

## THE ARTICLE III EXCEPTIONS CLAUSE: ANY EXCEPTIONS TO THE POWER OF CONGRESS TO MAKE EXCEPTIONS?

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Here is a typical coffee-table discussion that could take place anywhere in America:

*“What’s gotten into these federal courts lately? They legalize abortion and sodomy, then they prohibit the Ten Commandments and ‘under God’ in the Pledge!”*

“They’re just enforcing the Constitution. That’s their job.”

*“Not like that it isn’t. It’s time Congress told the judges to quit messing with basic American values.”*

“Congress can’t interfere with the Court. The Constitution provides for separation of powers.”

*“It also provides checks and balances. One of those checks is the power of Congress to cut off the Court’s jurisdiction.”*

“That’s insane! The Constitution says no such thing!”

*“It sure does! Just look at Article III, Section 2, Paragraph 2: ‘In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.’”*

“Well, that can’t mean what you say it means.”

And so the debate continues. As the federal courts consider cases that involve the most deep-seated convictions of Americans, and issues on which Americans are sharply divided, they understandably strike raw nerves. Public frustration is redoubled since, of the three branches of government, the judiciary is the furthest removed from popular election and public influence. Many believe that the nation is being governed by

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the “majority vote of a nine-person committee of lawyers, unelected and holding office for life.”<sup>1</sup>

Frustrated by court decisions prohibiting Ten Commandments displays and armed with substantial popular support, Decalogue supporters have proposed the Constitution Restoration Act, which would limit the federal courts’ jurisdiction over cases involving the acknowledgment of God through the public display of the Ten Commandments.<sup>2</sup> In a similar vein, opponents of same-sex marriage have introduced the Marriage Protection Act, which would remove the federal courts’ jurisdiction over cases arising under the Defense of Marriage Act.<sup>3</sup> Still others have proposed the Pledge Protection Act, which would prohibit federal courts from hearing cases involving the phrase “under God” in the Pledge of Allegiance.<sup>4</sup>

Opponents of these bills are often astounded that anyone could seriously believe that Congress could encroach on the federal courts’ independence in so blatant a manner as this. Conversely, supporters are equally incredulous that anyone could question Congress’s power to limit the Court’s appellate jurisdiction when that power is plainly spelled out in Article I, Section 2.

What does the Exceptions Clause really say? What did the Framers mean by it? How have the courts interpreted it, and how do constitutional scholars understand it today? This article will explore these questions.

On an even deeper level, these questions go to the heart of the judiciary’s role in our constitutional republic—a role that has been disputed almost from the beginning. Gouverneur Morris, who chaired the Committee on Style and wrote most of the final draft of the Constitution, declared that “[t]hose, who are charged with the important duties of administering justice, should, if possible, depend only on God.”<sup>5</sup>

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<sup>1</sup> Lino A. Graglia, *Judicial Review on the Basis of ‘Regime Principles’: A Prescription for Government by Judges*, 26 S. TEX. L. REV. 435, 441 (1985).

<sup>2</sup> H.R. 3799, 108th Cong. (2004).

<sup>3</sup> H.R. 3313, 108th Cong. (2004). This bill passed the House of Representatives. 150 CONG. REC. H6613 (daily ed. July 22, 2004). The Senate read the bill and then referred it to the Committee on the Judiciary; there has been no further action pertaining to this bill. 150 CONG. REC. S8853 (daily ed. Sept. 7, 2004).

<sup>4</sup> H.R. 2028, 108th Cong. (2004). This bill passed the House of Representatives. 150 CONG. REC. H7478 (daily ed. Sept. 23, 2004). The Senate received the bill from the House, but there has been no further action pertaining to this bill. 150 CONG. REC. S9722 (daily ed. Sept. 27, 2004).

<sup>5</sup> Gouverneur Morris, *Speech Composed for the King of France, With Some Observations on the Constitution*, in 2 THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS 490, 506 (Jared Sparks ed., Boston, Gray & Bowen 1832).

But Thomas Jefferson, primary author of the Declaration of Independence, the third President of the United States, and a frequent critic of the Federalist-controlled judiciary, warned that “[t]he great object of my fear is the federal judiciary. That body, like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is ingulphing insidiously the [state] governments into the jaws of that which feeds them.”<sup>6</sup>

From the inception of the Republic, Americans have looked on the third branch of government with mixed apprehensions. On the one hand, most agree with Gouverneur Morris that judges should decide cases justly on their merits, unaffected by political pressure. On the other hand, most also share Jefferson’s concern that if judges are not checked and balanced by other branches or levels of government, they will become tyrannical and oppressive.

These concerns surfaced in the early 1800s, when President Jefferson and others objected to the opinion written by Chief Justice John Marshall in *Marbury v. Madison*, which held that the Supreme Court had the power to invalidate acts of Congress that conflict with the Constitution.<sup>7</sup> Jefferson emphatically rejected Marshall’s doctrine of judicial review and pressed for the impeachment and removal of several Federalist judges.<sup>8</sup>

Conflict between the judicial and executive branches arose again in the 1820s and 1830s. In a series of decisions,<sup>9</sup> the Supreme Court limited the authority of states to regulate Indian nations on their tribal lands. President Andrew Jackson strongly resisted these decisions, reportedly responding to the 1832 *Worcester v. Georgia* ruling by saying, “John Marshall has made his decision,” and “[n]ow let him enforce it.”<sup>10</sup>

Shortly after the outbreak of the War Between the States (1861–1865), conflict again surfaced between the executive and judicial branches. A federal circuit court, in an opinion written by Chief Justice Taney, a Democrat, ruled that President Abraham Lincoln lacked

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<sup>6</sup> Letter from Thomas Jefferson to Judge Spencer Roane (Mar. 9, 1821), in 10 THE WRITINGS OF THOMAS JEFFERSON 188, 189 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1899).

<sup>7</sup> 5 U.S. (1 Cranch) 137, 180 (1803).

<sup>8</sup> ALAN BRINKLEY, AMERICAN HISTORY: A SURVEY 198–200 (11th ed. 2003). Jefferson’s congressional allies impeached and removed District Judge John Pickering of New Hampshire. A majority in the House voted to impeach Supreme Court Justice Samuel Chase, but the Jeffersonians fell short of the two-thirds vote needed in the Senate to remove him from office. *Id.* at 199–200.

<sup>9</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>10</sup> BRINKLEY, *supra* note 8, at 229, 245. Some historians question whether Jackson actually used those words, but in any event the decision was not enforced. *Id.*

constitutional authority to suspend the writ of habeas corpus.<sup>11</sup> Lincoln regarded this ruling as a personal embarrassment and an impediment to his conduct of the war and issued a presidential warrant for Taney's arrest, although the warrant was never served.<sup>12</sup>

Again in the 1930s, conflict arose between the executive and judicial branches, with Congress caught in the middle. President Franklin D. Roosevelt pressed for the passage of New Deal legislation to create various federal programs that were intended to bring the nation out of an economic depression. But a conservative-dominated Supreme Court invalidated much of this legislation, claiming it violated the Commerce Clause or the General Welfare Clause.<sup>13</sup> Roosevelt sought to change the ideological makeup of the Court by proposing legislation which, if passed by Congress, would authorize the appointment of one additional Justice for every Justice over the age of seventy.<sup>14</sup> Roosevelt declared the following in his *Fireside Chat* to the American public on March 1, 1937:

We have \* \* \* reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men.

I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized.<sup>15</sup>

Roosevelt's "court-packing" plan encountered widespread opposition from Congress, the public, and many Democrats, and was never

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<sup>11</sup> *Ex parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487).

<sup>12</sup> FREDERICK S. CALHOUN, *THE LAWYERS: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789–1989*, at 103 (1989). Calhoun says the warrant was placed in the hands of Ward Hill Lamon, U.S. Marshal for the District of Columbia, with Lincoln's instructions to "use his own discretion about making the arrest unless he should receive further orders." *Id.* Lamon decided not to arrest Chief Justice Taney, and as Calhoun says, "Taney was thus spared the embarrassment of imprisonment, the country was saved from an additional constitutional crisis, and Lamon neatly avoided embroiling himself and the president in another controversy." *Id.*

<sup>13</sup> *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>14</sup> LEWIS PAUL TODD & MERLE CURTI, *RISE OF THE AMERICAN NATION* 713–14 (1964).

<sup>15</sup> CRAIG R. DUCAT, *CONSTITUTIONAL INTERPRETATION* 314 (8th ed. 2004) (quoting Franklin D. Roosevelt, *Fireside Chat* (radio broadcast Mar. 9, 1937)). Note the similarity of Roosevelt's rhetoric to that of conservative critics of the Court today.

adopted.<sup>16</sup> In a key decision later that year, Chief Justice Charles Evans Hughes appeared to separate himself from the conservative bloc, resulting in a 5-4 decision upholding the National Labor Relations Act.<sup>17</sup> The tension cooled as the remaining conservative Justices retired over the following several years.<sup>18</sup>

The issue, however, remains very much alive as Americans continue to debate how to restrain judicial overreaching while at the same time preserving judicial independence. In the latter half of the twentieth century, most criticism of the judiciary has been from conservatives. In the 1950s and 1960s, many conservatives criticized the Warren Court for decisions concerning the rights of criminal defendants,<sup>19</sup> and some called for the impeachment of Chief Justice Earl Warren.<sup>20</sup> From the 1970s through the present, conservatives have criticized the federal courts' rulings on abortion,<sup>21</sup> sodomy,<sup>22</sup> the role of religion in the public arena (specifically school prayer),<sup>23</sup> and the public display of religious symbols.<sup>24</sup>

It is obvious from this brief history that criticism of the federal judiciary has not been limited to any one side of the political spectrum. During each era, a variety of remedies have been suggested: impeaching judges and Justices, refusing to enforce judicial decrees, amending the Constitution, "packing" the court, appointing judges and Justices who

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<sup>16</sup> *Id.*

<sup>17</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>18</sup> *DUCAT*, *supra* note 15, at 314–15; *TODD & CURTI*, *supra* note 14, at 714.

<sup>19</sup> *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>20</sup> BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 250, 280–82, 491, 541–42, 627 (1983).

<sup>21</sup> *Roe v. Wade*, 410 U.S. 113 (1973). Subsequent decisions following *Roe* were also criticized. *E.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>22</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>23</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>24</sup> *Stone v. Graham*, 449 U.S. 39 (1980) (dealing with a mandatory display of the Ten Commandments in Kentucky public schools). More recently, a sharply divided Supreme Court struck down a Ten Commandments display in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), and upheld a Ten Commandments display at the Texas State Capitol in *Van Orden v. Perry*, 545 U.S. 677 (2005). On August 18, 2006, in a fascinating opinion that combines folksy expressions with elements and structure from Dante's *Inferno*, a federal judge upheld as constitutional a Ten Commandments display in *Stigler, Oklahoma. Green v. Bd. of County Comm'rs*, 450 F. Supp. 2d 1273 (E.D. Okla. 2006).

For conservative criticism of these rulings, see generally ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003); PHYLLIS SCHLAFLY, *THE SUPREMACISTS: THE TYRANNY OF JUDGES AND HOW TO STOP IT* (rev. ed. 2006); EDWIN VIEIRA, *HOW TO DETHRONE THE IMPERIAL JUDICIARY* (2004).

are more to the critics' liking, and limiting the Supreme Court's appellate jurisdiction or the jurisdiction of other federal courts.<sup>25</sup>

The last of these remedies—limiting the federal courts' jurisdiction—is the focus of this article. This article will examine the wording of the Exceptions Clause of Article III, Section 2 of the U.S. Constitution, the circumstances that gave rise to its adoption, statements of the Framers that bear on its meaning, the views of early and current constitutional scholars, and Supreme Court decisions on the Exceptions Clause.

Both sides seem firmly entrenched in their positions. This article hopefully will provide information and food for thought for both sides. The issue is more complex than either side recognizes, and while the authority to limit the Supreme Court's appellate jurisdiction and the jurisdiction of lower federal courts definitely exists, it is subject to abuse and should be exercised carefully and in ways that do not conflict with the rest of the Constitution.

#### I. UNITED STATES CONSTITUTION, ARTICLE III, SECTION 2, PARAGRAPH 2

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.<sup>26</sup>

The words of this provision that are the subject of this article are "*with such Exceptions, and under such Regulations as the Congress shall make.*" Over the years several interpretations have been suggested: (1) Congress has unfettered discretion to limit the Supreme Court's appellate jurisdiction;<sup>27</sup> (2) Congress may limit the appellate jurisdiction of the Supreme Court so long as another federal court remedy is available (that is, so long as the aggrieved party may bring the action in

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<sup>25</sup> At the time of this writing, several bills to limit the Court's appellate jurisdiction are pending in the 108th Congress, but the best known is the Constitution Restoration Act. H.R. 3799, 108th Cong. (2004). Since this bill may undergo substantial change by the time this article is published, the author will not attempt to provide a detailed analysis of it here.

<sup>26</sup> U. S. CONST. art. III, § 2, para. 2. This provision remains in effect today except that cases in which a state is a party are also affected by the Eleventh Amendment, ratified in 1795, which states: "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." U.S. CONST. amend. XI. The Eleventh Amendment does not affect the interpretation of the Exceptions Clause and will not be discussed further in this article.

<sup>27</sup> See *infra* pp. 24–29.

a lower federal court);<sup>28</sup> (3) Congress may limit the appellate jurisdiction of the Supreme Court regardless of whether a lower federal court has jurisdiction, because the aggrieved party may bring the action in a state court;<sup>29</sup> (4) Congress may limit the appellate jurisdiction of the Supreme Court so long as no federal constitutional right is involved;<sup>30</sup> (5) Congress may limit the appellate jurisdiction of the Supreme Court, unless this action would have the effect of reversing or overturning a court decision, or affect the outcome of a pending case;<sup>31</sup> and (6) the Exceptions Clause modifies the word “Fact,” not the phrase “appellate Jurisdiction,” and simply means that Congress may limit the authority of the Supreme Court to alter fact determinations by juries.<sup>32</sup>

#### A. *The Adoption of the Exceptions Clause*

The Constitutional Convention was scheduled to begin on May 14, 1787, but a quorum was not present. The Convention, therefore, began its deliberations on May 25.<sup>33</sup> On May 29, Edmund Randolph of Virginia presented the “Virginia Resolves,” which were proposals of the Virginia delegation. Resolve No. 9 called for the establishment of a national judiciary:

That the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the *dernier ressort*, all piracies and felonies on the seas; captures from an enemy; cases in which foreigners, or citizens of other states, applying to such jurisdictions, may be interested, or which respect the collection of the national revenue; impeachments of any national officer; and questions which involve the national peace or harmony.<sup>34</sup>

The Virginia Resolves distinguished between original and appellate jurisdiction, but gave Congress no power to make exceptions to the federal courts’ jurisdiction.

Also on May 29, Charles Pinckney of South Carolina presented a draft of a more detailed plan for a federal government. Article IX of Pinckney’s plan provided for a judicial system:

ART. IX. The legislature of the United States shall have the power,

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<sup>28</sup> See *infra* pp. 31–32, 36–37, 38–39, 41, 42–43.

<sup>29</sup> See *infra* pp. 20, 39–41, 43–45.

<sup>30</sup> See *infra* pp. 29–30, 36–37, 41.

<sup>31</sup> See *infra* pp. 38. *Contra* pp. 45–46.

<sup>32</sup> See *infra* pp. 16–17, 48–49.

<sup>33</sup> JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION (1819), reprinted in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 139, 139 (photo. reprint 1968) (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT’S DEBATES].

<sup>34</sup> *Id.* at 144. *Dernier ressort* means “last resort.”

and it shall be their duty, to establish such courts of law, equity, and admiralty, as shall be necessary.

The judges of the courts shall hold their offices during good behavior and receive a compensation which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court, whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers, and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment affecting ambassadors, and other public ministers, this jurisdiction shall be original; and in all the other cases appellate.

All criminal offences (except in cases of impeachment) shall be tried in the state where they shall be committed. The trials shall be open and public, and be by jury.<sup>35</sup>

Pinckney's plan contained some features that were eventually adopted: the power and duty of Congress to establish courts, judges serving during good behavior, fixed compensation, a Supreme Court, public trials in the jurisdiction where the offense took place, trial by jury, and original jurisdiction in a few cases and appellate jurisdiction in all others. His plan contained no mention of congressional authority to limit the courts' jurisdiction.

On June 15, William Patterson of New Jersey submitted a set of resolutions to the Convention. Resolution 5 read as follows:

*Resolved*, That a federal judiciary be established, to consist of a supreme tribunal, the judges of which to be appointed by the executive, and to hold their offices during good behavior ; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary, so established, shall have authority to hear and determine, in the first instance, on all impeachments of federal officers ; and by way of appeal, in the *dernier ressort*, in all cases touching the rights and privileges of ambassadors; in all cases of captures from an enemy ; in all cases of piracies and felonies on the high seas ; in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any act or ordinance of Congress for the regulation of trade, or the collection of the federal revenue. That none of the judiciary officers shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for [\_\_\_\_\_] thereafter.<sup>36</sup>

Mr. Patterson's resolutions distinguish between original and appellate jurisdiction and limit original jurisdiction to cases involving

<sup>35</sup> *Id.* at 148–49.

<sup>36</sup> *Id.* at 176. Patterson left a blank space between “for” and “thereafter” at the end of the quote, presumably to be filled in at a later time.



impeachments. His resolutions contain no provisions for Congress to limit the courts' jurisdiction.

On June 18, Alexander Hamilton submitted a plan of government which contained the following provision:

The supreme judicial authority of the United States to be vested in [ ] judges, to hold their offices during good behavior, with adequate and permanent salaries. This court to have original jurisdiction in all causes of capture; and an appellate jurisdiction in all causes in which the revenues of the general government, or the citizens of foreign nations, are concerned.<sup>37</sup>

Like the other proposals, Hamilton's plan provided for very limited original jurisdiction and broader appellate jurisdiction, but no provision for congressional limitations on jurisdiction. The plan also provided for a chief executive and a senate, both of which were to serve during good behavior.<sup>38</sup> One of the Framers noted that Hamilton's plan was "approved by all and supported by none," and was neither discussed nor voted on.<sup>39</sup>

A Committee of the Whole House then considered Mr. Patterson's resolutions, and on June 19, the Committee reported its approval of nineteen resolutions. Resolutions 11–13 read as follows:

11. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal ; the judges of which to be appointed by the second branch of the national legislature ; to hold their offices during good behavior ; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution.

12. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.

13. *Resolved*, That the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachment of any national officers, and questions which involve the national peace and harmony.<sup>40</sup>

For the remainder of June and much of July, the delegates considered these various proposals.

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<sup>37</sup> *Id.* at 179. Hamilton left a blank space between "in" and "judges" at the beginning of the quote, presumably to be filled in at a later time.

<sup>38</sup> *Id.*

<sup>39</sup> One source attributes this statement to James Madison. W. CLEON SKOUSEN, *THE MAKING OF AMERICA: THE SUBSTANCE AND MEANING OF THE CONSTITUTION* 159 (1985). Another source attributes a similar statement to William Johnson of Connecticut. *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 366 (Max Farrand ed., rev. ed. 1966).

<sup>40</sup> MADISON, *supra* note 33, at 181–83.

On July 18, the Convention unanimously passed a resolution “that a national judiciary be established,”<sup>41</sup> and another that this judiciary was “to consist of one supreme tribunal.”<sup>42</sup> The delegates considered a proposal to amend Resolution 11 so that the “national executive” rather than the “second branch of the national legislature” would appoint federal judges; this proposed amendment was defeated.<sup>43</sup> They also considered an amendment that would change Resolution 11 to read that “the judges . . . shall be nominated and appointed by the executive, by and with the advice and consent of the second branch of the legislature of the United States, and every such nomination shall be made at least [ ] days prior to such appointment.”<sup>44</sup> This amendment, too, was defeated.<sup>45</sup> Then came another amendment which would change Resolution 11 to read: “that the judges shall be nominated by the executive ; and such nomination shall become an appointment, if not disagreed to, within [ ] days, by two thirds of the second branch of the legislature.”<sup>46</sup> The delegates unanimously agreed to postpone consideration of this amendment.<sup>47</sup> They unanimously accepted the provisions of Resolution 11 concerning service during good behavior and punctual compensation.<sup>48</sup> They struck the provision concerning increased compensation, but left the provision concerning diminished compensation intact.<sup>49</sup> They approved Resolution 12 unanimously and changed Resolution 13 to read: “[t]hat the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony.”<sup>50</sup>

On July 26, the delegates referred the resolutions they had adopted, as well as the proposals of Mr. Pinckney and Mr. Patterson, to a Committee on Detail consisting of John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania. They then adjourned until August 6 to give the Committee on Detail

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<sup>41</sup> *Id.* at 209.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* The proposed amendment left the number of days blank.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 209–10. The proposed amendment left the number of days blank.

<sup>47</sup> *Id.* at 210.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

time to consider these proposals.<sup>51</sup> At the time of adjournment, the adopted resolutions concerning the judiciary read as follows:

XIV. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature ; to hold their offices during good behavior ; to receive punctually, at stated times, a fixed compensation for their services, in which no diminution shall be made, so as to affect the persons actually in office at the time of such diminution.

XV. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.

XVI. *Resolved*, That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony.<sup>52</sup>

Up to that time, the delegates had considered the original and appellate jurisdiction of the federal judiciary, but had not considered the possibility of giving Congress the authority to limit the jurisdiction of the federal courts.

On August 6, the delegates reconvened and received the report of the Committee on Detail. The Committee presented the draft of a constitution in which part of Article XI read as follows:

ART. XI. SECT. I. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States.

SECT. 2. The judges of the Supreme Court, and of the inferior courts shall hold their offices during good behavior. They shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

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 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

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<sup>51</sup> *Id.* at 220–22.

<sup>52</sup> *Id.* at 222.

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.

SECT. 4. The trial of all criminal offences (except in cases of impeachments) shall be in the state where they shall be committed, and shall be by jury.<sup>53</sup>

No notes or minutes are known to exist which would give us insight into the deliberations of the Committee on Detail. Nevertheless, it is clear that during their deliberations the proposed constitution began to take shape in a form similar to the Constitution today. The Exceptions Clause appears in much the same form as the one finally adopted. The added sentence that permits the legislature to assign areas of appellate jurisdiction to inferior courts might appear as a limitation on the power of Congress to limit the Court's appellate jurisdiction. The last sentence of Section 3 might indicate that, under the draft constitution of the Committee on Detail, Congress may limit the Court's appellate jurisdiction only if it assigns that appellate jurisdiction to an inferior federal court.

On August 27, the Convention considered the proposed Article XI. According to Madison's *Notes*, the following discussion occurred:

Mr. GOV. MORRIS wished to know what was meant by the words "In all the cases before mentioned it [jurisdiction] shall be appellate with such exceptions &c," whether it extended to matters of fact as well as law—and to cases of Common law as well as Civil law.

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 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.<sup>54</sup>

James Wilson's answer to Gouverneur Morris could indicate that the delegates intended the Exceptions Clause to empower Congress to limit the Court's appellate jurisdiction over substantive issues of law, common and civil, as well as to empower Congress to withdraw from the Court the power to disturb jury verdicts.

A proposed amendment to part of Section 3 read as follows: "In all the other cases before mentioned, 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

<sup>53</sup> *Id.* at 228–29.

<sup>54</sup> Convention Floor Debate (Aug. 27, 1787) in JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 535, 539 (Adrienne Koch ed., Ohio Univ. Press 1984) (1840) (alteration in original). *Nem: con:* is an abbreviation for *nemine contradicente*, which means "no one dissenting." BLACK'S LAW DICTIONARY 1066 (8th ed. 2004).

regulations, as the legislature shall make.”<sup>55</sup> This amendment was withdrawn, and another amendment was proposed:

In cases of impeachment, cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a 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 . . .<sup>56</sup>

There was a proposed amendment to this amendment, which would have added the following language: “But in cases in which the United States shall be a party, the jurisdiction shall be original or appellate, as the legislature may direct.”<sup>57</sup> This amendment, too, was amended by striking the words “original or.”<sup>58</sup> This amendment to the amendment passed, but the original amendment was then defeated,<sup>59</sup> thus bringing the delegates back to Article XI as originally proposed by the Committee on Detail.

The delegates then approved an amendment to change the words, “the jurisdiction shall be original,” to “the Supreme Court shall have original jurisdiction.”<sup>60</sup> Another amendment, that read “[i]n all the other cases before mentioned, the judicial power shall be exercised in such manner as the legislature shall direct,” was defeated.<sup>61</sup> A proposal to delete the last clause of Section 3, the clause which provides that Congress may assign areas of appellate jurisdiction to inferior federal courts, passed unanimously.<sup>62</sup>

The delegates then turned their attention to other portions of the proposed draft. On September 8, they chose a Committee on Revision, sometimes called the Committee on Style, to prepare a final draft of the proposed constitution. That Committee consisted of William Samuel Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King of Massachusetts.<sup>63</sup>

On September 12, the Committee presented its Revised Draft of the Constitution.<sup>64</sup> Again, no records of the Committee’s deliberations are available, but the language of Article III (The Judiciary) was almost exactly in the form that was finally adopted. The delegates struck the

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<sup>55</sup> MADISON, *supra* note 33, at 268–69.

<sup>56</sup> *Id.* at 269.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 295.

<sup>64</sup> *Id.* at 297.

words “both in law and equity” from Section 1, apparently because the same language appears in Section 2.<sup>65</sup> In the phrase of Section 2, “both in law and equity,” they struck the word “both.”<sup>66</sup> They defeated a proposal to add the words, “and a trial by jury shall be preserved, as usual, in civil cases,” to Section 2, Clause 3.<sup>67</sup> And they also defeated a proposal to add the words, “but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.”<sup>68</sup> With these minor changes, Article III was adopted on September 15, along with the other six Articles of the Constitution. The delegates formally signed the Constitution on September 17, in the Year of Our Lord 1787.<sup>69</sup>

From the foregoing we may draw the following conclusions:

- (1) The delegates intended to distinguish between original and appellate jurisdiction.
- (2) The delegates intended that the Supreme Court’s original jurisdiction be limited to a few narrow areas, mostly involving foreign nations and disputes between states, and that other types of cases be within the Court’s appellate jurisdiction.
- (3) The proposal that Congress may limit the Supreme Court’s appellate jurisdiction apparently arose in the deliberations of the Committee on Detail, and this Committee drafted the Exceptions Clause in a form similar to that which was finally adopted.
- (4) Proposed language that Congress may remove cases from the Supreme Court’s appellate jurisdiction and give their jurisdiction to inferior federal courts was defeated, and may indicate that the delegates did not want to require that Congress give appellate jurisdiction to an inferior federal court as a condition for withdrawing jurisdictions from the Supreme Court.
- (5) The delegates intended that the Supreme Court have jurisdiction over cases of both common and civil law, and of matters of both law and fact; however, they were careful to preserve the right to trial by jury.

The Convention sent its proposed constitution to Congress, which unanimously approved it on September 29 and sent it to the states for ratification. The debate over ratification in the newspapers and in the

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<sup>65</sup> *Id.* at 314.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 315. The Seventh Amendment appears to have accomplished the objective of this provision. *See* 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 . . .”).

<sup>68</sup> MADISON, *supra* note 33, at 315.

<sup>69</sup> *Id.* at 317–18.

various state ratifying conventions can be helpful in understanding how the nation understood the Exceptions Clause.

The *Federalist*, a series of eighty-five essays written in 1787 and 1788 by John Jay, Alexander Hamilton, and James Madison, were published in newspapers to explain the proposed Constitution and to persuade people to support its adoption.<sup>70</sup> In *The Federalist Nos. 78–83*, Hamilton addressed the constitutional provisions concerning the judiciary. Seeking to assure his readers that the federal judiciary was not a threat to their liberties, Hamilton declared in *No. 78* that “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them.”<sup>71</sup> The judiciary, Hamilton wrote, “may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>72</sup>

In *No. 80*, Hamilton set forth the various aspects of Supreme Court jurisdiction and then concluded that essay with the following statements:

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 inconveniences 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.<sup>73</sup>

In *No. 81*, Hamilton noted the objections of those who feared that Article III would eliminate trial by jury or allow the Supreme Court to substitute its own findings of fact for those of the jury. Hamilton insisted that “the expressions, ‘appellate jurisdiction, both as to law and fact,’ do not necessarily imply a re-examination in the supreme court of facts decided by juries in the inferior courts.”<sup>74</sup> But he added the following:

“If, therefore, the re-examination of a fact, once determined by a jury, should in any case be admitted under the proposed constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or

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<sup>70</sup> George W. Carey & James McClellan, *Introduction* to THE FEDERALIST, at xliii–xliv (George W. Carey & James McClellan eds., 2001).

<sup>71</sup> THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

<sup>72</sup> *Id.*

<sup>73</sup> THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 71, at 416.

<sup>74</sup> THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 71, at 424.

by directing an issue immediately out of the supreme court.<sup>75</sup>

Hamilton closed *No. 81* by again setting forth the Exceptions Clause as a protection against judicial abuse:

The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that, in the partition of this authority, a very small portion of original jurisdiction has been 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 the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable; that this appellate jurisdiction does, in no case, *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils, will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.<sup>76</sup>

In *No. 80*, Hamilton seems to say the Exceptions Clause empowers Congress to limit the Court's appellate jurisdiction over substantive matters of common and civil law, and in *No. 81*, he seems to say the Exceptions Clause empowers Congress to limit the Court's authority to review jury determinations. *The Federalist* appears to be consistent with the explanation James Wilson gave to Gouverneur Morris at the Convention: the Exceptions Clause includes the power to limit the Court's appellate jurisdiction over civil and common law, and also includes the power to limit the Court's appellate jurisdiction over jury determinations.<sup>77</sup>

Other leading Americans expressed their views on the Constitution, and the Anti-Federalists (those who opposed ratification of the Constitution) raised the specter of an overly powerful judiciary as one of their primary objections. George Mason of Virginia, one of three delegates who refused to sign the Constitution, set forth his objections to the Constitution, one of which was the power given to the judiciary:

The judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several states ; thereby rendering laws as tedious, intricate, and expensive, and justice as unattainable, by a great part of the community, as in England ; and enabling the rich to oppress and ruin the poor.<sup>78</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 425.

<sup>77</sup> See *supra* note 54 and accompanying text.

<sup>78</sup> GEORGE MASON, OBJECTIONS OF THE HON. GEORGE MASON TO THE PROPOSED FEDERAL CONSTITUTION (1787), reprinted in 1 ELLIOT'S DEBATES, *supra* note 33, at 494, 495. Three delegates (Elbridge Gerry of Massachusetts, George Mason of Virginia, and Edmund Randolph of Virginia) refused to sign the Constitution. Governor Randolph



Luther Martin, a Maryland delegate who had signed the Constitution and upon later reflection decided he must oppose it, believed “the proposed Constitution not only makes no provision for the trial by jury in the first instance, but, by its appellate jurisdiction, absolutely takes away that inestimable privilege, since it expressly declares the Supreme Court shall have appellate jurisdiction both as to law and fact.”<sup>79</sup>

Richard Henry Lee, a congressman from Virginia, expressed his objections in a letter to Governor Edmund Randolph dated October 16, 1787, which quoted Sir William Blackstone as saying the right to trial by jury is “the most transcendent privilege, which any subject can enjoy or wish for,”<sup>80</sup> and that “every [sic] tribunal, selected [sic] for the decision of facts, [sic] is a step towards establishing aristocracy—the most oppressive of all [sic] governments.”<sup>81</sup> He then addressed the Exceptions Clause and found it to be an inadequate remedy:

The answer to these objections is, that the new legislature may provide remedies! But as they may, so they may not; and if they did, a succeeding assembly may repeal the provisions. The evil is found resting upon constitutional bottom ; and the remedy, upon the mutable ground of legislation, revocable at any annual meeting.<sup>82</sup>

The power of the judiciary was a major objection raised by Anti-Federalist writers. One such writer, using the penname the Federal Farmer, wrote the following:

By ART. 3. SECT. 2. all cases affecting ambassadors, other public ministers, and consuls, and in those cases in which a state shall be party, the supreme court shall have jurisdiction. In all the other cases beforementioned, [sic] the supreme court shall have appellate jurisdiction, both as to *law and fact*, with such exception, and under such regulations, as the congress shall make. By court is understood a court consisting of judges; and the idea of a jury is excluded. This court, or the judges, are to have jurisdiction on appeals, in all the

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changed his mind and decided to support the Constitution, concluding that it was flawed, but better than the status quo, and he expressed the hope that Virginia and other states would work for changes in the Constitution, among other things, “[i]n limiting and defining the judicial power.” EDMUND RANDOLPH, A LETTER OF HIS EXCELLENCY, EDMUND RANDOLPH, ESQ., ON THE FEDERAL CONSTITUTION (1787), *reprinted in* 1 ELLIOT’S DEBATES, *supra* note 33, at 482, 491.

<sup>79</sup> LUTHER MARTIN, LUTHER MARTIN’S LETTER ON THE FEDERAL CONVENTION OF 1787 (1788), *reprinted in* 1 ELLIOT’S DEBATES, *supra* note 33, at 344, 381.

<sup>80</sup> RICHARD HENRY LEE, LETTER FROM THE HON. RICHARD HENRY LEE, ESQ., ONE OF THE DELEGATES IN CONGRESS FROM THE STATE OF VIRGINIA, TO HIS EXCELLENCY, EDMUND RANDOLPH, ESQ., GOVERNOR OF SAID STATE (1787), *reprinted in* 1 ELLIOT’S DEBATES, *supra* note 33, at 503, 504 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*379).

<sup>81</sup> *Id.* (quoting 3 BLACKSTONE, *supra* note 80, at \*380).

<sup>82</sup> *Id.*

cases enumerated, as to law and fact; the judges are to decide the law and try the fact, and the trial of the fact is being assigned to the judges by the constitution, a jury for trying the fact is excluded; however, under the exceptions and powers to make regulations, congress may, perhaps introduce the jury, to try the fact in most necessary cases.<sup>83</sup>

But the Federal Farmer saw the Exceptions Clause as a possible danger to the people's liberties:

Thus general powers being given to institute courts, and regulate their proceedings, with no provision for securing the rights principally in question, may not congress so exercise those powers, and constitutionally too, as to destroy those rights? clearly, [sic] in my opinion, they are not in any degree secured.<sup>84</sup>

Brutus, another Anti-Federalist writer,<sup>85</sup> objected strongly to the powers granted to the federal judiciary in a series of letters to the people of New York.<sup>86</sup> Then, in a letter dated March 6, 1788, he addressed the Exceptions Clause:

It may still be insisted that this clause does not take away the trial by jury on appeals, but that this may be provided for by the legislature, under that paragraph which authorises [sic] them to form regulations and restrictions for the court in the exercise of this power.

The natural meaning of this paragraph seems to be no more than this, that Congress may declare, that certain cases shall not be subject to the appellate jurisdiction, and they may point out the mode in which the court shall proceed in bringing up the causes before them, the manner of their taking evidence to establish the facts, and the method of the courts proceeding. But I presume they cannot take from the court the right of deciding on the fact, any more than they can deprive them of the right of determining on the law, when a cause is once before them; for they have the same jurisdiction as to fact, as they have as to the law. But supposing the Congress may under this

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<sup>83</sup> Letter from the Federal Farmer, Oct. 10, 1787, *reprinted in* THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION 43, 53 (Herbert J. Storing ed., 1985) [hereinafter THE ANTI-FEDERALIST]. Both Federalists and Anti-Federalists frequently used pennames, often of Roman significance such as Cato, Brutus, Agricola, Publius, and others. The identity of the Federal Farmer is uncertain; some have attributed his writings to Richard Henry Lee. THE ANTI-FEDERALIST, *supra*, at 24.

<sup>84</sup> Letter from the Federal Farmer, Jan. 20, 1788, *reprinted in* THE ANTI-FEDERALIST, *supra* note 83, at 79, 85.

<sup>85</sup> Mr. Herbert Storing, editor of *The Anti-Federalist*, reports that "Brutus" has generally been identified as Robert Yates, a New York delegate to the Constitutional Convention who left before the Convention concluded because he believed the developing Constitution gave the federal government too much power. However, Storing personally considers this identification "somewhat questionable." THE ANTI-FEDERALIST, *supra* note 83, at 103.

<sup>86</sup> Brutus XI, Jan. 31, 1788, *reprinted in* THE ANTI-FEDERALIST, *supra* note 83, at 162; Brutus XII, Feb. 7, 1788, *reprinted in* THE ANTI-FEDERALIST, *supra* note 83, at 167; Brutus XIII, Feb. 21, 1788, *reprinted in* THE ANTI-FEDERALIST, *supra* note 83, at 173; Brutus XIV, Feb. 28, 1788, *reprinted in* THE ANTI-FEDERALIST, *supra* note 83, at 176.

clause establish the trial by jury on appeals, it does not seem to me that it will render this article much less exceptionable. An appeal from one court and jury, to another court and jury, is a thing altogether unknown in the laws of our state, and in most of the states in the union.<sup>87</sup>

The Exceptions Clause arose occasionally during the debates in the various state ratifying conventions, though it is uncertain how often it arose since some of the states did not keep transcripts of their proceedings. At the Pennsylvania ratifying convention, James Wilson, who had been an influential delegate to the Constitutional Convention and who would later serve as a Supreme Court Justice, argued that the Supreme Court should have the authority to set aside jury verdicts because

[t]hose gentlemen who, during the late war, had their vessels retaken, know well what a poor chance they would 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 had not been possessed of authority to reconsider and set aside the verdicts of those juries.<sup>88</sup>

He acknowledged that in some cases it might be necessary to limit the Court's appellate jurisdiction, but this is best done by Congress, as needed, rather than fixing those limits in the Constitution.

There are other cases in which it will be necessary; and will not Congress better regulate them, as they rise from time to time, than 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.<sup>89</sup>

Early in the Virginia Ratifying Convention, on June 5, 1788, Patrick Henry opened the case against ratification with a stirring oration. Among many other objections, he argued that the federal judiciary could be far more oppressive than a state or local judicial system.

It is a fact that lands have been sold for five shillings, which were worth one hundred pounds : if sheriffs, thus immediately under the eye of our state legislature and judiciary, have dared to commit these outrages, what would they not have done if their masters had been at Philadelphia or New York? If they perpetrate the most unwarrantable

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<sup>87</sup> Brutus XIV, *supra* note 86, at 178–79.

<sup>88</sup> THE DEBATES IN THE CONVENTION OF THE STATE OF PENNSYLVANIA ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1787), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 33, at 415, 493.

<sup>89</sup> *Id.* at 494.

outrage on your person or property, you cannot get redress on this side of Philadelphia or New York ; and how can you get it there? If your domestic avocations could permit you to go thither, there you must appeal to judges sworn to support this Constitution, in opposition to that of any state, and who may also be inclined to favor their own officers. When these harpies are aided by excisemen, who may search, at any time, your houses, and most secret recesses, will the people hear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power with a niggardly hand ; and here there is a strong probability that these oppressions shall actually happen. I may be told that it is safe to err on that side, because such regulations may be made by Congress as shall restrain these officers, and because laws are made by our representatives, and judged by righteous judges : but, sir, as these regulations may be made, so they may not; and many reasons there are to induce a belief that they will not.

. . . .  
. . . . Where are your checks in this government? Your strongholds will be in the hands of your enemies. It is on a supposition that your American governors shall be honest, that all the good qualities of this government are founded; but its defective and imperfect construction puts it in their power to perpetrate the worst of mischiefs, should they be bad men ; and, sir, would not all the world, from the eastern to the western hemisphere, blame our distracted folly in resting our rights upon the contingency of our rulers being good or bad? Show me that age and country where the rights and liberties of the people were placed on the sole chance of their rulers being good men, without a consequent loss of liberty! I say that the loss of that dearest privilege has ever followed, with absolute certainty, every such mad attempt.<sup>90</sup>

Virginia Ratifying Convention President Edmund Pendleton argued that Congress's power to establish inferior tribunals included the power "to appoint the state courts to have the inferior federal jurisdiction."<sup>91</sup> He noted the possibility that the Supreme Court, with appellate jurisdiction, could overturn jury findings of fact and send cases back to local tribunals, much to the vexation of the litigants. But this possibility, he said, can be remedied by the Exceptions Clause.

You cannot prevent appeals without great inconveniences; but Congress can prevent that dreadful oppression which would enable many men to have a trial in the federal court, which is ruinous. There is a power which may be considered as a great security. The power of making what regulations and exceptions in appeals they may think proper may be so contrived as to render appeals, as to law and fact,

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<sup>90</sup> THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1788), reprinted in 3 ELLIOT'S DEBATES, *supra* note 33, at 1, 58–59.

<sup>91</sup> *Id.* at 517.

proper, and perfectly inoffensive. How will this power be exercised? If I thought there was a possibility of danger, I should be alarmed.

But when I consider who this Congress are,—that they are the representatives of the thirteen states, (which may become fourteen or fifteen, or a much greater number of states,) who cannot be interested, in the most remote degree, to subject their citizens to oppressions of that dangerous kind, but will feel the same inclination to guard their citizens from them,—I am not alarmed.<sup>92</sup>

Henry and Pendleton seemed to agree that Congress could limit the Court's appellate jurisdiction. Both agreed that this is a substantial power; Henry said it could be used to prevent sheriffs from engaging in unlawful searches and seizures. But they disagreed as to whether this was an adequate check on judicial abuse. Pendleton said that since congressmen represent the states and the people, they can be trusted to protect their constituents from judicial abuses. Henry said it is naïve to rest our liberties on the assumption that our leaders will be virtuous.

George Mason, one of the Constitutional Convention delegates who had refused to sign the Constitution, argued that the appellate jurisdiction of the Supreme Court could be abused by appeals that would be vexatious to people who could not afford the costs of litigation.<sup>93</sup> James Madison answered the objection with the Exceptions Clause: "As to vexatious appeals, they can be remedied by Congress."<sup>94</sup> But Patrick Henry, perhaps the best known and most eloquent of the Anti-Federalists, was not convinced:

The verdict of an impartial jury will be reversed by judges unacquainted with the circumstances. But we are told that Congress are to make regulations to remedy this. I may be told that I am bold; but I think myself, and I hope to be able to prove to others, that Congress cannot, by any act of theirs, alter this jurisdiction as established. It appears to me that no law of Congress can alter or arrange it. It is subject to be regulated, but is it subject to be abolished? If Congress alter this part, they will repeal the Constitution . . . . What is meant by such words in common parlance? If you are obliged to do certain business, you are to do it under such modifications as were originally designed . . . . If Congress, under the specious pretence of pursuing this clause, altered it, and prohibited appeals as to fact, the federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void.<sup>95</sup>

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<sup>92</sup> *Id.* at 520.

<sup>93</sup> *Id.* at 524.

<sup>94</sup> *Id.* at 538.

<sup>95</sup> *Id.* at 540–41.

On June 20, Mason again objected to the powers of the judiciary.<sup>96</sup> John Marshall, later to become Chief Justice of the Supreme Court, answered with the following statements:

Gentlemen ask, What is meant by law cases, and if they be not distinct from facts? Is there no law arising on cases of equity and admiralty? Look at the acts of Assembly. Have you not many cases where law and fact are blended? Does not the jurisdiction in point of law as well as fact, find itself completely satisfied in law and fact? The honorable gentleman says that no law of Congress can make any exception to the federal appellate jurisdiction of facts as well as law. He has frequently spoken of technical terms, and the meaning of them. 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? I am persuaded that a reconsideration of this case will convince the gentleman that he was mistaken. This may go to the cure of the mischief apprehended. Gentlemen must be satisfied that this power will not be so much abused as they have said.

The honorable member says that he derives no consolation from the wisdom and integrity of the legislature, because we call them to rectify defects which it is our duty to remove. We ought well to weigh the good and evil before we determine. We ought to be well convinced that the evil will be really produced before we decide against it. If we be convinced that the good greatly preponderates, though there be small defects in it, shall we give up that which is really good, when we can remove the little mischief it may contain, in the plain, easy method pointed out in the system itself?<sup>97</sup>

During the ratification process, supporters and opponents seemed to agree that judicial abuse was possible, and they focused especially on the power of the Supreme Court to overturn jury verdicts on questions of fact. They generally agreed that Congress could use the Exceptions Clause to limit the Court's authority to overturn jury verdicts (although Brutus and Patrick Henry questioned that), but they disagreed as to whether that was an adequate remedy. Federalists thought congressmen would have a natural inclination to protect their citizens from abuse; Anti-Federalists thought it was foolish to place that trust in the hands of fallible human beings in Congress.

Both sides seemed to agree that Congress's authority to make exceptions and regulations to the Court's appellate jurisdiction went beyond the questions of jury verdicts. Hamilton and Madison saw the

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<sup>96</sup> *Id.* at 551.

<sup>97</sup> *Id.* at 559–60.

Exceptions Clause as a general power to limit appellate jurisdiction, and Marshall believed Congress's authority to limit appellate jurisdiction extends as far as Congress shall determine that the interest of the people requires.

*B. Early Constitutional Scholars*

Constitutional scholars of the early 1800s addressed the Exceptions Clause but did not expound on it in great detail. Chancellor James Kent, whose *Commentaries on American Law* are often compared to Blackstone's *Commentaries*, simply noted that "[t]he Supreme Court was also clothed by the Constitution 'with appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress should make'; and, by the Judiciary Act of 1789, appeals lie to this court from the circuit courts, and the courts of the several states."<sup>98</sup> He provided no further interpretation of the Exceptions Clause.

St. George Tucker (1752–1827), a Virginia Supreme Court Justice, federal judge, and law professor, wrote in his *View of the Constitution of the United States* that "the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the congress shall make . . ."<sup>99</sup> Later he suggested that

congress appears to have considered, that it was not necessary that the supreme court should have original jurisdiction, but that it might, in the discretion of congress, be invested with it in those cases. By the constitution, originally, the Supreme Court might have had appellate jurisdiction, both as to law and fact, in all cases. But the ninth article of amendments provides that no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. A provision which has removed one of the most powerful objections made to this department.<sup>100</sup>

In 1825, William Rawle (1757–1836), United States District Attorney for Pennsylvania, wrote *A View of the Constitution*, which was used as the basic textbook on the Constitution at the United States Military Academy at West Point. He wrote concerning the Exceptions Clause: "The power given to except and to regulate does not—*ex vi termini*—carry with it a power to enlarge the jurisdiction: so far

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<sup>98</sup> JAMES KENT, COMMENTARIES ON AMERICAN LAW 298–99 (Oliver Wendell Holmes ed., 12th ed., Boston, Little, Brown, & Co. 1873) (1826).

<sup>99</sup> ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (1803), reprinted in A VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 91, 117 (Liberty Fund 1999).

<sup>100</sup> *Id.* at 297. At the time Judge Tucker wrote this treatise, the Bill of Rights consisted of twelve amendments, the first two of which were not ratified at that time. His reference to the "ninth article of amendments" is actually a reference to the Seventh Amendment which limits the authority of the federal courts to disturb jury verdicts in civil cases. *Id.* at xxi.

therefore as it relates to the subjects of jurisdiction, we must consider it as confined by the enumeration of them."<sup>101</sup> Rawle believed Congress's power to limit the Court's appellate jurisdiction did not include the power to remove cases from the Court's appellate jurisdiction and add those cases to the Court's original jurisdiction, which was fixed as enumerated in Article III, Section 2, Clause 2.

Joseph Story (1779–1845), Supreme Court Justice and Harvard law professor, wrote *A Familiar Exposition of the Constitution of the United States* in 1840. He assumed that Congress had a general power to limit the Supreme Court's appellate jurisdiction, but addressed whether the Court's enumerated appellate jurisdiction was presumed to exist unless limited by Congress, or whether it existed only if Congress granted the Court appellate jurisdiction in those cases. He concluded that the Court had appellate jurisdiction as enumerated, unless limited by Congress under the Exceptions Clause.

The appellate jurisdiction is to be, "with such exceptions, and under such regulations, as the Congress shall prescribe." But, here, a question is presented upon the construction of the Constitution, whether the appellate jurisdiction attaches to the Supreme Court, subject to be withdrawn and modified by Congress; or, whether an act of Congress is necessary to confer the jurisdiction upon the court. If the former be the true construction, then the entire appellate jurisdiction, if Congress should make no exceptions or regulations, would attach, by force of the terms, to the Supreme Court. If the latter, then, notwithstanding the imperative language of the Constitution, the Supreme Court is lifeless, until the Congress has conferred power on it. And if Congress may confer power, they may repeal it. So that the whole efficiency of the judicial power is left by the Constitution wholly unprotected and inert, if Congress shall refrain to act. There is certainly very strong ground to maintain, that the language of the Constitution meant to confer the appellate jurisdiction absolutely on the Supreme Court, independent of any action by Congress; and to require this action to divest or regulate it. The language, as to the original jurisdiction of the Supreme Court, admits of no doubt. It confers it without any action of Congress. Why should not the same language, as to the appellate jurisdiction, have the same interpretation? It leaves the power of Congress complete, to make exceptions and regulations; but it leaves nothing to their inaction. This construction was asserted in argument at an early period of the Constitution, and it has since been deliberately confirmed by the Supreme Court.<sup>102</sup>

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<sup>101</sup> WILLIAM RAWLE, A VIEW OF THE CONSTITUTION 231 (Philadelphia, H.C. Carey & I. Lea 1825). *Ex vi tirmini* means "from or by the force of the term" or "from the very meaning of the expression used." BLACK'S LAW DICTIONARY 626 (8th ed. 2004).

<sup>102</sup> JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED



The early constitutional scholars referred to the Exceptions Clause in their writings; they acknowledged its force and effect but did not expound on its meaning. Justice Story, who is widely regarded as the leading constitutional scholar of the 1800s, whose life overlapped with those of the Framers, and who *knew* many of the Framers personally, addressed the Exceptions Clause and declared that Congress's power to make exceptions is "complete."<sup>103</sup>

### C. The Case Law

Understandably, some might question how objective a court can be when deciding questions concerning the court's own power or jurisdiction. But as Chief Justice John Marshall wrote in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>104</sup>

The best-known case involving the Exceptions Clause is *Ex parte McCordle*, an 1868 Supreme Court case involving a Mississippi newspaper editor who was detained by occupying federal military authorities awaiting trial on charges of writing and publishing "incendiary and libelous" articles critical of Reconstruction and military rule of the South following the War Between the States.<sup>105</sup> McCordle filed a petition for a writ of habeas corpus, claiming that his imprisonment was unconstitutional and that his prosecution violated the First, Fifth, and Sixth Amendments, and that an 1867 statute authorized the Supreme Court to hear appeals from denials of writs of habeas corpus. The United States argued that the 1867 Act applied only to state prisoners, not federal prisoners. The Supreme Court rejected this proposition and set the case for argument.<sup>106</sup>

The *McCordle* case was argued on March 9, 1868. On March 12, Congress repealed the provision of the 1867 Act that gave the Supreme Court appellate jurisdiction over writs of habeas corpus. Several members of Congress clearly stated that their purpose was to prevent the Supreme Court from deciding *McCordle*, and thereby to hinder Reconstruction. One congressman declared that the amendment was "aimed at 'striking at a branch of the jurisdiction of the Supreme Court . . . thereby sweeping the [McCordle] case from the docket by taking away

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STATES 274–75 (Regnery Gateway 1986) (1859).

<sup>103</sup> *Id.* at 275.

<sup>104</sup> 5 U.S. (1 Cranch) 137, 177 (1803). Note that Chief Justice Marshall did not say it is *exclusively* the province and duty of the judicial department to say what the law is.

<sup>105</sup> 74 U.S. (7 Wall.) 506 (1868).

<sup>106</sup> *Id.* at 509.

the jurisdiction of the court.<sup>107</sup> President Andrew Johnson vetoed the bill on March 25, and Congress overrode his veto on March 27.<sup>108</sup>

Chief Justice Salmon P. Chase, writing for a unanimous Court, discussed the ongoing question whether the Court's constitutional jurisdiction is self-executing, noting that Congress has often acted as though a grant of appellate jurisdiction by Congress constituted a denial of jurisdiction not granted. However, he said that was not the determinative issue here:

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 the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.<sup>109</sup>

Many assume that *McCardle* settled once and for all the principle that Congress has unrestricted power to limit the Supreme Court's appellate jurisdiction in whatever way Congress chooses. Others question whether the *McCardle* ruling went that far. They note that *McCardle* still had other appellate rights in federal courts, including the right to appeal to the Supreme Court under the Judiciary Act of 1787. Chief Justice Chase said that

[c]ounsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.<sup>110</sup>

While it seems clear that *McCardle* held that Congress may limit the Court's appellate jurisdiction, an argument can be made that the *McCardle* court did not define the outer parameters of Congress's power.

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<sup>107</sup> William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229, 239 (1973) (quoting CONG. GLOBE, 40th Cong., 2d Sess. 2062 (1868) (statement of Rep. Wilson)) (alteration in original).

<sup>108</sup> *Id.* at 239–40.

<sup>109</sup> *McCardle*, 74 U.S. (7 Wall.) at 513–14.

<sup>110</sup> *Id.* at 515.

One could argue, consistently with *McCardle*, that Congress may not limit the Court's appellate jurisdiction in a manner that precludes relief in another court.

A few months after *McCardle*, the Court decided *Ex parte Yerger*, another case of a newspaper editor challenging the Military Reconstruction Act.<sup>111</sup> The Court did not directly contradict or overrule its holding in *McCardle*, but the Court took jurisdiction of Yerger's case, noting that the 1867 Act which repealed the Court's appellate jurisdiction over writs of habeas corpus did not affect the Court's jurisdiction over writs of certiorari. *Yerger* could be read as restricting Congress's power to limit the Court's appellate jurisdiction. But a careful reading of *Yerger* does not support that interpretation. The Court narrowly defined what Congress had done, not what Congress had the power to do.

In fact, prior to *McCardle*, the Court had taken an even narrower view of its own jurisdiction and a broader view of the power of Congress to define and limit its jurisdiction. In earlier years, the Court seemed to believe its powers of jurisdiction were not self-executing. Rather, even in those areas in which the Constitution gives the Court original or appellate jurisdiction, the Court believed that it could exercise that jurisdiction only pursuant to an act of Congress. In the 1799 case, *Turner v. Bank of North America*, Justice Samuel Chase wrote:

The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess [sic] it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.<sup>112</sup>

In *Durousseau v. United States*, Chief Justice John Marshall took a slightly enlarged view of Supreme Court jurisdiction:

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

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<sup>111</sup> 75 U.S. (8 Wall.) 85 (1869).

<sup>112</sup> 4 U.S. (4 Dall.) 8, 10 n.1 (1799). See also *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321 (1796), where the Court held that admiralty cases were "civil actions" and therefore within the power of appellate review that Congress had given to the Court. "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." *Id.* at 327.

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.<sup>113</sup>

But while Chief Justice Marshall thought the Court's jurisdiction was conferred directly by the Constitution, subject to the limitations imposed by Congress, a later Supreme Court decision said otherwise. In *Barry v. Mercein*, the Supreme Court ruled that "[b]y the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of congress."<sup>114</sup>

By 1861 the Court was ready to say its original jurisdiction was conferred directly by the Constitution and did not require congressional authorization. Chief Justice Roger Taney wrote in *Kentucky v. Dennison* that the Court is authorized to exercise original jurisdiction "without any further act of Congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice."<sup>115</sup>

But in the exercise of appellate jurisdiction, the Court considered itself more dependent on Congress. In 1865 the Court held in *Daniels v. Railroad Co.* that in order for the Court to exercise appellate jurisdiction in a case,

two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority.

. . . [I]t is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.<sup>116</sup>

With this background we now look again at the leading Exceptions Clause case, *Ex parte McCordle*. The Court again considered the nature of its appellate jurisdiction and concluded that this jurisdiction came directly from the Constitution.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."<sup>117</sup>

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<sup>113</sup> 10 U.S. (6 Cranch) 307, 313–14 (1810).

<sup>114</sup> 46 U.S. (6 How) 103, 119 (1847).

<sup>115</sup> 65 U.S. (24 How.) 66, 98 (1861).

<sup>116</sup> 70 U.S. (8 Wall.) 250, 254 (1865).

<sup>117</sup> *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512–13 (1868) (quoting U.S. CONST.

While the Court in *McCardle* decided that its appellate jurisdiction was derived directly from the Constitution, it expressly recognized Congress's power to make exceptions and regulations to this jurisdiction. The *McCardle* and *Yerger* decisions never questioned the extent of Congress's power to make exceptions and regulations; they addressed only the extent and interpretation of the exception Congress had in fact made in the Act of 1867. These decisions never questioned whether Congress could have gone further in limiting appellate jurisdiction, had Congress so desired. To interpret *McCardle* and *Yerger* as restricting Congress's authority to make exceptions and regulations is to read more into the language of these decisions than is actually stated therein, and to ignore the background of the cases on which *McCardle* and *Yerger* are based.

The next major Exceptions Clause case is *United States v. Klein*.<sup>118</sup> By an 1863 statute, Congress had provided that property owners could file claims in the Court of Claims to recover property that had been confiscated by the Federal Government during the War Between the States, provided the claimant had not engaged in any acts of rebellion against or disloyalty to the United States. Various claimants had presented presidential pardons to establish that their Confederate military service or other aid to the Confederacy did not bar them from claiming their property under the 1863 Act. To counter these claims, in 1870 Congress enacted a statute providing that the presentation of any such pardon to the Court of Claims, or upon other proof presented to the Court of Claims that any such pardon exists, would cause the jurisdiction of the Court of Claims to cease, and require the Court of Claims to promptly dismiss the claim. Chief Justice Chase, speaking for the Court majority, held that provision of the 1870 statute unconstitutional.<sup>119</sup>

However, one must be careful in citing *Klein* as authority for the proposition that Congress may not limit the Court's appellate jurisdiction. Chief Justice Chase clearly stated, "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."<sup>120</sup> Rather, Chief Justice Chase said that this was an attempt to limit the President's power to pardon.

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. This court is required to receive special pardons as evidence of guilt and to treat them as null

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art. III, § 2, cl. 2).

<sup>118</sup> 80 U.S. (13 Wall.) 128 (1872).

<sup>119</sup> *Id.* at 147.

<sup>120</sup> *Id.* at 146.

and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end.<sup>121</sup>

Furthermore, Chief Justice Chase wrote that the statute prescribes rules of evidence by which the Court must decide a case:

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 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?

We think not . . .<sup>122</sup>

The Court viewed the case as a matter of the President's power to pardon and the Court's authority to consider the President's pardon in property claims. At most, *Klein* stands for the proposition that in a case in which the United States is a party, Congress may not prescribe rules that require the Court to decide the case in favor of the United States. To that small extent, *Klein* may limit the power of Congress to restrict the Court's appellate jurisdiction.

In 1881 the Court considered *The "Francis Wright,"* another Exceptions Clause case, and simply ruled that

while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.<sup>123</sup>

Two leading twentieth century cases address the Exceptions Clause. In 1995, in *Plaut v. Spendthrift Farm, Inc.*, the Court heard a challenge to an act of Congress that had the effect of overturning a previous Supreme Court decision.<sup>124</sup> The Court had previously held that litigation

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<sup>121</sup> *Id.* at 148.

<sup>122</sup> *Id.* at 146.

<sup>123</sup> 105 U.S. 381, 385–86 (1881).

<sup>124</sup> 514 U.S. 211 (1995).

based on section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 must be commenced within three years of the violation and within one year after discovery of the facts constituting the violation, and dismissed several lawsuits that did not meet that statute of limitations.<sup>125</sup> In 1991 Congress passed and the President signed into law a new provision to the effect that those cases and similar cases must be reinstated. Justice Scalia wrote the opinion for the Court majority which held that the 1991 statute was unconstitutional. Justice Scalia acknowledged that “[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.”<sup>126</sup> However, since the 1991 statute required the Court to reopen final judgments, it violated the fundamental principle that “Article III establishes a ‘judicial department’ with the ‘province and duty . . . to say what the law is’ in particular cases and controversies.”<sup>127</sup> The separation of powers doctrine required that this statute be struck down as unconstitutional.

The following year, in 1996, the Court considered *Felker v. Turpin*.<sup>128</sup> Felker had been convicted of murder and sentenced to death, his appeal to the state appellate court had been denied, and his petition for a writ of habeas corpus in federal district court had been denied as well. He then brought a second habeas corpus petition in federal court, but while it was pending, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996.<sup>129</sup> This Act provides that after a first petition for writ of habeas corpus has been denied, subsequent petitions for writs of habeas corpus must be dismissed unless the law under which the petitioner had been convicted has been changed, or unless new evidence has been discovered that could not previously have been known, and no reasonable fact-finder would have convicted petitioner if this evidence had been presented at the trial.<sup>130</sup>

Felker argued that the Act of 1996 was an unconstitutional usurpation of the appellate jurisdiction of the federal courts. But the Court, in its opinion written by Chief Justice Rehnquist, held that the Act is constitutional. Chief Justice Rehnquist noted that the Act did not deprive the Court of its jurisdiction to hear the first petition for writ of habeas corpus, and further, that the Act did not deprive the court of its

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 226.

<sup>127</sup> *Id.* at 218 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>128</sup> 518 U.S. 651 (1996).

<sup>129</sup> Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

<sup>130</sup> *Id.*

authority to hear original petitions for writs of habeas corpus. He concluded:

This conclusion obviates one of the constitutional challenges raised. The critical language of Article III, § 2, of the Constitution provides that, apart from several classes of cases specifically enumerated in this Court's original jurisdiction, "[i]n all the other Cases . . . 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." . . . The Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its "gatekeeping" function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2.<sup>131</sup>

Justice Stevens concurred, joined by Justices Souter and Breyer, noting that the Court's response to the argument that the Act exceeded Congress's authority under the Exceptions Clause was "incomplete."<sup>132</sup> He wrote:

[T]here are at least three reasons for rejecting petitioner's argument that the limited exception violates Article III, § 2. First, if we retain jurisdiction to review the gatekeeping orders pursuant to the All Writs Act—and petitioner has not suggested otherwise—such orders are not immune from direct review. Second, by entering an appropriate interlocutory order, a court of appeals may provide this Court with an opportunity to review its proposed disposition of a motion for leave to file a second or successive habeas application. Third, in the exercise of our habeas corpus jurisdiction, we may consider earlier gatekeeping orders entered by the court of appeals to inform our judgments and provide the parties with the functional equivalent of direct review.<sup>133</sup>

Justice Souter also wrote a concurring opinion joined by Justices Stevens and Breyer. Like Justice Stevens, Justice Souter noted that the Act did not, at least as applied in this case, totally cut off the Court's power of appellate review: "I write only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."<sup>134</sup>

Neither Chief Justice Rehnquist nor the authors of the concurring opinions argued that Congress could not completely remove the Court's powers of appellate review in cases like this one. Chief Justice Rehnquist

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<sup>131</sup> *Felker*, 518 U.S. at 661–62 (quoting U.S. CONST. art. III, § 2, cl. 2) (alteration in original).

<sup>132</sup> *Id.* at 666 (Stevens, J., concurring).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 667 (Souter, J., concurring).



simply noted that the Court's powers of appellate review are not completely removed by this Act. Justice Souter observed that if the Court's powers of appellate review were in fact removed, the question whether Congress had exceeded its Exceptions Clause powers would be open. He did not venture to say how that question would be decided.

From this examination of the case law we may draw the following conclusions:

- (1) Before *McCardle* (1868), the Court did not question or inhibit Congress's power to limit the Court's appellate jurisdiction.
- (2) Before *McCardle*, the major issue concerning the Court's appellate jurisdiction was whether that jurisdiction had to be conferred on the Court by both the Constitution and an act of Congress, or whether appellate jurisdiction was conferred by the Constitution alone. Both Chief Justice Marshall and Chief Justice Taney concluded that appellate jurisdiction was conferred by the Constitution alone, unless limited by Congress, and by the time of *McCardle*, this issue seems to have been settled.
- (3) *Klein* (1871), which concluded that an act of Congress directing the Court to dismiss any claim for recovery of property if a presidential pardon for serving the Confederacy was found to exist, did not raise an Exceptions Clause issue but rather was an unconstitutional attempt by Congress to interfere with the authority of the Court to receive evidence and determine its significance.
- (4) *Francis Wright* (1881) recognized Congress's limitless power to restrict the Court's appellate jurisdiction.
- (5) *Plaut* (1995) held that Congress may not retroactively command federal courts to reopen final judgments, as this interferes with the judicial power to decide cases.
- (6) *Felker* (1996) upheld the power of Congress to limit the Court's authority to hear multiple habeas corpus petitions, but left open the possibility that Congress might exceed its Exceptions Clause authority if it were to remove the Court's authority to hear such cases entirely.

In sum, it is clear that the Court acknowledges Congress's authority to restrict the Supreme Court's appellate jurisdiction. However, the Court might limit Congress's power under the Exceptions Clause when congressional action would require the Court to reopen or reverse final decisions, or where congressional action would cut off all of a defendant's avenues to seek redress of grievances through the courts.

Before leaving the case law, it is important to address a collateral issue—the authority of Congress to limit the jurisdiction of other federal courts. This article focuses on the Exceptions Clause as applied to the Supreme Court, but the jurisdiction of other federal courts is a related issue. The Constitution does not directly address the issue, but Article

III provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>135</sup> In a parallel clause of Article I, Section 8, Congress is given power “[t]o constitute Tribunals inferior to the supreme Court.”<sup>136</sup>

The simplest and most common view is that because inferior federal courts exist only as creations of Congress, Congress can define, expand, or limit the jurisdiction of those courts in whatever ways Congress sees fit, except for cases that the Constitution specifically delegates to the Supreme Court. And the Court has so held on several occasions. In *Sheldon v. Sill*, the Court held that “[c]ourts created by statute can have no jurisdiction but such as the statute confers.”<sup>137</sup> In *Ex parte Bollman*, the Court, in an opinion written by Chief Justice Marshall, held that “courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.”<sup>138</sup> In *United States v. Hudson & Goodwin*, the Court held that Congress’s power to create inferior courts necessarily carried with it “the power to limit the jurisdiction of those Courts to particular objects.”<sup>139</sup> More recently, in *Lauf v. E.G. Shinner & Co.*, the Court reaffirmed that “[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.”<sup>140</sup>

In opposition to this position, some have cited Justice Story’s opinion in *Martin v. Hunter’s Lessee*.<sup>141</sup> While his words about Congress’s authority to limit the jurisdiction of inferior federal courts were only dictum, Justice Story wrote that “[i]f, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*.”<sup>142</sup> He also wrote:

[Congress] might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.<sup>143</sup>

Justice Story’s dictum may be read as saying that Congress must create inferior courts with full federal judicial power. It may also be read

<sup>135</sup> U.S. CONST. art. III, § 1.

<sup>136</sup> U.S. CONST. art. I, § 8, cl. 9.

<sup>137</sup> 49 U.S. (8 How.) 441, 449 (1850).

<sup>138</sup> 8 U.S. (4 Cranch) 75, 98 (1807).

<sup>139</sup> 11 U.S. (7 Cranch) 32, 33 (1812).

<sup>140</sup> 303 U.S. 323, 330 (1938); *accord* *Yakus v. United States*, 321 U.S. 414 (1944); *Lockerty v. Phillips*, 319 U.S. 182 (1943).

<sup>141</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>142</sup> *Id.* at 330.

<sup>143</sup> *Id.* at 331.

as saying that if Congress creates inferior courts, it must give them full federal judicial power. Full resolution of this question is beyond the scope of this article. Note, however, that none of the subsequent Supreme Court decisions cited above have followed Justice Story's lead in that direction. The case law supplies little support to the notion that Congress's power to limit the jurisdiction of inferior federal courts is in any way limited.

## II. RECENT AND CONTEMPORARY SCHOLARS

Much of the recent and contemporary scholarship on the Exceptions Clause is more critical of jurisdiction-stripping than either the case law or early scholarship. Many lawyers and law professors are accustomed to using the judiciary as the avenue to bring about policy changes. Understandably, they view Exceptions Clause legislation as a barrier to their own efforts as well as to those of the federal courts.

Many view Exceptions Clause legislation as the efforts of social and political conservatives to prevent the courts from striking down conservative legislation. Professor Ira Mickenberg of the University of Dayton School of Law, describes bills in Congress to divest the Supreme Court of jurisdiction to hear certain classes of appeals as "[p]rimarily a brainchild of the so-called 'New Right'" and claims that "these proposals are designed to remove controversial social issues, such as abortion, busing, school prayer, and pornography, from the scope of Supreme Court review."<sup>144</sup> Mickenberg argues that the various Supreme Court cases on the Exceptions Clause merely involve procedural limitations and do not actually exempt categories of cases from Supreme Court review, and insists that impeachment<sup>145</sup> and constitutional amendment<sup>146</sup> are the proper courses of action when one believes a federal court has decided a case wrongly.

Harvard Law Professor Laurence Tribe notes that Congress has often limited the federal courts' jurisdiction:

The Emergency Price Control Act of 1942 took a different if equally controversial tack: Congress denied individuals who were criminally prosecuted for price control violations the right to challenge the validity of the price control regulations in that trial; instead, regulations could be challenged only by bringing an action before a special Emergency Court of Appeals within 30 days after an unsuccessful administrative challenge to the regulations. So too, the

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<sup>144</sup> Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 497 (1983).

<sup>145</sup> *Id.* at 534.

<sup>146</sup> *Id.* at 541-42.

Voting Rights Act of 1965 requires a state seeking judicial review of a decision of the Attorney General suspending the state's voting regulations to bring its action only in the District Court for the District of Columbia. Finally, the Selective Training and Service Act of 1940 placed a particularly draconian limitation on federal jurisdiction: in a suit in which an individual was prosecuted for failing to report for induction, the federal court could not hear the individual's defense that he had been wrongly classified; he could raise this argument only by submitting to induction and proceeding through administrative and judicial remedies while in the service.

Federal courts held none of these jurisdictional regulations to be unconstitutional.<sup>147</sup>

Nevertheless, Tribe warned that this does not mean current jurisdiction-stripping proposals are constitutional. If such proposals violate citizens' constitutional rights or even unintentionally burden the exercise of such rights, they warrant strict scrutiny: "[I]f busing were demonstrably the only remedy to effectuate one's right not to attend a segregated school, federal legislation limiting judicial power to order busing as a remedy would appear highly suspect."<sup>148</sup> He cited a 1953 Harvard Law Review article in which Professor Henry Hart argued that Congress does not have the authority to limit the Court's appellate jurisdiction in ways that "will destroy the essential role of the Supreme Court in the constitutional plan."<sup>149</sup> Tribe observed that Hart's thesis "has never been put to the test" in the courts.<sup>150</sup> We should also note that neither Hart's thesis nor Tribe's thesis appears in the clear language of the Exceptions Clause. At the risk of making an irreverent pun, the Exceptions Clause contains no exceptions to Congress's power to make exceptions. Tribe noted, correctly, that the Court can consider the constitutionality of Congress's use of the Exceptions Clause:

The argument that Congress can wholly preclude review even of preliminary jurisdictional issues may flow from an incomplete reading of *Ex Parte McCardle* . . . . But even in *McCardle* it appears that the Court did indeed decide whether the congressional action was consistent with the Constitution. The Court noted, for example, . . . "We are not at liberty to inquire into the motives of the legislature. We can only examine into its powers under the Constitution; and the

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<sup>147</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 270-71 (3d ed. 2000) (footnotes omitted).

<sup>148</sup> *Id.* at 273.

<sup>149</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953), quoted in TRIBE, *supra* note 147, at 277.

<sup>150</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 49 (2d ed. 1996).

power to make exceptions to the appellate jurisdiction of this court is given by express words.”<sup>151</sup>

Dr. Louis Fisher, Senior Specialist in Separation of Powers for the Congressional Research Service of the Library of Congress, articulated a balanced approach:

The Exceptions Clause, it is argued, gives Congress plenary power to determine the Court’s appellate jurisdiction.

Although this approach appears to be grounded on constitutional language, the Exceptions Clause must be read in concert with other provisions in the Constitution. An aggressive use of the Exceptions Clause by Congress would make an exception the rule and deny citizens access to the Supreme Court to vindicate constitutional rights. Stripping the Supreme Court of jurisdiction to hear certain issues would vest ultimate judicial authority in the lower federal and state courts, producing contradictory and conflicting legal doctrines.

. . . To deny the lower federal courts jurisdiction to hear claims arising under the Constitution would upset the system of checks and balances, alter the balance of power between the national government and the states, and strengthen the force of majority rule over individual rights . . . .

Withdrawing appellate jurisdiction from the Supreme Court and withdrawing jurisdiction from the lower federal courts would also undercut the Supremacy Clause in Article VI, which states that the Constitution and federal laws “made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”<sup>152</sup>

Although it is unclear what Dr. Fisher means by an “aggressive use” of the Exceptions Clause that could make the exception the rule, he seems to imply that Congress could limit the Court’s appellate jurisdiction occasionally, but not too often. At what point does Congress cross the line and go beyond the powers authorized by the Exceptions Clause?

His suggestion that limiting the federal courts’ jurisdiction could “alter the balance of power between the national government and the states” ignores the fact that the power to limit the federal courts’ jurisdiction is vested in the federal Congress. The claim that limiting the federal courts could “strengthen the force of majority rule over individual rights” assumes that federal courts are more sensitive to individual rights than are state courts—an assumption that has probably been accurate at certain times in the nation’s history, but far from universally true. And his claim that limiting federal-court jurisdiction would

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<sup>151</sup> *Id.* at 47 n.20 (quoting *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868) (citation omitted)).

<sup>152</sup> LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 1036 (6th ed. 2005) (quoting U.S. CONST. art. VI, cl. 2).

“undercut the Supremacy Clause” falls flat when one recognizes that the Supremacy Clause says that the Constitution is the supreme law of the land, that the reference to the “Constitution” must include the entire Constitution, and that the Exceptions Clause is part of the Constitution.

Dr. Fisher also cites a report by the Association of the Bar of the City of New York titled *Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review*.<sup>153</sup> Citing proposals to limit judicial review of public prayer, abortion, busing, and drafting women into military service, the report calls these proposals a “radical departure from the system of checks and balances that has served our nation well for the past two centuries . . . .”<sup>154</sup> In this respect, the New York City Bar misses the point: far from being a departure from the system of checks and balances, the Exceptions Clause is one of the checks and balances. It is a check the Framers gave to Congress to limit the power of the Judiciary, a power the Framers would not have given to Congress had they not intended that it be at least occasionally used.

The report of the New York City Bar does raise a significant question: If Congress removes an issue from the federal courts’ jurisdiction, what happens to cases the federal courts have already decided on that issue? The report gives the following answer:

[O]ne of the ironies of the present bills is that the constitutional interpretations with which the bills’ sponsors differ would remain frozen as the supreme law of the land forever, binding upon state courts under the Supremacy Clause and the doctrine of *stare decisis*, without any possibility of change through the evolution of legal thought or a change in judicial (particularly Supreme Court) personnel . . . .<sup>155</sup>

The issue raised by the New York City Bar is important, but their conclusion does not automatically follow. When Congress acts under the Exceptions Clause the status of previously decided cases is far from clear. If the bill expressly declares that previous federal cases have no precedential force, what weight should be given to that declaration? Constitutional interpretation may be emphatically the role of the courts, but it is not necessarily exclusively the role of the courts. In any event, when Congress removes a matter from the federal courts’ jurisdiction, state courts will feel free to ignore previous federal court decisions without fear of reversal.

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<sup>153</sup> ASS’N OF THE BAR OF THE CITY OF N.Y., *JURISDICTION-STRIPPING PROPOSALS IN CONGRESS: THE THREAT TO JUDICIAL CONSTITUTIONAL REVIEW* (1981), *reprinted in* FISHER, *supra* note 152, at 1041.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1042.

Professor Akhil Amar of Yale Law School has argued for a middle-ground position on the Exceptions Clause. On one side, he says, was Justice Joseph Story, who insisted that since Article III vests all judicial power in the Supreme Court and other federal courts, these courts must have full jurisdiction of all cases itemized in Article III.<sup>156</sup> Amar summarizes Justice Story's position in three premises:

First, the judicial power of the United States must extend to certain cases, and must be vested—in either original or appellate form—somewhere in the federal judiciary. Second, there are some cases, such as federal criminal prosecutions, falling within the mandatory judicial power that could not be heard as an original matter by state courts. Federal criminal prosecutions were, for Story, “unavoidably . . . exclusive of all state authority.” Any delegation of such cases to state trial courts, therefore, would impermissibly vest “the judicial Power of the United States” in non-Article III courts. Third, the Supreme Court's original jurisdiction could not be expanded to take cognizance of all such exclusively federal cases. From these three premises, Story deduces his conclusion: Congress is obliged to establish “one or more inferior courts” in which “to vest all that jurisdiction which, under the Constitution is *exclusively* vested in the United States, and of which the Supreme Court cannot take original cognizance.”<sup>157</sup>

Professor Theodore Eisenberg supports Justice Story's position. He maintains that the Founders intended that all cases listed in Article III be decided by federal courts, and that Congress, therefore, must establish inferior federal courts to hear at least some of the cases that the Court cannot hear itself.<sup>158</sup> Professor William Crosskey goes beyond Justice Story's position and argues that every case itemized in Article III must be heard, either at trial or on appeal, by a federal court.<sup>159</sup> However, Amar rejects Justice Story's position because “Article III plainly imposes no obligation to create lower federal courts.”<sup>160</sup> Article III uses mandatory language regarding jurisdiction, such as “the judicial Power *shall* be vested’ and ‘*shall* extend,’” but uses permissive language concerning inferior courts: “such inferior Courts as the Congress *may* ordain.”<sup>161</sup> Amar notes that “[i]f ‘shall’ means ‘must,’ then ‘may’ has to

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<sup>156</sup> Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 216–19 (1985).

<sup>157</sup> *Id.* at 211–12 (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330–31, 337 (1816)) (footnotes omitted).

<sup>158</sup> Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 508 (1974).

<sup>159</sup> 1 WILLIAM CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 610–20 (1953).

<sup>160</sup> Amar, *supra* note 156, at 212.

<sup>161</sup> *Id.* (quoting U.S. CONST. art. III, § 1).

mean ‘can, but need not.’”<sup>162</sup> Amar also notes that Justice Story, writing in 1816, did not have access to Madison’s *Notes*, which were first released in 1837 and which demonstrate that Article III, Section 2 was a “‘Madisonian compromise’ to give Congress the choice of creating inferior federal courts or proceeding through state trial courts.”<sup>163</sup> Amar also observes that Congress regularly provided for state court prosecution of federal cases beginning in the early 1800s, and despite Justice Story’s reservations, the Supreme Court upheld prosecutions in consenting states in *Houston v. Moore*.<sup>164</sup>

On the other side, Professor Henry Hart has argued that Congress need not create inferior federal courts, and that Congress can make exceptions to the Supreme Court’s appellate jurisdiction, so long as in doing so, Congress does not impede the “essential role” of the Court.

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.<sup>165</sup>

While it is possible that Congress could exercise its Exceptions Clause power in a way that impedes the essential functions of the Court, thus “reading the Constitution as authorizing its own destruction,”<sup>166</sup> Hart observes that “[o]ur whole constitutional history shows that Congress generally doesn’t intend to violate constitutional rights, and a court ought not readily to [sic] assume any sudden departure.”<sup>167</sup>

Hart believes that Congress could assign certain types of cases to state courts without impeding the Supreme Court’s essential functions or destroying the constitutional plan.<sup>168</sup> He notes that “[t]he state courts always have a general jurisdiction to fall back on. And the Supremacy Clause [Article VI, Section 2] binds them to exercise that jurisdiction in accordance with the Constitution.”<sup>169</sup> But Amar counters that Hart has sidestepped the Article III mandate that “judicial power *shall* be vested in *federal* courts and *shall* extend to *all* cases arising under the Constitution, laws and treaties of the United States.”<sup>170</sup> And Tribe

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 213 (citing *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820)).

<sup>165</sup> Hart, *supra* note 149.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1399.

<sup>168</sup> *Id.* at 1401.

<sup>169</sup> *Id.*

<sup>170</sup> Amar, *supra* note 156, at 216.



observes that Hart's "essential functions" test "has never been put to the test in the courts."<sup>171</sup>

In support of Hart's position, Professor Martin Redish believes that Congress may leave final jurisdiction over a constitutional issue to the state courts,<sup>172</sup> much like the preemption doctrine by which Congress has supreme authority to regulate interstate commerce, but is not required to do so, and may leave such regulation to the states.<sup>173</sup> But Amar argues that Redish's analogy between Congress's regulatory power over commerce and the Supreme Court's jurisdiction over federal cases is invalid because the Court has a watchdog role of checking the other branches and levels of government.<sup>174</sup>

Amar also interacts with Professor Leonard Ratner's argument that Congress may limit the Supreme Court's appellate jurisdiction provided it does not destroy the Court's "essential" functions, which are "(1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority."<sup>175</sup> Ratner concludes that

[a]lthough these essential functions would not ordinarily be disrupted by a procedural limitation restricting the availability of Supreme Court review in some but not all cases involving a particular subject, legislation denying the Court jurisdiction to review any case involving that subject would effectively obstruct those functions in the proscribed area.<sup>176</sup>

Amar says Ratner's thesis is "problematic" because it has "little grounding in explicit text or firm constitutional history."<sup>177</sup>

Obviously some in Congress have believed that their authority to limit the Court's appellate jurisdiction goes further than Ratner would acknowledge. Ratner noted that

as early as 1830 congressional legislation was introduced which proposed to eliminate the Supreme Court's appellate jurisdiction over state court decisions . . . . The 1830 proposal would have allowed the

<sup>171</sup> TRIBE, *supra* note 150.

<sup>172</sup> Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 909, 912 (1982).

<sup>173</sup> *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 585 (1987).

<sup>174</sup> Amar, *supra* note 156, at 222–23.

<sup>175</sup> Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960).

<sup>176</sup> *Id.*

<sup>177</sup> Amar, *supra* note 156, at 220.

state courts to determine for themselves the meaning of the Constitution, laws, and treaties of the United States . . .<sup>178</sup>

Of course, it should also be noted that the 1830 legislation did not pass.<sup>179</sup>

Ratner made a helpful contribution to the debate by citing definitions of the term *exception*. “Ash’s [*The New and Complete Dictionary of the English Language*, published in London in 1775, described the term [*exception*] as ‘an exclusion from a general rule or law.’”<sup>180</sup> Samuel Johnson, in *A Dictionary of the English Language* (1755), defined *exception* as an “exclusion from the things comprehended in a precept, or position; exclusion of any person from a general law.”<sup>181</sup> From these and other definitions, Ratner concluded that if an exception became too commonplace, it was no longer an exception: “[A]n exception cannot nullify the rule or description that it limits. In order to remain an exception, it must necessarily have a narrower application than that rule or description.”<sup>182</sup> Noah Webster’s 1828 *An American Dictionary of the English Language* lends further support to Ratner’s position, defining *exception* as:

The act of excepting, or excluding, from a number designated, or from a description; exclusion. All the representatives voted for the bill, with the *exception* of five. All the land is in tillage with an *exception* of two acres. 2. Exclusion from what is comprehended in a general rule or proposition. 3. That which is excepted, excluded, or separated from others in a general description; the person or thing specified as distinct or not included. Almost every general rule has its *exceptions* . . .<sup>183</sup>

Ratner seems to be saying that Congress has power to make exceptions to the Court’s appellate jurisdiction so long as they remain exactly that—exceptions. If they become too commonplace, they are no longer exceptions, but the rule. But at what point do the exceptions become the rule? And how does one determine this? By the number of exceptions? By their importance? By the breadth of cases they cover? And who makes the determination that they are so numerous that they are no longer exceptions? All of these questions are problematic.

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<sup>178</sup> Ratner, *supra* note 175, at 159.

<sup>179</sup> *Id.* at 159–60.

<sup>180</sup> *Id.* at 168 (quoting JOHN ASH, *THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (London, n.p. 1775)) (footnote omitted).

<sup>181</sup> *Id.* (quoting SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (London, n.p. 1755)).

<sup>182</sup> *Id.* at 169.

<sup>183</sup> *Id.* at 168 (quoting 1 NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 76 (1828)).

After surveying the various commentators on the Exceptions Clause, Amar concluded that Congress may limit the Supreme Court's appellate jurisdiction over certain types of cases, provided Congress creates an inferior federal court with jurisdiction to hear such cases.

First, Article III vests the judicial power of the United States in the federal judiciary, and not in state courts, or in Congress. Second, the federal judiciary must include one Supreme Court; other Article III courts may—but need not—be created by Congress. Third, the judicial power of the United States must, as an absolute minimum, comprehend the subject matter jurisdiction to decide finally all cases involving federal questions, admiralty, or public ambassadors. Fourth, the judicial power may—but need not—extend to cases in the six other, party-defined, jurisdictional categories. The power to decide which of these party-defined cases shall be heard in Article III courts is given to Congress by virtue of its powers to create and regulate the jurisdiction of lower federal courts, to make exceptions to the Supreme Court's appellate jurisdiction, and to enact all laws necessary and proper for putting the judicial power into effect. Fifth, Congress's exceptions power also includes the power to shift final resolution of any cases within the Supreme Court's appellate jurisdiction to any other Article III court that Congress may create. The corollary of this power is that *if* Congress chooses to make exceptions to the Supreme Court's appellate jurisdiction in admiralty or federal question cases, it *must* create an inferior federal court with jurisdiction to hear such excepted cases at trial or on appeal; to do otherwise would be to violate the commands that the judicial power “shall be vested” in the federal judiciary, and “shall extend to all” federal question and admiralty cases.<sup>184</sup>

While Amar's argument has a certain appeal, the reasons he presents for it are unconvincing. His argument that federal judges have greater incentive to issue sound decisions because they are subject to removal for lack of *good behavior* falls flat when one considers how few federal judges have ever been removed from office for any reason, let alone for issuing bad decisions. State judges and justices generally have to stand periodically for reelection or reappointment; one might argue that this is actually better assurance that they will decide cases soundly, than is the rarely-used power to remove federal judges. His argument that federal judges are assured independence from other branches of government while state judges are not, ignores the fact that Article IV, Section 4 requires that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government,”<sup>185</sup> and the enabling acts by which Congress admits new states into the Union commonly include this

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<sup>184</sup> Amar, *supra* note 156, at 229–30.

<sup>185</sup> U.S. CONST. art. IV, § 4.

guarantee.<sup>186</sup> Many state constitutions have stronger *separation of powers* clauses than does the federal Constitution.<sup>187</sup>

Amar's argument that "Article III vests the judicial power of the United States in the federal judiciary, and not in state courts, or in Congress"<sup>188</sup> sounds convincing until one carefully reads the language of Article III: "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."<sup>189</sup> Focus on the key verbs of the dependent clause: *ordain* and *establish*. If Article III used only the word *establish*, Amar might have a sound argument: the judicial power vests and must therefore reside permanently in the Supreme Court and inferior federal courts established by Congress. Arguably, that judicial power could not be re-delegated to a state court. But the clause reads "ordain and establish." Why did the Framers use both words? Is there a shade of difference between them?

Webster's 1828 *An American Dictionary of the English Language* defines the two words as synonyms that can have the same meaning, but also gives shades of difference in their meanings. *Establish* can mean "[t]o enact or decree by authority and for permanence; to ordain; to appoint; as, to *establish* laws, regulations, institutions, rules, [and] ordinances . . ."<sup>190</sup> But the word can also mean "[t]o found permanently; to erect and fix or settle; as, to *establish* a colony or an empire."<sup>191</sup> The same dictionary defines *ordain* as follows:

Properly, to set; to establish in a particular office or order; hence, to invest with a ministerial function or sacerdotal power; to introduce

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<sup>186</sup> *E.g.*, Act of February 22, 1889, ch. 180, 25 Stat. 676 (enabling the creation of North Dakota, South Dakota, Montana, and Washington); Act of July 16, 1894, ch. 138, 28 Stat. 107 (enabling the creation of Utah); Act of June 20, 1910, ch. 310, 36 Stat. 557, 568–79 (enabling the creation of Arizona).

<sup>187</sup> *E.g.*, COLO. CONST. art. III ("The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."); MASS. CONST. pt. 1, art. XXX ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."). The Alabama Constitution includes a provision nearly identical to that of Massachusetts. ALA. CONST. art. III, § 43.

<sup>188</sup> Amar, *supra* note 156, at 229.

<sup>189</sup> U.S. CONST. art. III, § 1.

<sup>190</sup> NOAH WEBSTER, NOAH WEBSTER'S FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (2d ed., Foundation for American Christian Education 1980) (1828).

<sup>191</sup> *Id.*

and establish or settle in the pastoral office with the customary forms and solemnities; as, to *ordain* a minister of the gospel. In America, men are *ordained* over a particular church and congregation, or as evangelists without the charge of a particular church, or as deacons in the episcopal church.<sup>192</sup>

The terms *ordain* and *establish* can be used as synonyms, or they can have different meanings. Ordaining an inferior court could mean investing that inferior court with certain powers; establishing an inferior court could mean creating an inferior court that did not exist before. So which interpretation is more likely to be correct: that which treats these words as synonyms or that which treats them differently?

A basic principle of statutory and constitutional construction is the presumption against redundancy.<sup>193</sup> We presume the drafters did not use unnecessary words; they would not have used two words where one would suffice. If they wrote “ordain and establish” instead of just “establish,” we presume the words “ordain and” add a shade of meaning that would not be present had they just wrote “establish.” The Framers of the Constitution chose their words with special care. As James Madison wrote concerning “charters of liberty” like the Constitution, “Every word . . . decides a question between power and liberty . . .”<sup>194</sup>

A fair interpretation of Article III, Section 1, then, is that federal judicial power vests in (1) the Supreme Court; (2) inferior federal courts that Congress may establish; or (3) inferior state courts that Congress may ordain or clothe with federal jurisdiction. If this interpretation is correct, then one could fairly conclude that Congress can limit the jurisdiction of the Supreme Court and other federal courts over a particular subject, so long as state courts retain jurisdiction over that subject matter.

A more recent contributor to this discussion, Doctor Edwin Vieira, believes that Congress has the authority to limit the Supreme Court’s appellate jurisdiction, but he recognizes that this authority is not absolute. He argues that Congress cannot use its Exceptions Clause power to deny a litigant the opportunity to vindicate a constitutional right because “that would deny constitutional protection to litigants otherwise entitled to it.”<sup>195</sup> Also, he states that Congress cannot use the Exceptions Clause to deny a litigant the opportunity to defend his First Amendment rights because the fact “that the First Amendment

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<sup>192</sup> *Id.*

<sup>193</sup> See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

<sup>194</sup> James Madison, *Philadelphia: Charters*, NAT’L GAZETTE, Jan. 19, 1792.

<sup>195</sup> EDWIN VIEIRA, HOW TO DETHRONE THE IMPERIAL JUDICIARY 273 (2004).

postdates the Exceptions Clause would be a strong argument that the former imposes limitations on the latter.”<sup>196</sup>

Before Congress can invoke the Exceptions Clause, Vieira says, Congress must determine that the Supreme Court’s interpretation of the Constitution on a particular point is wrong; and he argues that Congress has the authority to make such a determination.<sup>197</sup> He observes that in *Marbury v. Madison*, Chief Justice John Marshall held that the Justices have a duty to interpret the Constitution since they “take an oath to support it[.] This oath certainly applies in an especial manner, to their conduct in their official character . . . . Why does a judge swear to discharge his duties agreeably [sic] to the constitution . . . , if that constitution forms no rule for his government?”<sup>198</sup>

Vieira notes, however, that Congress and the President, just like the Justices of the Supreme Court, take an oath to support and defend the Constitution of the United States.<sup>199</sup> That being the case, Congress and the President, like the Court, have a constitutional duty to interpret the Constitution.<sup>200</sup> He cites the following statement of President Andrew Jackson:

[T]he opinion of the Supreme Court . . . ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive . . . , but to have only such influence as the force of their reasoning may deserve.<sup>201</sup>

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<sup>196</sup> *Id.* at 277.

<sup>197</sup> *Id.* at 233–34.

<sup>198</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78, 180 (1803).

<sup>199</sup> VIEIRA, *supra* note 195, at 215–16 (citing U.S. CONST. art. VI, cl. 3; *id.* art. II, § 1, cl. 8).

<sup>200</sup> *Id.* at 207–46.

<sup>201</sup> *Id.* at 220–21 (quoting Andrew Jackson, Veto Message (July 10, 1832), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1145 (J. Richardson ed., N.Y., Bureau of Nat’l Literature 1897)).

Vieira's belief that Congress has authority to interpret the Constitution is central to his belief that Congress can limit the appellate jurisdiction of the Supreme Court.

For Congress to withhold appellate jurisdiction from the Supreme Court over certain constitutional issues, it must first determine for itself the meaning and application of the Constitution in the premises, and then conclude either that: (i) based on prior judicial decisions and the then-present composition of the bench, the Court will *wrongly* decide the issues; or (ii) the Court should not be permitted to hear the issues at all, *howsoever* it might decide them. In the first instance, Congress might believe that the Court's judicial decisions on the subject have been wrong, that the present group of Justices will not correct these errors, and that therefore removal of appellate jurisdiction will protect the constitutional rights of parties against whom otherwise the Court would enter new and no less erroneous rulings.<sup>202</sup>

In a case involving same-sex marriage, by making a determination that the Court has interpreted or is likely to interpret the Constitution wrongly, Congress demonstrates its good faith. Congress demonstrates by this determination that they are not seeking to violate a litigant's constitutional rights, because in the view of Congress, the Constitution properly interpreted does not confer a right to same-sex marriage. Vieira supports his position convincingly, but for nearly two centuries, the Court has been accustomed to being the final arbiter of constitutional interpretation. Given that background, there is no assurance that the Court will accept Vieira's position. It is possible they might accept this position, but it is also possible that the Court would see this position as a challenge to their own authority and react vigorously.

The recent and contemporary scholars cited above are representative of many others who have written on the Exceptions Clause. From their writings one might draw the following conclusions:

- (1) Many recent and contemporary scholars, such as Mickenberg and the New York Bar Association, seem hostile to the Exceptions Clause, either because they fear its use by conservatives or because it interferes with their use of the courts to effect social change.
- (2) Fisher recognizes the legitimacy of the Exceptions Clause but insists it must be read in conjunction with the rest of the Constitution.
- (3) Tribe suggests that use of the Exceptions Clause to deny a litigant the opportunity to vindicate a fundamental constitutional right would be subject to strict scrutiny.

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<sup>202</sup> *Id.* at 272. Vieira also suggests a related and intriguing possibility: "Similarly, through its power '[t]o constitute Tribunals inferior to the Supreme Court,' Congress could create a special court with jurisdiction over all or certain types of constitutional questions." *Id.* at 282 (quoting U.S. CONST. art. I, § 8, cl. 9) (alteration in original).

- (4) Ratner maintains that the Exceptions Clause may not be invoked in a way that would impede the “essential functions” of the federal judiciary, which are to (a) resolve conflicting interpretations of federal law and (b) maintain federal supremacy. Furthermore, he suggests that Congress may not use the Exceptions Clause so frequently that the exceptions become the rule.
- (5) Most agree that Congress may not limit the appellate jurisdiction of the Supreme Court without providing or allowing another opportunity for a litigant to vindicate his or her constitutional rights. Eisenberg and Crosskey believe that Congress must provide this means of redress through an inferior federal court. Hart and Redish believe that Congress may provide this means of redress through either federal or state courts. The language of Article III, Section 2, “ordain and establish,” supports the interpretation of Hart and Redish.
- (6) Vieira acknowledges that Congress may not limit the Supreme Court’s appellate jurisdiction for the purpose of denying a litigant the opportunity to vindicate his or her constitutional rights. He notes, however, that sometimes Congress may not seek to deny the litigant’s constitutional rights; rather, in these instances Congress simply does not believe the litigant (or the Court) is interpreting the Constitution correctly. In these instances Congress can avoid this problem by adopting its own interpretation of the relevant constitutional provision, enter a finding that the Court is likely to interpret the provision wrongly, and therefore withdraw the appellate jurisdiction of the Court on that subject.
- (7) Tribe observes that even when Congress removes a case from the Court’s appellate jurisdiction, the Court retains the authority to consider whether Congress’s act of removal is constitutional.

### III. CONCLUSION

Constitutional powers, like muscles, atrophy if they are not used. If in fact the Framers intended the Exceptions Clause to be a congressional check on judicial power, it is important to understand the nature, extent, and limits of this check. We have examined the text of Article III, the proceedings concerning the Exceptions Clause in the Constitutional Convention of 1787, the ratification debates, the views of early constitutional scholars, the case law, and the views of recent and contemporary constitutional scholars. Now it is time to draw some conclusions from these studies.

From James Wilson’s response to Gouverneur Morris’s question about the meaning of the Exceptions Clause on the Convention floor on August 27, 1787, it is clear that one purpose of the Exceptions Clause was to enable Congress to prevent the Supreme Court from overturning



jury verdicts in lower courts.<sup>203</sup> Numerous other statements could also indicate that this was not the only purpose of the Exceptions Clause. For example, in *Federalist No. 80*, Hamilton assured his readers that if the federal court system causes “inconveniences,” the “national legislature will have ample authority to make *exceptions* . . . .”<sup>204</sup> In *No. 81*, he said the federal courts could not interfere with trial by jury but added that the Supreme Court’s appellate jurisdiction was “subject to any *exceptions* and *regulations* which may be thought advisable . . . .”<sup>205</sup> James Wilson argued at the Pennsylvania ratifying convention that the appellate jurisdiction of the Supreme Court needed to be limited occasionally, but “will not Congress better regulate them, as they rise from time to time, than could have been done by the Convention?”<sup>206</sup> During the Virginia ratification debates, convention president Edmund Pendleton argued that the Exceptions Clause empowered Congress to except and regulate appellate jurisdiction so that appeals would not be vexatious and burdensome to litigants. He acknowledged that Congress could abuse this power but considered this unlikely since Congress consisted of representatives of the thirteen states.<sup>207</sup> Similarly, when George Mason argued that the Supreme Court’s appellate jurisdiction could be abused by costly appeals, James Madison responded that “[a]s to vexatious appeals, they can be remedied by Congress.”<sup>208</sup> And John Marshall’s answer to George Mason stated that Congress can make exceptions to the Court’s appellate jurisdiction both as to law and to fact, and that “[t]hese exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.”<sup>209</sup> Neither the language of the Exceptions Clause, nor any statements on the Convention floor, nor any statements by supporters or opponents during the ratification debates, give any indication that Congress’s power to make exceptions to the Supreme Court’s appellate jurisdiction is limited in any way.

Early constitutional scholars give little insight into the meaning of the Exceptions Clause. James Kent, St. George Tucker, William Rawle, and Joseph Story acknowledge the existence of the Clause but do not expound on its meaning.<sup>210</sup>

The pre-*McCardle* (1868) case law gives no indication that Congress’s power under the Exceptions Clause is in any way limited.

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<sup>203</sup> See *supra* note 54 and accompanying text.

<sup>204</sup> THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 71, at 416.

<sup>205</sup> THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 71, at 424.

<sup>206</sup> See *supra* note 89 and accompanying text.

<sup>207</sup> See *supra* note 92 and accompanying text.

<sup>208</sup> See *supra* note 94 and accompanying text.

<sup>209</sup> See *supra* note 97 and accompanying text.

<sup>210</sup> See *supra* Part I.B.

The issue, rather, was whether the constitutional grants of jurisdiction to the Court were self-executing without an act of Congress, or whether an act of Congress was necessary to implement any constitutional grant of jurisdiction. *Wiscart v. D'Auchy*,<sup>211</sup> *Turner v. Bank of North America*,<sup>212</sup> and *Barry v. Mercein*<sup>213</sup> held that even if the Constitution delegates jurisdiction to the Supreme Court, the Court cannot exercise that jurisdiction unless authorized by an act of Congress.<sup>214</sup> But *Durousseau v. United States* held that the Supreme Court's jurisdiction is given by the Constitution, not federal statute, and is effective with or without an act of Congress.<sup>215</sup> *Durousseau* recognized, however, that Congress can make exceptions to the Court's appellate jurisdiction.<sup>216</sup> By 1861 the Court seems to have decided firmly, in *Kentucky v. Dennison*, that its original jurisdiction came directly from the Constitution, independent of federal statutes.<sup>217</sup> But as late as the 1865 case, *Daniels v. Railroad Co.*, the Court still believed its appellate jurisdiction had to be conferred by statute.<sup>218</sup> None of these cases suggest that Congress's power to limit the Court's appellate jurisdiction is in any way limited.

*Ex parte McCardle* established that both the Court's original jurisdiction and its appellate jurisdiction are conferred by the Constitution, not by Congress, "[b]ut [are] conferred 'with such Exceptions, and under such Regulations as the Congress shall make.'"<sup>219</sup> *McCardle* gave no indication that Congress's power under the Exceptions Clause is in any way limited. *United States v. Klein* invalidated an act of Congress requiring the Court to dismiss a claim for recovery of property when evidence of a pardon was presented.<sup>220</sup> But the Court expressly stated that "this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power,"<sup>221</sup> but rather an invalid attempt to dictate to the Court what use and construction it should give to the evidence of a pardon.<sup>222</sup> *The "Frances Wright"* held that the extent of Congress's power under the

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<sup>211</sup> 3 U.S. (3 Dall.) 321 (1796).

<sup>212</sup> 4 U.S. (4 Dall.) 8 (1799).

<sup>213</sup> 46 U.S. (6 How.) 103 (1847).

<sup>214</sup> See *supra* text accompanying notes 113, 115.

<sup>215</sup> 10 U.S. (6 Cranch) 307, 313-14 (1810).

<sup>216</sup> *Id.*

<sup>217</sup> 65 U.S. (24 How.) 66, 98 (1861).

<sup>218</sup> 70 U.S. (8 Wall.) 250, 254 (1865).

<sup>219</sup> *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512-13 (1868) (quoting U.S. CONST. art. III, § 2).

<sup>220</sup> 80 U.S. (13 Wall.) 128, 146 (1872).

<sup>221</sup> *Id.*

<sup>222</sup> See *supra* note 122 and accompanying text.

Exceptions Clause was for Congress to determine.<sup>223</sup> Two more recent cases, *Plaut v. Spendthrift Farm, Inc.*<sup>224</sup> (1995) and *Felker v. Turpin*<sup>225</sup> (1996), suggest that Congress may not limit the Court's appellate jurisdiction in a way that denies the Court the opportunity to perform its essential functions.<sup>226</sup>

Recent and contemporary legal scholars often seem hostile to the Exceptions Clause but have difficulty denying that the plain language of the Clause, the history of its adoption and ratification, and most of the case law indicates that Congress's power to limit the Court's appellate jurisdiction is itself unlimited. The most persuasive arguments for a more restrictive interpretation are that (1) the Exceptions Clause must be balanced against other portions of the Constitution;<sup>227</sup> (2) Congress may not use the Exceptions Clause in a way that would deny the Court the power to perform its "essential functions";<sup>228</sup> (3) Congress may use the Exceptions Clause so long as the litigant still has the opportunity to pursue his or her remedies in a federal court;<sup>229</sup> (4) Congress may use the Exceptions Clause so long as the litigant still has the opportunity to pursue his or her remedies in either a federal or a state court;<sup>230</sup> (5) an *exception* by definition must be a departure from the norm and therefore the exceptions may not be so numerous as to become the rule;<sup>231</sup> and (6) Congress may use the Exceptions Clause in a way that denies a litigant the opportunity to pursue an alleged constitutional right, so long as Congress has made a finding that the relevant provision of the Constitution should properly be interpreted in a certain way and that the Court is likely to interpret that provision wrongly.<sup>232</sup>

The supreme irony is that the final arbiter of the validity of Exceptions Clause limits on the Court's appellate jurisdiction will, in all probability, be the Court itself. The Court has never ruled on the "essential functions" test, though language in *Plaut*<sup>233</sup> and *Felker*<sup>234</sup> suggests that at least some of the Justices might be sympathetic to this

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<sup>223</sup> 105 U.S. 381, 385–86 (1881).

<sup>224</sup> 514 U.S. 211 (1995).

<sup>225</sup> 518 U.S. 651 (1996).

<sup>226</sup> See *supra* text accompanying notes 125–32.

<sup>227</sup> See *supra* note 154 and accompanying text.

<sup>228</sup> See *supra* notes 151, 178–79 and accompanying text.

<sup>229</sup> See *supra* notes 160–61, 187 and accompanying text.

<sup>230</sup> See *supra* notes 175–76 and accompanying text.

<sup>231</sup> See *supra* notes 180–83 and accompanying text.

<sup>232</sup> See *supra* notes 195–202 and accompanying text.

<sup>233</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

<sup>234</sup> *Felker v. Turpin*, 518 U.S. 651 (1996).

position.<sup>235</sup> In *Yerger*<sup>236</sup> and in *Felker*, the Court seemed to consider it important that the litigant had other avenues to pursue his or her remedies.<sup>237</sup>

Must those avenues be federal courts, or could they include state courts as well? The argument that they could include state courts is persuasive. Many of the Framers believed human rights were best protected at the state level. Roger Sherman of Connecticut, one of the most influential delegates to the Constitutional Convention, argued on the Convention floor that a federal bill of rights was unnecessary because “[t]he State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.”<sup>238</sup> No one present disputed his statement, and the proposal to create a bill of rights was defeated, 0-10, with Massachusetts abstaining.<sup>239</sup> Virginia Ratifying Convention President Edmund Pendleton stated that Congress’s power to establish inferior tribunals included the power to “appoint the state courts to have the inferior federal jurisdiction.”<sup>240</sup> Many of the nation’s leading legal minds were present at that ratifying convention, including James Madison, John Marshall, George Wythe, George Mason, and Patrick Henry; none of them disputed or questioned Pendleton’s assertion. Amar has noted that Article III, Section 2 was a compromise that gave Congress the choice of creating inferior federal courts or proceeding through state courts,<sup>241</sup> and that Congress regularly gave such authority to state courts in the early 1800s, a procedure which the Court upheld in *Houston v. Moore*.<sup>242</sup> Hart observed the basic principle that the state courts have general jurisdiction,<sup>243</sup> and Article VI, Section 2 provides that “the Judges in every State shall be bound thereby [by the United States Constitution], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>244</sup> Against this backdrop, there is little to support the assertion that only federal courts can adequately fulfill the function of protecting human rights.

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<sup>235</sup> See *supra* notes 133–34 and accompanying text.

<sup>236</sup> *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

<sup>237</sup> See *supra* text accompanying notes 133–34.

<sup>238</sup> Convention Floor Debate (Sept. 12, 1787), in MADISON, *supra* note 54, at 616, 630.

<sup>239</sup> *Id.*

<sup>240</sup> See *supra* note 91 and accompanying text.

<sup>241</sup> See *supra* note 163 and accompanying text.

<sup>242</sup> 18 U.S. (5 Wheat.) 1 (1820).

<sup>243</sup> See *supra* note 169 and accompanying text.

<sup>244</sup> U.S. CONST. art. VI, cl. 2.

So if a senator were to ask about his or her authority to limit the Court's appellate jurisdiction on a particular matter, I would offer the following advice:

- (1) The Framers were concerned about judicial usurpation of power, just as they were concerned about usurpation of power by other branches of government, and they intended the Exceptions Clause of Article III, Section 2 of the Constitution to be a congressional check on the judiciary. The Framers would not have given Congress that check had they not intended that Congress use that check in appropriate circumstances.
- (2) However, Congress must consider what exercises of the Exceptions Clause power are likely to be upheld by the courts. Accordingly Congress should consider the following:
  - (a) If Congress were to enact a statute entirely cutting off all federal court jurisdiction over that type of case, the Court might uphold the statute.
  - (b) If Congress were to enact a statute cutting off all federal court jurisdiction over that type of case but providing that state courts shall have jurisdiction, the Court probably would uphold the statute.
  - (c) If Congress were to enact a statute cutting off Supreme Court appellate jurisdiction over that type of case, but leaving jurisdiction with some federal court, the Court would be even more likely to uphold the statute.
  - (d) If Congress were to enact a statute like those described in (a), (b), or (c) above, and add language to the effect that the relevant provision of the Constitution should be interpreted a certain way and that the Court is likely to interpret it wrongly, that added language might possibly increase the likelihood that the Court would uphold the statute.

Giving the Exceptions Clause a broad interpretation raises the possibility that a litigant may be frustrated in his or her effort to redress grievances. But the main purpose of the Constitution was not to remedy every possible grievance or vindicate every imaginable right, but to provide a workable structure of government, checking and balancing power between the federal and state governments and among the three branches of the federal government.

The Exceptions Clause, like most other provisions granting powers to government, contains the possibility of abuse. It is incumbent on all of us to ensure that the Exceptions Clause power is used in a restrained and responsible manner. But a refusal to use it when warranted is an abdication of the duty the Framers placed on Congress to check and balance the judiciary.