decisions during the formative period that raise this question involve questions of inferior court jurisdiction, particularly questions concerning common and statutory law. *See, e.g.*, Sheldon v. Sill, 8 U.S. (49 How.) 441 (1850) (diversity); Barry v. Mercein, 5 U.S. (46 How.) 103 (1847) (pleading jurisdictional amount in *habeas corpus*); Turner v. Bank of North America, 4 U.S (4 Dall.) 8 (1799) (remarks from oral argument noted in margin).

151. Another Supreme Court case, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), by answering the question of the source of the Court's jurisdiction could have also answered the underlying questions concerning the exceptions and regulations clause. The dispute in *Cohens* was whether a civil writ of error had been properly exercised to review Cohens' criminal conviction before a state court. While § 25 of the Judiciary Act of 1789 provided for the denial of any claim under the Constitution to be reviewed by writ of error (presumably the case in *Cohens*), Chief Justice Marshall found the writ to apply only in civil cases. Counsel for Virginia appears to have been instructed only to argue jurisdiction of the Court, but there seems to be no record of jurisdictional argument on this point. Even so, this might be argued to be a procedural jurisdiction rather than a substantive jurisdiction. *See* P. BATOR, P. MISHKIN, D. SHAPIRO AND H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 455-56 n.1 (1973).

measures was enacted. This most volatile period did not lead to the establishment of precedent for congressional exertion of power over the Court's jurisdiction to hear cases arising under the Constitution.[152] Thus, the law and politics of the formative era of American constitutional law do not provide answers to the central question of the power of Congress to make exceptions from the jurisdiction of the Court in general, and to make exceptions from jurisdiction to hear cases arising under the Constitution in particular. Despite numerous *dicta* of the Court and arguments propounded in Congress during that period, congressional authority, if it exists, was neither exercised nor challenged. In essence, whatever the basis and range of the Court's jurisdiction, Congress enacted no legislation to except affirmatively cases arising under the Constitution (or for that matter, any class of cases), and accordingly, the Court was never placed in the position of determining the validity of such an exception.

B. The Great Insurrection and Its Aftermath

As the late ante-bellum period drew to a close, the relative calm between Congress and the Court was shattered by the Court's exercise of judicial review in *Dred Scott v. Sandford*.[153] While there were initially calls for reprisal against the Court, little action was taken; however, but the course was charted toward the Great Insurrection.[154] A decade later, with the Civil War fresh within memory, the Court decided that the President could not suspend the civil courts and detain a civilian before a military tribunal outside the actual theater of war.[155] That decision, in turn, led to concern that the Court might overturn the

152. There were calls for the repeal of § 25 of the Judiciary Act of 1789 almost immediately after its enactment and again in 1831, but none succeeded; nor did Congress change the Court's statutory operation in any major way. Congress did, however, make an unsuccessful attempt to avoid federalist developments like *Marbury v. Madison*. F. FRANKFURTER & J. LANDIS, *supra* note 56, at 4-55; 1 C. WARREN, *supra* note 54, at 10-11; 2 *id.* at 12, 16, 123, 196-201. *See generally* 1 HOLMES DEVISE, *supra* note 48; 2 G. HASKINS & H. JOHNSON, THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES—FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815 (1981) [hereinafter cited as 2 HOLMES DEVISE]. *See also* 3 C. WARREN, *supra* note 54, at 55, 57.

153. 60 U.S. (19 How.) 393 (1856) (declaring the prohibition of slavery in the Missouri territory unconstitutional; subsequently vitiated by § 1 of the 14th Amendment).

154. 5 C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES—THE TANEY PERIOD, 1836-1864, 631-52 (1974) [hereinafter cited as 5 HOLMES DEVISE]; 2 C. WARREN, *supra* note 54.

155. *Ex parte* Milligan, 4 U.S. (71 Wall.) 2 (1866). *See* 6 HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES—RECONSTRUCTION AND REUNION, 1864-1888 (pt. 1), 182-252 (C. Fairman ed. 1971) [hereinafter cited as 6 HOLMES DEVISE (pt. 1)]; 3 C. WARREN, *supra* note 54, 140-76.

convictions of those who had conspired to kill President Lincoln. Since four of those individuals had been executed, such an action would have effectively branded the executions as murder.[156] Against the backdrop of this newly heightened political tension, the Court was faced with the petition of a violently anti-Reconstruction Vicksburg editor named McCardle.

1. Ex parte McCardle (I & II)

Congress set the stage for *Ex parte McCardle (I & II)*[157] in February, 1867, by expanding the *habeas corpus* jurisdiction of the inferior federal courts to better protect newly freed slaves and by providing a right of appeal to the Supreme Court.[158] In March, 1867, Congress also established military districts for the administration of ten states and authorized military trials to enforce Reconstruction.[159] McCardle was charged before such a military tribunal after publishing editorials opposing—indeed encouraging defiance of—the Reconstruction administration. Late in 1867, McCardle won his bonded release in circuit court from military custody under the *habeas corpus* provisions of the 1867 Act; McCardle then took advantage of the right under the Act to appeal to the Supreme Court.

Thus, McCardle was poised to challenge military Reconstruction by invoking the provisions of one of its sister acts. The government—through counsel Lyman Trumbull—moved to dismiss the appeal for want of jurisdiction, citing a number of technical grounds under the 1867 Act. The Court rejected these contentions and, on February 17, 1868 (*McCardle I*), specifically declared its jurisdiction to hear the appeal under the provisions of the Act.[160] Oral argument on the merits was commenced on March 2, 1868. Chief Justice Chase was called to the Senate chamber to preside over the impeachment trial of President Johnson on March 5th, while oral argument in *McCradle* was not concluded until March 9th.[161] Three days later, with *McCardle sub judice*,

156. 6 HOLMES DEVISE (pt. 1), *supra* note 155, at 237-39, 488-92; 3 C. WARREN, *supra* note 54, at 165-66. A petition for *habeas corpus* was filed in 1869, and oral argument appears to have been heard, but the case was mooted by President Johnson's pardon of March 1, 1869.

157. 73 U.S. (6 Wall.) 318 (1867) (*McCardle I*); 74 U.S. (7 Wall.) 506 (1868) (*McCardle II*).

158. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

159. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

160. 73 U.S. (6 Wall.) 318 (1867).

161. CONG. GLOBE, 40th Cong., 2d Sess. 1644 (1868) (letter from Chief Justice Chase on proceedings and oath of senators); *id.* at 1696 (Chief Justice Chase takes chair of Court of

the House and Senate—under the leadership of Senator Lyman Trumbull—adopted the Repealer Act, providing, in pertinent part,

> That so much of the act approved February [5, 1867] . . . as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed.[162]

President Johnson vetoed this Act, despite his own perilous condition before the Senate, in a ringing defense of the Court, on March 25th.[163] The veto was summarily overridden on March 27th.[164]

The Court met on March 30th at 11:00 a.m., but Chief Justice Chase was due in the Senate to preside at the opening argument of the trial of impeachment at 12:30 p.m. Justice Nelson presided after the Chief Justice's departure, and the suggestion he made to counsel in another case like McCardle's was prescient: It might be better to plead under section 14 of the Judiciary Act of 1789.[165] The Court did not opt to make *McCardle II* a race with Congress to a decision; rather, they suggested the need for argument on the effect of the Repealer Act.[166] The Court adjourned on April 6th, averting for the time any exacerbation of the situation, leaving McCardle to his bail and the Chief Justice to the trial of impeachment.[167]

This review of history may appear stark, but further detail only darkens the shadows of the politics of the time. Before turning to the decision in *McCardle II*, one ever-controlling fact must be reiterated: The law of the case from *McCardle I* was that the Court had jurisdiction under the Act of February 5, 1867, to hear an appeal of the cause.[168]

Impeachment). *See also* 6 HOLMES DEVISE (pt. 1), *supra* note 155, at 455, 459; 3 C. WARREN, *supra* note 54, at 165.

162. *See* text of Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44, *passed* CONG. GLOBE, 40th Cong., 2d Sess. 2062 (1868).

163. CONG. GLOBE, 40th Cong., 2d Sess. 2165 (1868).

164. Act of Mar. 27, 1868, ch. 34, 15 Stat. 44. The trial of impeachment of Andrew Johnson is set out in CONG. GLOBE, 40th Cong., 2d Sess. (Supp. 1868). 6 HOLMES DEVISE (pt. 1), *supra* note 155, at 458-60.

165. Section 14 of the Judiciary Act of 1789 provides for a writ of *habeas corpus* to be taken in challenging the legality of confinement or the jurisdiction of the tribunal ordering confinement. 6 HOLMES DEVISE (pt. 1), *supra* note 155, at 472-78.

166. 6 HOLMES DEVISE (pt. 1), *supra* note 155, at 472-78. There is some suggestion that the Court could not have decided the case within this short a time period had they attempted to do so, for the Court was continuing to sit six days each week.

167. *Id.*

168. 73 U.S. (6 Wall.) at 324. The decision that the Court had jurisdiction under the Act of 1867 is critical because of the historical inference that the further actions of Lyman Trum-

The Court decided *McCardle II* on April 12, 1869, over a year after the political intrigue generated by the Repealer Act and impeachment proceedings, making the decision almost anticlimactic. Chief Justice Chase began by accepting two principles previously discussed: (1) the origin of jurisdiction in the Constitution; and (2) Chief Justice Marshall's negative inference from the statutory enumeration.[169] From these premises, Chief Justice Chase stated and answered the question before the Court:

> The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation 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.
>
> 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.
>
> 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 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. And this is not less clear upon authority than upon principle.[170]

Chief Justice Chase dismissed several state authorities in the next paragraph as not on point, and went on to affirm the nonexistence of acts after their repeal except as to transactions previously concluded. The Chief Justice then returned to the effect of the Repealer Act on the Court's jurisdiction:

> 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 seem to have supposed, if effect be given to the repealing Act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is in error. The Act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the Act of 1867. It does

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bull, as Senator, were specifically designed to derogate that decision by removing the jurisdictional act. Indeed, the Repealer Act reads more like a judicial order than legislation.

169. *See* notes 146-50 *supra*.

170. 74 U.S. (7 Wall.) at 513-14.

not affect the jurisdiction which was previously exercised.[171]

At this point, the Court reached its conclusion, with no dissent: "The appeal of the petitioner in this case must be dismissed for want of jurisdiction."[172]

Three critical questions must be answered about *McCardle II*: (1) whether or not the Court had jurisdiction as pleaded; (2) whether or not the Repealer Act was an exception from cases arising under the Constitution or a regulation of the procedure for review; and (3) whether or not an exception or regulation can be made applicable to a case *sub judice*.

The question before the Court in *McCardle II* was one of jurisdiction over the particular case. McCardle based his case on the Act of February 5, 1867, and prosecuted it throughout under the aegis of the Act. His plea to the Court appears to harbor no alternative source of jurisdiction, and the jurisdictional attack in *McCardle I* was based solely on that Act.[173] Thus, when the Court held that it had jurisdiction under the Act of February 5, 1867, it did more than affirm its power under that Act—it also limited its jurisdiction to that conferred by the Act. The intimation of "jurisdiction previously exercised" in *McCardle II* and Justice Nelson's advice to counsel in another case[174] suggest an alternative source of jurisdiction, namely, section 14 of the Judiciary Act of 1789, which provides that the writ of *habeas corpus* may be invoked to challenge the legality of confinement or the jurisdiction of the tribunal ordering confinement.[175] Within a year, the Court answered these intimations, in the less celebrated but equally important case of *Ex parte Yerger*,[176] by declaring that section 14 was unimpaired by the Repealer Act and remained an appropriate method of invoking

171. *Id.* at 515.

172. *Id.*

173. 73 U.S. (6 Wall.) at 324. The government's motion to dismiss set up the law of the case; the Court implemented that law with a narrow holding. *See* Brief to Resist Motion for Judgment (undated), *McCardle II*, 74 U.S. (7 Wall.) 506, at 511-12 (1868).

174. *See* note 165 and accompanying text *supra*.

175. Section 14 of the Judiciary Act of 1789 provides:

"*And be it further enacted*, that all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73.

176. 75 U.S. (8 Wall.) 85 (1868).

the Court's jurisdiction. *Yerger* stands for the narrow proposition that the repeal of the more convenient appeal did not impair the right to petition for the more complex and narrow writ of *habeas corpus*. In short, McCardle's reliance on the right of appeal, to the exclusion of the alternative plea for a writ of *habeas corpus*, was the fatal error in *McCardle I* that controlled the decision of *McCardle II*. Dismissal in *McCardle II* was for want of jurisdiction over a particular party who pleaded under a particular statute.[177] Therefore, the conclusion that the Court had no jurisdiction must be read narrowly and technically, as the Court appears to have read it subsequently. The Court lacked jurisdiction only over the appeal taken, not necessarily over any alternative petition that could have been filed.

177. In *A Critical Guide to* Ex parte McCardle, Professor Van Alstyne asks: "Given this consideration, should not the Court have proceeded to reach the merits [in *McCardle II*] acknowledging that the technical basis on which appeal had been perfected from the circuit court had been withdrawn by Congress, but declining to reject the case in view of the existing alternative basis for retaining jurisdiction as confirmed by section 14 of the Judiciary Act of 1789? In favor of this result it might be observed that the Supreme Court has generally not been overly technical in holding parties to the particular source of appellate jurisdiction they have invoked." Van Alstyne, *supra* note 20, at 247. He goes on to conclude that the appropriate criticism of the Court is that it "simply declined, under the circumstances, to proceed *sua sponte* on a different jurisdictional basis than that previously relied upon." *Id.* at 254.

The only rebuttal to Van Alstyne's remark that the Court has not been "overly technical" about jurisdiction, is that the Court was in fact quite technical. At the time of *McCardle II*, the perils of erroneous common law pleading were still firmly entrenched. Common law pleadings would not become comatose for another 70 years, and they are not completely lifeless even today. The distinctions between detinue, replevin, and assumpsit were hardly dead in contract law of 1969, nor were the distinctions between appeal and writ of error lost. *See* O. HOLMES, THE COMMON LAW (1881). Professor Van Alstyne cites contemporary authority (28 U.S.C. § 2103 (1976)), for the proposition that the Court may consider appeals improvidently taken as petitions for writs of certiorari. However, this authority was not added until the famous Judge's Bill of 1925. Judicial Code of 1911, § 237(c), *amended by* Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 937, 938. Even this did not entirely do away with the problem of prejudicial pleadings between the statutory appeal and the common law writs of certiorari or error. *See* F. FRANKFURTER & J. LANDIS, *supra* note 56, at 285 n.114. It was not until Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), and the modern merger of law and equity in the Federal Rules of Civil Procedure, 308 U.S. 645-766 (effective Sept. 16, 1938), that the decline of common law pleading in the federal courts became irreversible. In some states today, the problem of prejudicial pleading still exists.

Thus, the criticism that Van Alstyne feels is appropriate does not meet its mark; the Court could not consistently have accepted jurisdiction other than as had been pleaded. The ascendency of the radical Reconstruction Congress and the trial of impeachment being held just steps away, while certainly no justification for shirking judicial duty, may have reinforced the Court's resolve not to depart from an established practice. Nor can the result be said to have been unjust to the petitioner. He was then on bail, and the dismissal did not prejudice his capacity to file the suggested *habeas corpus* petition, nor did it recommit him to the custody of military authority.

The answer to the second question has already been suggested. Even after the Repealer Act had become law, there remained alternative jurisdiction by way of petition for a writ of *habeas corpus*,[178] and Congress is presumed to have been fully aware of that legal fact. The language of the Repealer Act itself—"so much of the Act" under which the appeal was taken—was narrowly and precisely drawn by the government's counsel to fit the appeal of *McCardle*, an appeal "which ha[s] been or may hereafter be taken."[179] Thus, *McCardle II* cannot be fairly judged to be an *exception* to the Court's jurisdiction; rather, it must be regarded as a *regulation* of the Court's process.

Finally, the question of legislative timing of the change in the regulation of the Court's process must be considered. The Court's disposition of *McCardle II*, in which it respected a statutory change in the fabric of the law while an affected case was *sub judice*, emphatically stands for the proposition that there is nothing sacred about the intonation that the "case is submitted" at the close of oral argument. If nothing else, *McCardle II* settles the power of Congress to alter the premises of a case right up to the time the case is decided.

Thus, for all that *McCardle II* is thought to settle, it actually settles very little. Historically, to paraphrase Professor Hart's "Dialogue," *McCardle II* has been read for all that it *might* be worth rather than for the least that it *must* be worth.[180] Under the concept of *ratio decidendi*, the least that it must be worth is the narrow rule of the case discussed above.

2. *United States v. Klein*

In determining the scope of exceptions that Congress may make in the Court's appellate jurisdiction, *McCardle II* has limited value and is perhaps overshadowed by *United States v. Klein*.[181] *Klein* is the product of a long and complex legal travail over the effect of presidential pardons on the right to the return of property confiscated during the Great Insurrection.[182] In 1870, Congress responded to the travail by

178. *See* note 177 *supra*.

179. *See* text accompanying note 162 *supra*.

180. Hart, *supra* note 20, at 1364-65.

181. 80 U.S. (13 Wall.) 128 (1871). Greater background on the *Klein* case can be found in 6 HOLMES DEVISE (pt. 1), *supra* note 155, at 840-48.

182. In 1862, Congress had authorized confiscation of the property of all persons in rebellion. Act of July 17, 1862, ch. xx, § 5, 12 Stat. 589. The act also "authorized" the President to issue pardons (an unnecessary action in light of the plenary authority of article II, § 2, clause 1, of the Constitution). In *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867), the Court held that a presidential pardon had the effect of not only relieving the punishment for an offense, but obliterating the guilt as well, "so that in the eye of the law the offender is

enacting the "Drake proviso," which provided that (1) evidence of a pardon was not admissible in the Court of Claims to support any claim against the United States; (2) a recitation in a pardon that the claimant had taken part in the insurrection was to be treated as conclusive proof of disloyalty, and thus bar the return of confiscated property; (3) if already in evidence, a pardon was not to be considered by the Court of Claims or by the Supreme Court, except to prove disloyalty; and (4) the Court of Claims and the Supreme Court were to dismiss any pending claims based on such a pardon *for want of jurisdiction*.[183] The Reconstruction Congress apparently considered the decision in *McCardle II* to be a victory, for the Drake proviso had a far broader effect. On December 22, 1870, the Court of Claims held that Wilson, Klein's decedent, had been absolved of any offenses or disloyalties by the amnesty oath he had executed. The holding conformed with previous Supreme Court interpretations but was contrary to the express requirements of the Drake proviso.[184]

The Court was thus caught on the horns of a dilemma, with the pardoning power on one hand and what facially appears to be an exception on the other. While the opinion of the Court in *Klein* leaves much to be desired, its path is clear. After the incantation of the familiar dicta regarding congressional power over inferior court jurisdiction and the Supreme Court's appellate jurisdiction, Chief Justice Chase addressed his Scylla and Charybdis: "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."[185] Chief Justice Chase went on to outline the requirements of the Drake proviso, and continued:

> 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? In the case before

as innocent as if he had never committed the offence." Given that the President's pardons had all provided for the restoration of confiscated property, the Court, in United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870), held that a claimant under such a pardon was entitled to his property. Congress intervened with the "Drake proviso," which was attached to an appropriation authorization statute.

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

184. 4 Ct. Cl. 559 (1870).

185. 80 U.S. (13 Wall.) at 145.

> us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?[186]

Chief Justice Chase was posing rhetorical questions in light of the conclusion reached by the Court. After distinguishing cases of congressional alteration of decisions where the power to alter the effect of the decision was otherwise within its province, the Court concluded, "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."[187] Were this the only question before the Court, the result would make it clear that Congress could not except cases arising under the Constitution in which the government was the party defendant and the statutory exception conclusively favored the government's litigative position. However, the Drake proviso also deprived the President's pardon of efficacy, so that another conclusion could be independently reached: "The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive."[188] Thus, *Klein* cannot be said to stand for the proposition that Congress cannot except cases from the jurisdiction of the Court because the basis for the exception was held substantively invalid. Moreover, the effect of the exception was to impose a particular rule of decision that was conclusive in the government's favor. Since the Court did not treat these issues as separable, even though they would appear to be separable, there is no clear *ratio decidendi* for *Klein*.

Just as *McCardle II* proved too little, *Klein* may have proved too much. What would otherwise have been a clear exception from the Court's jurisdiction was clouded by the manner of the exception's implementation—a biased rule of decision. *Klein*, however, is instructive of how cases arising under the Constitution will be viewed. These cases will inexorably pit a right or power under the Constitution against the power of Congress under the exceptions and regulations clause. In *Klein*, the right conferred by a presidential pardon was raised against the Reconstruction Congress' attempt to deny the Court's jurisdiction to effectuate that pardon. This clear conflict is clouded by the require-

186. *Id.* at 146.
187. *Id.* at 147.
188. *Id.*

ment that the Court find a state of facts and dismiss after finding that state of facts, a rule of decision that does violence to the doctrine of separation of powers. Thus, *Klein* does not stand for the proposition that there are limits on the power of Congress to make exceptions, but for the broader proposition that Congress may not violate the principles of separation of powers to accomplish a forbidden act by casting legislation in terms of the Court's jurisdiction.[189]

The attention of Congress and the Court slowly turned away from the constitutional fencing that left both weary and neither victorious. The question of the scope of congressional authority to make exceptions from the Supreme Court's appellate jurisdiction remained in flux.[190] In its haste to rein the Court, the Reconstruction Congress may politically have succeeded, but legally have failed. *McCardle II* stands for the proposition that Congress, by repealing a statute, may reach into the Court's conference to excise a case that is dependent on that statute. *Yerger* stands for the proposition that Congress must leave no residuum of jurisdictions if it is ever to make an exception that will be free of a litigable alternative. *Klein* stands for the proposition that the Congress may not direct decisional results in the effectuation of its powers over the jurisdiction of the Court. Where the limits imposed by statute dispose of the merits of the case, *Klein* clearly indicates that the statute cannot stand. Even these holdings, however, were subject to further elucidation in the following century. The debate since that time has been relatively tame, and the acts of Congress that set *McCardle*, *Yerger*, and *Klein* in motion precipitated the last truly critical bouts of constitutional sparring.

C. The Developing Substantive Regulation of the Federal Courts

For the last century, the Court has undergone a series of philosophical and personal clashes, but the fundamental power of the Court itself has not again been raised. Prior to the outset of the contemporary debates, two formidable periods of conflict took place: (1) the clash between substantive due process and the progressive movement early in the twentieth century; and (2) Franklin Roosevelt's Court-packing plan. Otherwise, little effort has been made to curb the Supreme Court or to alter its power substantially. The Court, for its part, has continued to comment only in the vein of dicta.

189. *Id.*

190. Further dicta deferential to Congress can be found in The Francis Wright, 105 U.S. 381 (1881); Daniels v. Railroad Co., 3 U.S (70 Wall.) 250 (1865).

The progressive era of the early twentieth century led to a variety of social legislation, much of which, to the disgruntlement of its proponents, was struck down by state courts of last resort. During this period, the Supreme Court was perceived as unable to review these decisions because its statutory jurisdiction did not extend to cases in which a state court of last resort had declared a state statute unconstitutional.[191] The predicament was sharply focused when the New York Court of Appeals struck down a workmen's compensation law and the Supreme Court of Oregon upheld a similar law.[192] The end result of this conflict—over which the Supreme Court held statutory jurisdiction to review only the Oregon decision of constitutionality—was the expansion of statutory jurisdiction.[193] During this period, the recall of both judicial decisions and judges was advocated, but no action was taken.[194] With the exception of the expansion of statutory jurisdiction, the question of the Court's jurisdiction was not raised.

The more formidable attack on the Court came from Franklin D. Roosevelt and his attempt to "pack" the Court.[195] The idea of altering the size of the Court was not novel; indeed, such an idea had a history of political use.[196] Even today the Court-packing plan is not fully understood, but the substantial question of why jurisdictional exceptions, if available, were not employed instead must be asked.[197] Whatever the intentions of the architects of the Court-packing plan, the idea of excepting from the Court's jurisdiction was not raised as a congressional alternative.

Congress has passed numerous enactments restricting the jurisdiction, procedure, and available remedies of inferior federal courts over the years.[198] Alteration of the statutory mandates of Supreme Court

191. F. FRANKFURTER & J. LANDIS, *supra* note 56, at 193-96.

192. *Compare* Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 294 (1911), *with* State v. Clausen, 65 Wash. 156, 195-96 (1911).

193. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

194. *See* F. FRANKFURTER & J. LANDIS, *supra* note 56, at 169-70. Other examples of conflict are: Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, *further opinion*, 158 U.S. 429 (1895), overruled by the 16th Amendment; Hammer v. Dagenhart, 247 U.S. 251 (1918); and the still-pending proposed amendment on Child Labor. *See* J. KILLIAN, *supra* note 45, at 51-52.

195. *See* Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing Plan,"* 1966 SUP. CT. REV. 347 (P. Kurland ed. 1966).

196. *See* note 55 *supra*.

197. *Compare* Leuchtenburg, *supra* note 195, *with* R. BERGER, CONGRESS V. THE SUPREME COURT 291-92 (1969).

198. *E.g.*, Oestereich v. Selective Serv. Sys. Bd., 393 U.S. 233 (1968); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Yakus v. United States 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943); Lauf v. E.G. Shinner Co., 303 U.S. 323 (1938); Military Selec-

writ jurisdiction has consisted of minor changes in wording and the addition of omnibus remedial authority.[199] Changes in Supreme Court statutory jurisdiction have only been expansive.

Congress also began investing varying amounts of adjudicatory power in "article I courts" and administrative bodies during the development of the regulatory model of government.[200] Corresponding restrictions on the scope of judicial review by article III courts also became commonplace, but a new approach to the theory arose in the dicta of the Court. The Court began to pose a new question, not one of deference to Congress, but, as Chief Justice Hughes noted, "rather a question of the appropriate maintenance of the Federal judicial power."[201] In *Crowell v. Benson* the Court intimated that the adjudication of "constitutional facts"—those facts that form the predicate of a constitutional claim—must be reviewable by an article III court.[202] This approach has not been fully tested or explicated in the context of congressional attempts to limit the power of the federal courts, but should the Court hold that an article III court review of constitutional facts is mandated, proposals that eliminate all federal court jurisdiction over a constitutional cause of action (thus delegating final adjudication

tive Serv. Act of 1967, Pub. L. No. 90-40, 81 Stat. 100; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23; Norris-LaGuardia Act, ch. 229, 47 Stat. 70 (1932).

199. The writs issued—error, certiorari, and habeas corpus—historically controlled the scope of review within the law-fact distinction, a distinction developed at common law and occasionally changed by congressional enactment. None of these enactments removed a writ in such a way as to preclude constitutional as opposed to statutory consideration.

200. We must distinguish here between administrative boards, article I courts, state courts, and district and territorial courts. Delegation of adjudicatory power to administrative bodies began in earnest with the Interstate Commerce Act in 1887. Such bodies—for example, the late Board of Tax Appeals (administrative), now the United States Tax Court (an article I court)—have long had adjudicatory powers subject to judicial review by an article III court. State courts, on the other hand, ordinarily share concurrent jurisdiction with inferior federal courts, and their decisions are subject to review by the Supreme Court. The District of Columbia and territorial courts have territorial jurisdiction that is reviewable, but which depends on the power of Congress to affirmatively legislate under special authorities of article IV, § 3, clause 2, and article I, § 3, clause 16, respectively. *See generally* Key v. Doyle, 434 U.S. 59 (1977); Palmore v. United States, 411 U.S. 389 (1973); Durousseau v. United States, 10 U.S. (6 Cranch) at 312-15.

201. Crowell v. Benson, 285 U.S. 22, 56 (1932).

202. *Id.* This approach has been further expanded in the article I courts area. In United States v. Raddatz, 447 U.S. 667 (1980), the Court upheld the use of an adjunct magistrate's fact-finding, but only if that magistrate is subject to sufficient control by an article III court. In Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 50 U.S.L.W. (U.S. June 28, 1982) (Nos. 81-150 & 81-546), the Court struck down the use of an article I judge to determine (and enter judgment on which execution could be made) state law claims pendent to a bankruptcy matter when one of the parties objected. *Marathon* is reminiscent of the badly divided decision in Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

of such claims to state courts) would be constitutionally dubious on this score alone. This has not yet been the case. This approach appears to leave open the possibility that an inferior federal court might be designated to review administrative action without the possibility of review by the Supreme Court.[203]

Perhaps beginning with *Klein*, and particularly corresponding with the development of modern bureaucratic government, the Court has developed a more holistic approach to constitutional decisionmaking. More conservative dicta began to appear with regard to the exceptions and regulations clause. The elder Justice Harlan's comment in *United States v. Bitty*[204] illustrates this point while discussing congressional power over jurisdiction: "[W]hat such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution."[205] Similarly, Justice Black eventually concluded that since the Constitution, in its original form, is replete with grants of authority that may complement, converge, diverge, conflict, and even contradict, "these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."[206]

Dicta with respect to the Court's jurisdiction were not limited in the development of a more holistic approach. The constitutional origin of jurisdiction, while it declined as a subject of dicta, saw occasional resurgence.[207] Statements regarding the dependence of the Court on congressionally determined jurisdiction were guided by Justice Frankfurter's oft-cited dissent in *National Mutual Insurance Co. v. Tidewater Transfer Co.*:[208] "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*."[209] Justice Frankfurter appears to have stated the modern efficacy of a broad view of *McCardle II*, as apparently did the younger Justice Harlan.[210] By 1962, however, Justice Douglas, in a dissent joined by Justice Black, eschewed the *McCardle II* holding, whether broad or narrow, observing, "There is a serious question whether the *McCardle* case could command a majority

203. *But see* notes 230-35 and accompanying text *infra*.
204. 208 U.S. 393 (1908).
205. *Id.* at 399-400.
206. Williams v. Rhodes, 393 U.S. 23, 29 (1968).
207. *See, e.g.*, Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898).
208. 337 U.S. 582 (1949).
209. *Id.* at 655 (Frankfurter, J., dissenting).
210. Bruner v. United States, 343 U.S. 112, 117 n.8 (1952).

view today."[211] Yet again, the composition of the Court has changed, and its present view of *McCardle II* and of the power of Congress over its appellate jurisdiction is unclear.[212]

In conclusion, history illuminates no hard and fast rule, no distinct contours of power, nor does it reveal a void. Like many powers and rights under the Constitution, at this late day there remains only resort to the structure and function of the Constitution to determine the proper sphere of congressional action. Many of the cases here cited are grounded on the regulation or establishment of inferior federal courts, whatever the consequential effects these changes may have on the manner in which a cause may reach the Supreme Court. Those cases dealing directly with the Court's appellate jurisdiction have concerned congressional action that is regulatory in nature.

Neither constitutional history nor the manner in which the Constitution has been implemented by the Congress and the Court provides a basis for reaching a conclusive decision on whether Congress may except classes of cases arising under the Constitution from the appellate jurisdiction of the Supreme Court. Both the Congress and the Court have suggested that the Court is wholly dependent on Congress for its appellate jurisdiction, but Congress has never attempted to limit constitutional claims in this way. The Court, in its proper role of adjudicating only that which is properly brought before it, has not been asked the question. In short, whether founded on regulation of constitutional causes of action through exception of the jurisdictional predicate or as a response to controversial or unpopular Court decisions, the proposition of excepting cases arising under the Constitution from the Court's appellate jurisdiction is unprecedented.

IV. Legislating and Adjudicating Exceptions of Cases Arising Under the Constitution

The central question of legislating and adjudicating exceptions of cases arising under the Constitution must be answered on the basis of (1) the constitutional purpose and intent of the exceptions and regulations clause as revealed by the Federal Convention of 1787 and the

211. Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting). *Compare* Justice Harlan's majority reliance on *McCardle* for what it did not do. *Id.* at 567-68. Justice Harlan cites *McCardle* with approval even though noting that Congress' "authority is not, of course, unlimited." *Id.* at 568. The regulations aspect may cover much more, however, and may perhaps extend to the regulation of the entire judicial power, but that question is beyond the scope of this article.

212. *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371, 425, 427-34 (1980) (Rehnquist, J., dissenting).

state ratifying conventions (discussed in part II), and (2) the historical interpretations given the clause by Congress and the Court (discussed in part III). In this part, first, the affirmative theories of interpretation of the clause are reiterated. Second, assuming a legislative exception of a class of cases arising under the original Constitution, an eclectic view of the original Constitution will help to determine whether the Court is likely to strike down the exception as unconstitutional. Finally, assuming a legislative exception of a class of cases arising under a provision of the Bill of Rights or a right derived from another provision, a synergetic view of the Constitution is utilized to make a parallel determination.

A. Affirmative Interpretations of the Exceptions and Regulations Clause

Four relevant categories of affirmative interpretation and application of the exceptions and regulations clause appear to be supported by the foregoing discussion: (1) exceptions and regulations based on the law-fact distinction; (2) regulation of judicial process, such as procedure and remedies; (3) regulation of the division of jurisdiction between the Supreme Court, inferior federal courts, and the state court systems; and (4) regulation, and possibly exceptions, of statutory claims. History does *not* provide affirmative support for an interpretation of the power to except from jurisdiction to hear cases arising under the Constitution or constitutional claims.

The law-fact distinction animated much of the discussion of the exceptions and regulations clause during the construction, ratification, and implementation of the Constitution. The intention of the Framers was clearly to delegate the determination of the availability of civil jury trials and the finality of jury-found facts to the Congress, but this reliance on future determination was insufficient for the ratifiers. Thus, the First Congress, supported by the state legislatures' ratifications, constitutionalized the finality of jury-found facts on appeal and the common law right to a jury trial in controversies involving more than twenty dollars.[213] Limiting the exceptions and regulations clause to delegating the law-fact controversy to Congress has the appeal of simplicity, but simplicity merely obfuscates underlying concerns.[214]

213. U.S. CONST. amend. VII, discussed at notes 109-12 and accompanying text *supra*.

214. *See, e.g.*, R. BERGER, *supra* note 197, at 286-87; Merry, *supra* note 20, at 68-69. Although the Federal Convention may have been satisfied with Wilson's explanation of the exceptions and regulations clause, *supra* note 78, the issue arose in several contexts, including the variations discussed in both the federal convention and the state ratifying conventions.

Procedure and remedies were another major focus of the Convention of 1787 and the state ratifying conventions and were a considered part of the exceptions and regulations clause insurance against any "inconveniences" that might arise.[215] While many enactments of Congress confirmed the common law, equity, and admiralty practice of the times, there were specific procedures provided by Congress that were indigenous to the new system of government.[216] While not germane to this discussion, the circuit-riding duties of the justices to the statutory enactment of civil, criminal, and appellate rules of procedure until the 1930's, and beyond, exhibit this interpretation. Legislation to regulate remedies under statutes of the Supreme and inferior courts also is clearly constitutional.[217] Any constitutional limitations on this regulatory, and possibly excepting, power are the subject of a separate debate of great magnitude.[218]

The divisions of jurisdiction between federal and state courts,[219] and between the Supreme and inferior federal courts,[220] pose substantial possibilities for interpretation of the exceptions and regulations clause. First, unless precluded by Congress, the state courts naturally have, and commonly exercise, general jurisdiction to hear and determine federal questions of law between private parties and that State, or even another state, but not between private parties and the federal government.[221] As to the choice of federal court, Congress has specifically provided concurrent jurisdiction in the district courts of cases involving ambassadors, and, contrary to *Marbury v. Madison*,[222] the Court may well have exercised original jurisdiction in issuing original writs of *habeas corpus* when it lacked jurisdiction to review the lower federal court's denial of that writ.[223] Whatever the potential for this line of

215. *See generally* notes 122-90 and accompanying text *supra*.

216. Perhaps the first of these indigenous procedures was the removal of cases in which the defendant was an officer of the United States from state to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 72, 79 (codified at 28 U.S.C. § 1441 (1976)).

217. *See, e.g.*, Norris-LaGuardia Act, ch. 229, 47 Stat. 70 (1932).

218. *See* notes 15 & 21 *supra*.

219. *See* notes 74 & 75 and accompanying text, *supra*. In essence, however, this question was resolved by the compromise to delegate inferior courts.

220. *See* note 20 *supra*.

221. Testa v. Katt, 330 U.S. 386 (1947). The limitations on jurisdiction of the state courts of one state over another are obvious. *But see* Nevada v. Hall, 440 U.S. 410 (1979). The limitation of a state court jurisdiction in cases to which the United States is a party is clear and, where avoided by suits against an officer, such cases are removable. 28 U.S.C. § 1441 (1976).

222. 5 U.S. (1 Cranch) 137 (1803). *See 1969 Hearings*, *supra* note 29; Van Alstyne, *supra* note 29.

223. *See* note 29 *supra*.

argument, it adds nothing to the question of precluding Supreme Court jurisdiction.

The final affirmative interpretation applies the exceptions and regulations clause to all civil (*i.e.*, statutory) rights, an interpretation far narrower than the reading implicit in current bills that "the Supreme Court shall have appellate jurisdiction . . . with such exceptions . . . as the Congress shall make." The broader interpretation appears to have been adopted in the *Federalist Papers*.[224] Further, it is widely argued that this interpretation animates the holding in *McCardle II*.[225] Indeed, given the lack of checks other than confirmation and impeachment (which have historically proved fruitless), the interpretation would appear to have substantial structural and political support. True, Congress has exempted whole classes of statutory cases from review, and criminal cases generally until 1892,[226] yet none of those exceptions appears to have been raised or argued to the point of a constitutional claim. Rather, as in *McCardle I* and *II*, the exceptions have been merely statutory.

Thus, the affirmative interpretations historically appear to reach many of the possible combinations of exception and regulation of the Supreme and inferior courts with respect to jurisdiction, procedure, and remedies arising under constitutional, statutory, or common law claims. The one subject *not* reached is that of exceptions to the Supreme Court's jurisdiction over constitutional claims.[227] We must turn, then, from history to more eclectic and synergetic legal considerations.

B. An Eclectic View of the Original Constitution and the Limits of the Constitutional Exceptions Theory

It is axiomatic to say that the Constitution must be read so as to be internally consistent, at least within the framework of the original unamended Constitution. Should any of the current proposals to except constitutional claims from the Court's jurisdiction become acts of Con-

224. THE FEDERALIST, *supra* note 36, at 505. *But see id.* at 513-14.

225. Van Alstyne, *supra* note 20. *Contra* notes 157-80 *supra*.

226. See, *e.g.*, the lack of general jurisdiction to review federal criminal cases, discussed at note 38 *supra*. Congress has also regulated the degree of discretion in the Court's determination of the right to review. *Compare* 28 U.S.C. § 1257 (1) (1976) *with id.* at § 1257 (2) (certiorari and appeals jurisdiction in the Supreme Court over judgments of state courts).

227. It has been suggested that in order to analyze fully any distinct constitutional problem, the specific categorization of what is done is imperative. *See* notes 6 (constitutional/statutory), 21 (Supreme/inferior), 23 (jurisdiction/procedure/remedy) & 25 (exception/regulation) and accompanying text *supra*. Many of these theoretical constructions can be disposed of *en bloc*, such as the inferior court possibilities.

gress, such an act must initially be read as consistent with the Constitution, original and as amended, because of the presumption of constitutionality of Acts of Congress.[228] Thus, in reviewing the constitutionality of these presumably constitutional Acts, the appropriate method may be more akin to an attack on the legislation *per se*. Finding no affirmative support or impregnable defense in history, we turn to the adjudicative process.[229]

The first perceivable limitation on the exception of constitutional cases from the Court's jurisdiction theory of the exceptions and regulations clause is the structural and functional argument of the "essential functions" of the Supreme Court.[230] The structural aspect of the "essential functions" argument lies in the concept of "one supreme Court" as the body to insure the functional aspect, the uniformity and the supremacy of federal law—particularly the Constitution.

It should be recalled that the delegates to the Convention of 1787 generally agreed early in the proceedings to the idea that there should be a Supreme Court.[231] Under the Constitution, little time elapsed until Supreme Court dicta on the role of the Court began to appear. *Durousseau*, clearly a case on lower (even article I, territorial) court jurisdiction of the District Court for Louisiana, presented Chief Justice Marshall with an occasion for comment on the structure and function of the Court under the Constitution, but Marshall's argument that to

228. A presumption of the constitutionality of a congressional enactment may effectively range from a mere catchword for the burden of going forward, to a nearly irrebuttable presumption, where persuasion may be futile (*e.g.*, in an area in which the legislative ambit is substantively within the political arena). *See* C. BLACK, THE PEOPLE AND THE COURT 215-20 (1960).

229. It should be kept in mind that the Court will initially postpone jurisdiction over the merits in order to determine its jurisdiction where a question of jurisdiction *per se* such as this is apparent. This practice is necessary for the elucidation of the jurisdiction of the Court in any sense where the Court determines that it does not have jurisdiction. In essence, this jurisdiction is "jurisdiction to determine jurisdiction."

According to contemporary Supreme Court practice, in cases brought by way of appeal, the appropriate order would be to postpone the question of jurisdiction to the hearing on the merits. SUP. CT. R. 16 (as amended Nov. 18, 1980). In the case of a petition for a statutory or common law writ of certiorari, the Court would necessarily grant certiorari and dismiss the writ as improvidently granted if the Court later determined a want of jurisdiction. SUP. CT. R. 17. In the case of jurisdiction of certified questions, the Court may simply dismiss the matter. SUP. CT. R. 25.2.

230. The origin of the caption for this theory may be traced to Ableman v. Booth, 62 U.S. (21 How.) 506 (1858). *See* note 238 and accompanying text *infra*.

231. In the Virginia Resolutions presented by Randolph, the question of whether there should be one or more such courts was left undecided. 1 RECORDS, *supra* note 31, at 21-22 (Madison) (May 29th). The alternate resolutions proposed by Paterson on behalf of the New Jersey delegation settled on a "supreme Tribunal." 1 RECORDS, *supra* note 31, at 244 (Madison) (June 15th).

allow no appeal from the district court would arrogate that court to a "supreme" court is mere dicta.[232] The fundamental problem with a structural approach,[233] of course, remains that there are numerous historical instances in which inferior federal courts have been the final arbiters of at least statutory questions.[234] In review of state court decisions, however, the Supreme Court has always enjoyed statutory jurisdiction to review any judgment that upheld a state action against a challenge of repugnancy to the Constitution or federal law.[235] In the limited sphere of the constitutional questions, therefore, the structural approach has historical legitimacy.

The rationale for a structurally supreme tribunal was voiced in the Convention of 1787 as being the need for uniformity of both interpretation and judgment as to federal law.[236] Chief Justice Marshall carried the theme forward in *Cohens v. Virginia*:

> [T]he necessity of uniformity, as well as correctness [of decision] in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved . . . .
>
> [The Framers] declare, that in such cases, the Supreme Court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a State Court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.[237]

Thus, Chief Justice Marshall embraced both the structural and functional aspects of the "essential functions" approach. It was Chief Justice Taney in *Abelman v. Booth*, however, who joined these two aspects with the requirements of the supremacy clause:

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232. *See* note 148 and accompanying text *supra*.

233. A structural approach has been used in the context of a proposed National Court of Appeals. *See, e.g.*, Goldberg, *One Supreme Court*, THE NEW REPUBLIC 14 (Feb. 10, 1973); Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951, 960-70 (1973).

234. *See* notes 38 (general federal question jurisdiction in inferior courts) & 39 (general jurisdiction to review criminal cases in Supreme Court) *supra*.

235. At a minimum, all substantial claims of unconstitutionality in a state action could be reviewed by the Supreme Court. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85 (current version at 28 U.S.C. § 1257 (1976)).

236. Even the staunch states' rights advocate, John Rutledge, is reported by Madison as suggesting: "[T]he State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts . . . ." 1 RECORDS, *supra* note 31, at 124 (Madison) (June 31st).

237. 19 U.S. (6 Wheat.) 264, 416-17 (1822).

> But the supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place . . . [a]nd the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that . . . a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided . . . . And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every State . . . .[238]

The use of the supremacy clause as the binding force is a complementary interpretation to that of the finality of judicial review, but is clearly antithetical to allowing use of the exceptions and regulations clause to relegate certain constitutional decisions to finality in state courts.[239]

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238. 62 U.S. (21 How.) at 517-18 (1858). Uniformity is specifically mentioned as a requirement in the constitutional grants of power to Congress over naturalization and bankruptcy law. U.S. CONST. art. I, § 8, cl. 4. The "imperative demand [for] a single uniform rule" as contrasted with "that diversity, which alone can meet the local necessities" has enlivened much of the judicial interpretation of the commerce clause, U.S. CONST. art. I, § 8, cl. 3, in instances in which Congress has not acted. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851). Instances in which the Court has required uniform minimum standards of affirmative conduct are also clear. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (application of equal protection standards by state court); Oregon v. Hass, 420 U.S. 714 (1975) (confessions during detention; state court may impose a higher standard of conduct or more stringent limitation of use than required as a matter of state law, but not as a matter of constitutional interpretation); Harris v. New York, 401 U.S. 222 (1971); Miranda v. Arizona, 384 U.S. 436 (1966). The Court's decision to grant certiorari is also stimulated by a concern for the uniformity of federal law. SUP. CT. R. 17.1(a) (effective June 30, 1980, as amended). Thus, the root of uniformity in American constitutional jurisprudence is far deeper than the suggestion in the above text would indicate.

239. The supremacy clause, U.S. CONST. art. VI, § 1, has been the source of the doctrinal development of "preemption" of state authority by federal authority. The exact contours are not ascertainable. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (Black, J., for the Court). As we have noted, finality is now beyond peradventure, with perhaps one exception—the commerce clause. Finality of judgments of the Supreme Court as to the constitutionality of a state regulation of interstate commerce are constantly subject to alteration by Congress. For example, the affirmance of the constitutionality of a Montana coal severance tax, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), may be preempted by congressional prohibition of such a tax under the commerce clause. Also, the invalidation of an

It was on this foundation that Professor Hart built his test for the limits of "Exceptions." In response to the rhetorical question of whether Congress might provide a minimum federal jurisdiction over patent cases, Professor Hart responded:

> The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan. *McCardle*, you will remember, meets that test. The circuit courts of the United States were still open in habeas corpus, and the Supreme Court itself could still entertain petitions for the writ which were filed with it in the first instance.[240]

The addition of review authority over federal questions in general and over criminal cases was only statutory. Hart states that the original *habeas corpus* could be brought and that this common law writ could be used to challenge only the jurisdiction of the court or the authority of the jailer, either of which would encompass the constitutionality of procedure or confinement. In light of this circumvention of statutory gaps by the Court, Professor Ratner states his conclusions about the first bill to propose exceptions of constitutional claims:

> Despite some impediments in early statutes, the Supreme Court from its inception has performed the essential constitutional functions of maintaining the uniformity and supremacy of federal law. These functions provide a standard for testing the validity of legislation limiting the Court's appellate jurisdiction. Even though the legislation may narrowly restrict the procedures for obtaining Supreme Court review, constitutional limitations are not transgressed so long as the Court remains available ultimately to resolve conflicts between state and federal law and conflicting interpretations of federal law by lower courts. But legislation that precludes Supreme Court review in every case involving a particular subject is an unconstitutional encroachment on the Court's essential functions. Thus, [the Jenner proposal] was clearly invalid. Its enactment would have allowed the courts of each state to determine for themselves the constitutionality of state statutes and regulations on the specified subjects and would have permanently foreclosed Supreme Court resolution of inconsistent state and federal decisions concerning the application of the federal constitution and laws to such matters. The exceptions and regulations clause does not give Congress power thus to ne-

Iowa safety regulation prohibition of double trailers as excessively burdening interstate commerce, Kassel v. Consolidated Freightways, 450 U.S. 662 (1981), is subject to preemption by congressional authorization of such regulations. Nonetheless, the judgment of the Court remains final in its sphere. Congress, like the Court, cannot directly reach and alter state law.

240. Hart, *supra* note 20, at 1365.

gate the essential functions of the Supreme Court.[241]

Professor Ratner's argument of the essential functions relies heavily on the structural and functional aspects of the Court's existence. The historic lack of complete review of lower federal court decisions and the Court's jurisdictional dependence on the substantive decision of state courts substantially restrict the efficacy of this claim. The mere *capacity* to provide uniformity and maintain supremacy, however, may be all that is required under the theory.[242] Professor Ratner's ultimate conclusion would appear to rest on the existence of a separate right to animate the structural and functional aspects of the essential functions theory, although he does not explain this factor. Professor Wechsler, on the other hand, simply does not accept this limited view of the exceptions and regulations clause, the supremacy clause, and the "essential functions" that devolved upon the Court:

> 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. . . .
>
> The difficulty with legislative [preclusion] of jurisdiction is not one of constitutional dimension . . . . Congress could not, for example, employ federal courts as organs of enforcement and preclude them from attending to the Constitution in arriving at decision of the cause.[243]

Professor Wechsler suggests that a limitation is imposed on any attempt to use the federal courts to enforce a given statute without reference to the Constitution. He cites cases or remedial limitations,[244] but his enforcement approach is functionally limited to the federal courts because Congress cannot providently dictate these limitations to the state court systems.[245] Professor Wechsler's claim would also appear to have no validity as applied to self-executing constitutional rights in need

241. Ratner, *supra* note 20, at 201-02.

242. If that is the case, the historic capacity of the Court to hear all constitutional attacks that have failed, together with the concurrent jurisdiction of the state courts until the federal courts had general federal question jurisdiction and the Supreme Court gained plenary (albeit discretionary) review powers, would fill that need.

243. Wechsler, *supra* note 20, at 1006.

244. *Id.* at 1006 n.10 (citing Lockerty v. Phillips, 319 U.S. 182 (1943); Yakus v. United States, 321 U.S. 414 (1944)).

245. The Court does not have supervisory power over the state court systems. The Congress may gain limited power over state court systems through the use of conditional monetary grants to the states; however, because of federalism and the limited degree of retained sovereignty, Congress cannot mandate state court jurisdiction or procedure.

only of enforcement. At any rate, the question is begged as to the substance of the statute itself, as was the case of infringing on the judicial decisionmaking process in *Klein*.[246]

As Professor Sager notes, review of decisions of the state court systems is where the primary value of the essential functions theory lies.[247] In addition to the lack of systemic congressional or judicial supervision of the state courts, the sheer potential for conflicting interpretations of the Constitution among fifty-four courts of last resort is great. Further, the implication that constitutional facts must be reviewable by at least *some* federal court[248] poses a substantial limitation on removing Supreme Court review. Here, however, history has been entirely consistent: the Court has always had statutory jurisdiction to review decisions of state courts that have denied claims arising under the Constitution.[249]

Thus, the essential functions theory is diametrically opposed to excepting from the jurisdiction of the Court constitutional questions arising from, at the least, state court judgments. Should such a bill progress so far, the essential functions theory provides a formidable model and deserves attention in the policymaking functions of the Congress and veto decisions of the executive. Standing alone, however, it lacks vitality as a means of adjudicating the constitutionality, both procedurally and substantively, of a particular legislative preclusion of an article III case or controversy of constitutional dimension.[250] From here, attention must turn to the second aspect of *Klein* for aid in constitutional adjudication. Just as it was the substantive effect and interpre-

246. *See* notes 181-89 and accompanying text *supra*.

247. Sager, *supra* note 20, at 42-57.

248. Crowell v. Benson, 285 U.S. 22, 56-57 (1932). *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 50 U.S.L.W. 4892 (U.S. June 28, 1982) (Nos. 81-150 & 81-546).

249. Judiciary Act of 1789, § 25, 1 Stat. 73.

250. Adding the operative condition of the doctrine of separation of powers does not add appreciably to the substantiality of the argument, for, in effect, the "essential functions" theory *is* a separation of powers argument. Separation of powers has been the formulation for several invalidations either of legislative or executive action as intrusive on authority vested in the other. *See* note 99 *supra*. One example of this doctrine over the judiciary's authority was the declination to exercise power to initially determine war veterans' claims on the theory that review would lie in the executive branch, making the judges' actions nonjudicial. Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). The only other example of the use of a separation of powers rationale by the judiciary to protect "essential functions" was *United States v. Klein*, *see* text accompanying notes 181-90, in which it was claimed that a statute intruded on the decisionmaking function of the court of claims and the Supreme Court. It will be remembered, however, that the *Klein* decision was intermeshed with a separate claim, *i.e.*, that the Court must give effect to the presidential pardon granted to Klein's decedent.

tation of a presidential pardon that breathed life into Klein's claim,[251] all constitutional adjudicatory analysis of exceptions must accordingly include, as a factor, consideration of whether or not a specific constitutional right is being affected by operation of the challenged exception.

C. A Synergetic View of the Amended Constitution and Jurisdictional Exceptions to Constitutional Claims

In considering the scope of the original (unamended) Constitution, we have already noted that the various clauses must be read as internally consistent. The Bill of Rights and the subsequent amendments to the Constitution serve different purposes and have different effects. The Bill of Rights, as has been noted in the limited context of the Seventh and Eleventh Amendments,[252] was corrective by design. The guarantee of enumerated individual rights was intentionally a limitation on the government, and those enumerated rights have since been supplemented on several occasions.[253] Professor Wechsler has stated:

> There is, to be sure, a school of thought that argues that "exceptions" has a narrow meaning, not including cases that have constitutional dimension; or that the supremacy clause or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts.[254]

From the point of view that the original Constitution appears to include sufficient room for the proposition that Congress may limit the Court's jurisdiction over "constitutional" cases, via the supremacy clause or otherwise, this may be true. The reference to the Fifth Amendment's due process clause must be considered, however, to be a reference to a *per se* theory that the clause is violated by an exception of constitutional cases. On the contrary, as a matter of application to inferior courts, Judge Augustus Hand noted:

> We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so

251. Only when the existence and effect of the pardon was established could the issue of the statute's constitutionality arise.

252. *See* notes 109-18 and accompanying text *supra*.

253. The specific guarantees of the 13th, 14th, 15th, 19th, 24th, and 26th Amendments are in marked contrast to the government organization and powers of the 16th, 17th, 20th, and 25th Amendments.

254. Wechsler, *supra* note 20, at 1005.

> exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.[255]

This dictum by a lower federal court runs counter to Professor Wechsler's commentary that there is no *per se* violation of the due process clause, but the real issue is whether the *application* of the exception deprives a person of due process. In this functional mode, an exception must also be tested against the particular enumerated rights of the Bill of Rights and subsequent explicit guarantees. The powers of government are in all ways restricted by explicit rights guaranteed in the Constitution.[256]

A major debate over passage of the Bill of Rights focused, as today, on the effect of enumerating rights. Madison's oft-quoted remarks on the subject provide a useful starting point.

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [eventually the Ninth Amendment].
>
> It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of the particular States. It is true, there are a few particular States in which some of the most valuable articles have not, at one time or another, been violated; but it does not follow but they may have, in a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the

255. Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). *Battaglia* challenged the jurisdictional limitations of the Portal-to-Portal Act on the basis of a 5th Amendment due process challenge. As the court found no due process right, there was no need to determine whether the court had jurisdiction to adjudicate that right.

256. The multitude of cases that underline this common statement need not be catalogued here. The most conspicuous of cases suffices to illustrate that unless a particular governmental powers amendment was intended to alter or limit a specific right guaranteed by a previous amendment, the previous amendment will effectively limit a later governmental power. *See* Craig v. Boren, 429 U.S. 190 (1976) (state power to regulate intoxicating liquors under 21st Amendment limited by equal protection clause of the 14th Amendment).

> legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[257]

For organizational purposes, though not adoption, the conservative political notion might be introduced that the degree to which rights are guaranteed in the Bill of Rights and subsequent amendments is dependent upon whether the action in their regard is expressly prohibited, implicit from the requirement of governmental protection, or assumed from the structure and function of the government and the clauses of the Constitution.

If any limitation on the power of Congress to enact exceptions of constitutional claims from the Court's appellate jurisdiction must be activated by invoking the rights themselves, the device of limiting rights by removing jurisdiction to adjudicate them must also be subjected to review under those rights. Any limitation on the power of Congress in this regard must flow directly from the incapacity of Congress to effect the rights in question. Thus, it is necessary to examine the several rights involved in contemporary exceptions legislation.

Assuming that the affected right is one expressly, directly guaranteed in the Bill of Rights or another substantive guarantee, the question becomes whether that particular right limits the exceptions and regulations clause. Assuming instead, however, that the right affected is not textually established and defined, one must look to the contextual framework of the right and, if all else fails, the substantive values of the Constitution and how these values are interpreted. It is along this shifting spectrum of lessening certainty that the analysis will proceed.[258]

The dual rights to the free exercise of religion and to be free from the governmental establishment of religion might be the premier examples from the contemporary debate of rights textually found in the Constitution that may restrict the right of Congress to except "constitutional cases" from the Court's jurisdiction. In the first instance, the preamble of the First Amendment prohibits congressional action in the area of religious liberty: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof

257. 1 ANNALS OF CONG. 456-57 (Madison, (C), Va.) June 8, 1789).

258. The spectrum itself is disputable. We might begin with the least controversial and most acceptable form of constitutional interpretation, that of textual review, go so far as the enumeration of substantive values that an individual may embrace, and posit all such positions as legitimately a part of the judicial power. The last of these are clearly minority views. *See, e.g.*, Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223 (1981); Tribe, *supra* note 20; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

. . . ." This provision does not directly guarantee the right; rather, it assumes the right and prohibits interference. The extant standards for the interpretation of the right are to be found in the cases of the very type that Congress seeks to limit—*Engel v. Vitale*[259] and *Abington Township School District v. Schempp*.[260] In *Engel*, the Court dealt with a specific regulation and practice of the New York state schools of reciting the "Regents' Prayer" each day:

> We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York had adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. . . . [W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.[261]

H.R. 865 and S. 481, in the Ninety-seventh Congress, definitionally exclude this type of written prayer from their ambit.[262] Furthermore, the limitation of the statute to "voluntary" prayer is an attempted "savings" clause; however, there is substantial doubt as to whether the "voluntariness" device would work. The statute could be held invalid on the ground that public school regulation of student conduct inherently vitiates voluntariness.[263] Even so, as the Court noted directly in *Engel*:

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause . . . . The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or

259. 370 U.S. 421 (1962).

260. 374 U.S. 203 (1963).

261. 370 U.S. at 424-25.

262. *See* note 12 *supra*.

263. It is possible to avoid the entire question of constitutionality by reaching a conclusion that school children can exercise no constitutional voluntarism in complying with even the faintest suggestion by a teacher that they may pray if they so choose and that, in effect, any suggestion at all may be deemed coercive. This is merely a use of the common tactic of avoiding constitutional decisions wherever possible. Begging additional litigation by beginning down this road, however, without concluding the trip to a firm rule, is itself reason to reach the constitutional issue. Thus, if the choice is one of reaching the constitutional issue or creating a rule with unknown long-term effects, the former is preferable.

not.[264]

The direct relation of the state law to the limitation of power under the First Amendment obviates any need for coercive action on the part of the state.

Shortly after *Engel*, a requirement that verses of the Holy Bible be read at the beginning of each school day was challenged in *Schempp*. The Court rejected the secular purposes proffered by the state and stipulated future standards:

> [W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[265]

In addition, the Court has added a third test—that the statute in question not foster "an excessive government entanglement with religion."[266]

"Secular purpose," "principal or primary effect," and "non-excessive entanglement" are the three separate tests under which the school prayer proposals, such as H.R. 865[267] and S. 481[268] in the Ninety-seventh Congress, could be declared unconstitutional. Considering the ongoing litigation of government-religion separation, the impatience of the Court with that litigation, and the rhetoric supporting such proposals, survival of the school prayer bill from a constitutional attack appears doubtful. In the first instance, such bills do not appear to meet the substantive requirements of the *Engel* and *Schempp* cases which they seek to limit.[269] Also, the device of "voluntariness" may be seen as ineffectual, since prayer is suggested by the authority figure of teachers.[270]

Of similar contextual clarity is the issue of "busing." If the current proposals were recast in a form more amenable to treatment as jurisdictional—for example, to except appellate jurisdiction over cases relating

264. 370 U.S. at 430.

265. 374 U.S. at 222.

266. *E.g.*, *Lemon I*, 403 U.S. 602, 612-13 (1971). *See generally* note 13 *supra*.

267. 97th Cong., 1st Sess. (1981).

268. *Id.*

269. This is to suggest that the current school prayer bill is unconstitutional because it is an "encouragement" of religion in violation of *Engel*; its primary and principal effect is to remove the Supreme Court from adjudicating complaints about religious exercises, thereby suggesting to local authorities license to engage in establishment of religion in schools.

270. *See* note 263 *supra*.

to pupil composition of schools based on race—the proposal would be within the analytical framework of this article. The prohibition of racial discrimination is contextually founded in the Fourteenth Amendment's equal protection clause. It seems clear that a direct proposal to limit desegregation would be suspect.[271]

The removal of the Supreme Court's capacity to review school desegregation cases is not distinguishable from other methods implicating student assignment that were formally nondiscriminatory criteria but that were discriminatory in application—such as direct pupil placement laws;[272] freedom of choice plans,[273] zoning, or a combination of the two;[274] minority transfer plans;[275] and school closings.[276] State interference with the process of desegregation has been struck down,[277] and it seems doubtful that the Court would welcome a congressionally mandated end to its overseeing of the process. Assuming only a case that might necessarily be brought in federal court where past discriminatory practice could be proved, the action of Congress in removing jurisdiction would become the predicate action continuing that discrimination. Accordingly, the jurisdictional exception would fail for the same reason that all the other facially neutral actions failed: discriminatory impact.[278] Furthermore, such a proposal would encourage public educational discrimination far more significantly than did the California constitutional prohibition of statutes providing for equal treatment in housing opportunities that was struck down in *Reitman v. Mulkey*;[279] the Akron charter provision—requiring housing opportunity legislation to traverse a more rigorous gauntlet than normal ordinances—that was

271. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Brown v. Board of Educ., 347 U.S. 483 (1954), 349 U.S. 294 (1955).

272. *E.g.*, Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969); Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969).

273. *E.g.*, Green v. County School Bd., 391 U.S. 430 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968).

274. *E.g.*, Northcross v. Board of Educ., 333 F.2d 661 (6th Cir. 1964).

275. *E.g.*, Goss v. Board of Educ., 373 U.S. 683 (1963).

276. *E.g.*, Griffin v. County School Bd., 377 U.S. 218 (1964). *See also* Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962); Bush v. Orleans Parish School Bd., 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961).

277. McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

278. Only H.R. 869, 97th Cong., 1st Sess. (1981), would appear to fail on this point. Most busing bills are limitations on remedies, although these may fail as an interference under *Barresi*, 402 U.S. 39 (1971), and *Swann*, 402 U.S. 43 (1971).

279. 387 U.S. 369 (1967).

struck down in *Hunter v. Erickson*;[280] or the state of Washington's assumption of direct control (here, by referendum) over whether to use busing in a school district's desegregation plan that was struck down in *Washington v. Seattle School District No. 1*.[281] Jurisdictional modification that encourages racial discrimination would appear no less suspect than legislation that would have the same effect more directly. This is not to say that Congress could not repeal the entirety of the civil rights laws currently in the United States Code, assuming its intent was not to encourage discrimination, but only to say that Congress cannot affirmatively enact legislation having a discriminatory effect. Nor does section 5 of the Fourteenth Amendment provide shelter from such an analysis under the congressional authority specifically provided—authority to legislate implementation of the requirements of equal protection under the Fourteenth Amendment—even though this type of proposal appears to be antithetical to equal protection.

At the other end of the spectrum, where perhaps the least textual and contextual support for the substantive rights involved may be found, lies the question of abortion.[282] *Roe v. Wade*[283] and *Doe v. Bolton*[284] establish the right of a woman to choose to have an abortion during the first trimester of pregnancy and base that right on the Fourteenth Amendment. Whatever one's view regarding the legitimacy of that right, it must be admitted that there is no textual or contextual support for the conclusion reached. Rather, the right to an abortion is a substantive right created by the Court and is based on the values of the Constitution as interpreted by the Court at the time of the decision.[285] The lack of textual or contextual support for the right of a woman to choose to have an abortion is the underlying basis for much of the political debate over the efficacy of the right, whether couched in terms of granting the state and Congress the power to regulate abortion by a constitutional amendment[286] or of prohibiting the Supreme Court

280. 393 U.S. 385 (1969).

281. 50 U.S.L.W. 4998 (U.S. June 30, 1982) (No. 81-9). A more direct approach was taken and struck down in Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y.), *aff'd*, 402 U.S. 935 (1971). The Court has distinguished these evasive tactics from the mere repeal, without more, of statutory requirements greater than the minimum imposed by the 14th Amendment. Crawford v. Board of Educ., 50 U.S.L.W. 5016 (U.S. June 30, 1982) (No. 81-38).

282. The decisional history concerning abortion indicates substantial vacillation over the "morality" of the act. Morality, however, ought to play no part in the process of constitutional decisionmaking. Here the problem is one of the lack, until recently, of any contextual reference, consideration, or concern for abortion.

283. 410 U.S. 113 (1973).

284. 410 U.S. 179 (1973).

285. *See* Tribe, *supra* note 20.

286. *E.g.*, S.J. Res. 16, 97th Cong., 2d Sess. (1982).

from reviewing state or inferior federal court decisions on abortion.[287]

Substantial differences will arise over the order and relative merit of the spectrum of constitutional interpretation of rights, and these are but some preliminary thoughts on the manner of addressing the interface of an exception of cases based on a constitutional right with the legitimacy of that right *in se*. Contextually supported rights are more likely to receive protection against exceptions from Supreme Court appellate review than rights newly created by the Court. Nonetheless, the question of excepting constitutional claims from the Supreme Court's appellate jurisdiction will arise in this substantive manner.

Conclusion: The Adjudicatory Framework

The adjudicatory path for reaching an outcome in a case of exception of classes of constitutional rights, at least, is clear. Assuming that a particular bill becomes law and that the law provides for an exclusion of jurisdiction from the lower federal courts, a case and controversy must arise in a state court system. The adjudication of the right by the state courts need not affirm or deny the federal right, for, as a general matter, the Supreme Court has jurisdiction to hear the case by varying methods.[288] The immediate question facing the Court is whether it has jurisdiction to hear and determine the matter presented. There are only two alternative consequences of accepting jurisdiction to determine jurisdiction: either (a) the limitation of jurisdiction is constitutional and the Court has no jurisdiction to proceed further, or (b) the limitation on jurisdiction is unconstitutional and the Court must proceed to the merits of the claim.

The claim must be of a constitutional dimension in order to raise the current question, and obviously it must be the claim sought to be excepted from the Court's jurisdiction. The question of the jurisdiction of the Court, however, is not immediately tied to the claim itself. First, the Court must consider the authority under which Congress has enacted the exception. The plaintiff bears the burden of going forward and persuading the Court to look beyond the presumption that the enactment is constitutional. As has been discussed, the text and direct context of the Constitution do not provide support for the notion that Congress has authority to make constitutional exceptions, nor does his-

287. *E.g.*, H.R. 867, S. 583, 92d Cong., 1st Sess. (1981). This should not be read to suggest that the right to an abortion is any less constitutional than other rights, merely that there is less textual support, and, thus, greater vulnerability to attack.

288. *Compare* 28 U.S.C. § 1257(1) *with id.* at § 1257 (2) (1976). *See* notes 192-93 and accompanying text *supra*.

tory support that notion, nor is such a notion precluded. In essence, the question before the Court will be novel. The party claiming the right will advocate that the essential functions of the Court are implicated and that only the Supreme Court is capable of providing for uniform interpretation of the Constitution in compliance with the supremacy clause and the doctrine of separation of powers. This argument will be pitted against the plethora of the Court's own dicta of deference to the Congress over the scope of jurisdiction. An outcome on this issue alone is unlikely.

Next, the party claiming the right must show that the exception itself does violence to the right claimed. Here it is inescapable that the Court will extend the line of jurisprudence under the Constitution in order to resolve the argued collision of right and congressional power. Indeed, the right claimed and the power asserted by Congress must in fact collide in order for the party claiming the right to argue the cause. Further, the legitimacy of the right asserted will be again tested. Textually and contextually based rights provide a clear path to adjudicatory choice within the bounds of the clauses of the Constitution itself. Rights that the Court has interpolated from the Constitution and contemporary values will face a far sterner challenge.

Thus, the question returns remarkably to the bifurcated analysis and decision of *Klein*. The case would be clearer if, as in *Klein*, the outcome were proscribed by the statute. Nonetheless, the litigatory requirement that the right animate and collide with the asserted power provides sufficient clarity of the outcome-determinativeness of the exceptions of constitutional claims from the Court's jurisdiction. If the Court ultimately finds that the claim is of the constitutional nature jurisdictionally proscribed by the statute, the only alternative short of declaring the statute unconstitutional would be dismissal. Thus, *Klein*, not *McCardle*, is the appropriate standard for consideration, and constitutional development should hinge on this precedent.

The impact of legislating and adjudicating exceptions of constitutional claims from the Supreme Court's appellate jurisdiction is highly speculative. Exceptions from jurisdiction in which the constitutional claim is founded on express textual prohibitions of governmental action, such as the First Amendment's prohibition of congressional enactments respecting an establishment of religion, are unconstitutional, whether such a claim is based on the infringement on the Court's essential functions in violation of the doctrine of separation of powers, or directly as a violation of the First Amendment. Exceptions from jurisdiction in which the constitutional claim is founded on contextual

rights, such as the prohibition of racial discrimination in the Fourteenth Amendment, are more problematic, but past decisions indicate that the discrimination that would be established by such an exception would be struck down.[289] Exceptions from jurisdiction based on nontextual rights, such as abortion, pose much more substantial problems—first, in establishing a nexus between the right to an abortion and the Court's jurisdiction; second, in pressing the effects of the limitation on the Court's essential functions. The question of whether the constitutional fabric of government would withstand such a direct conflict between the powers of Congress and the Court warrants the most serious avoidance.

289. Read together, Washington v. Seattle School District No. 1, 50 U.S.L.W. 4998 (U.S. June 30, 1982) (No. 81-9), Crawford v. Board of Education, 50 U.S.L.W. 5016 (U.S. June 30, 1982) (No. 81-38), and Northern Pipe Line Constr. Co. v. Marathon Pipeline Co., 50 U.S.L.W. 4892 (U.S. June 28, 1982) (Nos. 81-150 & 81-546), indicate that the Court is fully cognizant of the potential for further evasion of desegregation by either the states or Congress.